APPENDIX A

Docket No. UT-990146

Response to Specific Comments

1 In this appendix the Commission responds to comments made on the proposed rules. We received hundreds of pages of comments, most concerning the choice between opt-in approval and opt-out approval. The appropriate approval mechanism and the legal basis for our choices are addressed at length in the body of the adoption order. In this appendix the Commission responds to the other substantive comments.

2 The Commission received comments from several telecommunications companies, consumer advocates, and others, including AARP, AT&T, Allegiance Telecom, Claudia Berry, Elizabeth Clawson, Rep. Mary Lou Dickerson, Electronic Privacy Information Center (EPIC), Elizabeth Fehrenback, Emeri Hansen, Gail Love, Low Income Telecommunications Project (LITE), Lindsay Olsen, Public Counsel Section of the Office of Attorney General, Qwest, Senior Services, Sprint, Robert Stein, Matilda Stubbs, Desinee Sutton, Ben Unger, Verizon, WashPIRG, Washington Independent Telephone Association (WITA), and WorldCom.

3 The material is organized by subject and by rule number, which is noted at the end of each response. In each response we indicate whether we made a change in the adopted rules based upon the comment, or whether we adhered to the language in the proposed rule.

4 **Definition of customer network proprietary network information (CPNI):** The definition of CPNI in the proposed rules contained the phrase "which includes information obtained by the company for the provision of telecommunications service." The consumer advocates considered the phrase to be ambiguous and perhaps providing permission for companies to use, disclose, or permit access to such information as medical status submitted by a customer in compliance with proposed WAC 480-120-173 with no more than opt-out approval. In order to remove the ambiguity, we removed the phrase from the adopted rules. The remaining definition of CPNI in subsections (a) and (b) came directly from the federal statute. However, because the Commission proposes specific, more stringent protections for those portions of CPNI that are individually identifiable, we have added to the definition of

CPNI a description of the subsets of data contained within that broader category of data. *See WAC 480-120-201*.

5 **Interference with Marketing "Friends and Family" Type Plans:** Some companies provide reduced toll rates to customers who call other customers who use the company's service. Company comments suggest that our definition of call detail would restrict marketing these programs. It is true that under our rules a company may not examine numbers called to determine if a particular customer routinely calls another customer and use that information to suggest to the customer a change of long-distance plans. The examination of such information for that purpose would stray into a practice that we have determined could result in revealing sensitive communications habits and personal habits. Once a customer elects "Friends and Family" service, the company can of course use specific call detail information in order to initiate, render, coordinate, facilitate, bill, and collect for telecommunications services the customer has purchased or requested. *See WAC 480-120-201 and 205.*

6 **Suggested Changes to Definition of Call Detail:** Companies suggested elimination of subsections (b) and (c) in the definition of call detail, and asked for clarification of the scope of (d). Subsection (b) defines as call detail information associating individual customers with specific area codes, prefixes, or complete telephone numbers correlated with the time of day, length of call and cost of call. Elimination of this subsection would mean that companies could, without opt-in approval, examine customers' communications habits and know or deduce a great deal about customers' personal habits or circumstances (e.g., determine a customer makes routine calls to Alcoholics Anonymous). Elimination of this subsection would undo one of the most important protections we seek to achieve with these rules.

7 Elimination of subsection (c) would permit companies and others into whose hands the information falls to discern calling patterns that may also reveal sensitive personal habits. While we exclude from call detail general calling patterns and expenses when expressed in terms of one month or more of activity or expense, we consider that information to be call detail when viewed for shorter periods.

8 We revised subsection (d) so it is clear that it refers only to information that is associated with a specific individual. *See WAC 480-120-201.*

9 **Prohibit Use of CPNI Except as Permitted by 47 U.S.C. § 222 or By These Rules:** Our proposed rules permit the use of CPNI in accordance with federal law except when these rules require otherwise. Consumers suggested that this should be changed so that no use is permitted unless authorized by federal law or these rules. The purpose would be to emphasize that that CPNI is the property of customers and that it can only be used when there is specific permission granted. We reviewed the rule with these comments in mind and determined the rule is unnecessary and it has been withdrawn.

10 **Oral Approval for Use of CPNI:** Companies expressed concern that our rules permitting oral opt-in approval for use of CPNI and call detail are inconsistent with federal requirements. The concern is that our rule permitting third-party verification similar to that used to verify customer changes from one long distance provider to another cannot be used while the customer is on the line with the company representative. The underlying concern appears to be that a competitor could not look at certain account information in the process of completing a new service order for a customer who is switching from another carrier.

11 Our adopted rules address these concerns in a variety of ways. First, no approval is required to use CPNI to initiate, render, coordinate, facilitate, bill, and collect for telecommunications services the customer has purchased or requested. This has not changed from the proposed rules.

12 Second, we permit the use of CPNI for the duration of inbound and outbound telemarketing calls without third-party verification of approval. We do not require a safeguard in these circumstances because the customer may simply hang up.

13 Third, where we do require third-party verification, we have added an option in the adopted rules that was not in the proposed rules. If a company requests opt-in approval for use of call detail beyond the duration of the call, it may use third-party verification process that is similar to that used for third-party verification when customers switch long-distance providers, or it may make a sound recording of the oral approval sufficient to establish knowing approval. The inclusion of making a sound recording as an option is a change from the proposed rules. (Note that Washington is a two-party consent state with

respect to recording conversations, so a company using this method to obtain oral approval will have to inform the customer that the call will be recorded.) *See WAC 480-120-205, 206, and 212.*

14 **Use of CPNI During Inbound and Outbound Telemarketing Calls:** In our proposed draft we permitted use of private account information after oral notice and oral approval during an inbound telemarketing call. After consideration of company comments concerning customers' desires to receive a quick response when discussing telecommunications services with a company that is already providing service, we determined that a rule concerning inbound telemarketing alone was insufficient to lead to responsive service. In the adopted rules we permit use of CPNI during outbound as well as inbound telemarketing calls, provided there is notice and the customer approves of the use of CPNI. In both instances, the approval and use are permitted only for the duration of the call, which provides a privacy safeguard for customers that balances company access to CPNI during outbound telemarketing calls. *See WAC 480-120-206.*

15 **Restriction on the Use of Call Detail Will Require Companies to Stop Some Marketing Practices:** Some companies stated that certain of their current marketing practices would be prohibited by the proposed rule. For example, using CPNI to market caller identification, Digital Subscriber Line (DSL) service, voice mail, and second residential lines. Most of the examples given are related to services already provided to a customer, because they only work with local service. We addressed this concern in the adopted rules with an additional rule that permits use of private account information without either notice or approval to market services related to those already provided by a company.

16 Other services, such as DSL, could be marketed to customers that are not local service customers, in which case a company would either have no CPNI related to the person because the person is not a customer, or would have to have opt-out or opt-in approval, depending on whether the company planned to use private account information or call detail to market the service. (Note that advertising and marketing based on information that does not come from CPNI may be used without any approval.) *See WAC 480-120-208.*

17 **Notice Issues:** We received many comments on notice, some general in nature and others specific to various subsections.

- **Notice Generally:** In general, companies suggested the amount and types of notice would be confusing, and consumer advocates did not question the amount and type of notice. Our response to the general concern that there is too much notice required is that we have a record that demonstrates that customers have expressed more interest in privacy of telecommunications records than any other policy issue to come before the Commission. We believe that customers genuinely care about their privacy, that privacy is an interest that should be protected, and that customers will not be confused by information that enables them to make an informed decision. We have tried to develop notice requirements that will enable customers to make informed choices and that do not contain unnecessary provisions. *WAC 480-120-209.*

- **Annual Notice:** We received several company comments suggesting we follow the Federal Communications Commission (FCC) and reduce the required frequency of opt-out notice from one year to every two years. The issue is whether customers need notice more or less often in order to be sure they understand their options and how to exercise them. We are persuaded that with the substantial notice required and the multiple mechanisms for opting out, customers will receive notices that can be read and understood and that the process of opting out will be easy. For these reasons, we believe that less frequent notice will not reduce customer understanding or the opportunity to opt out. We also see a value in reducing the cost to notify customers. We have changed opt-out notice requirement to once every two years. *See WAC 480-120-209(2).*

- **Inclusion of Notice with Other Advertising or Promotional Material:** Our proposed rule contained a prohibition against providing the opt-out notice with any other advertising or promotional material; it did permit inclusion of the notice with customer bills. Companies commented that it would be beneficial to companies to be permitted to place both advertising and opt-out notices together in bills because placing advertising in bill envelopes is cost-effective. We do not doubt that it would be cost-effective for companies to include advertising with the notice, but the efficiency in advertising costs may come at the

expense of the effectiveness of the notice because it could be lost in the advertising and other material. We have not changed this requirement in our adopted rules. *WAC 480-120-209(3).*

- **A Mix of Opt-In and Opt-Out Approval Will Cause Customer Confusion:** Companies and consumers are united in believing that customers will be confused if call detail is made available only after opt-in approval is given, and private account information is available to companies after notice and an opportunity to opt-out. The argument appears to be that two possibilities is one too many. We disagree. First, not all companies will send both types of notice. Some may elect not to ask for opt-in or opt-out approval. Others may request one or the other, or use a single opt-in notice for all CPNI. Second, if both notices are sent, we think customers and companies alike can understand two sets of information and two types of approval.

  We believe that confusion is unlikely if companies provide accurate notices to customers. It is not difficult to understand the difference between using, disclosing, and permitting access to information about services purchased (e.g., a second line) and call detail (e.g., whom you call and who calls you). Companies have an incentive to provide correct notice that informs rather than confuses.

  Commenters also suggested customers will be confused by the contradictions between our notice requirements and FCC notice requirements. If companies send two different notices to customers under the opt-out mechanism, no doubt confusion will be the result. Confusion can be avoided if companies send customers only the correct notice based on these rules. To the extent our rules are more protective of sensitive call detail information than the FCC's rules, companies will be required to send opt-in notices. Following the rule that provides the greater privacy protection is not a confusing concept. *See WAC 480-120-209, 211, and 212.*

- **Informing Customers of Rights and Duties:** Companies commented that notice requirements that inform customers of their rights with respect to confidentiality of CPNI, and the requirement also to inform customers that companies have a duty to protect the confidentiality of

CPNI, may be confusing. No commenter explained just how this information may confuse customers, so lacking any specific concern, we reject the unsupported assertion. *See WAC 480-120-209(5)(c) and 480-120-212(3)(a) and (b).*

- **Required Use of 12-Point Type for Notices:** Our proposed rule requires the use of 12-point type in opt-out notices, and companies have commented that it is unnecessary to state the required size of type. Our experience is that many notices use type sizes that are small and difficult to read. Prior to including the type size in the proposed rules, our staff produced a notice that contains all the required notice contents in twelve-point type. The sample notice fits on one side of a standard size sheet of paper. The example has standard margins and contains considerable separation between notice elements. No commenter stated that the sample notice was deficient or for any reason could not be used. Because we have not been informed that there is a specific problem we have retained the requirement in the adopted rules. *See WAC 480-120-209(7).*

- **Notice That Not All Call Detail Will Be Used, Disclosed, or Accessed:** Another company comment is that limited notice is not permitted when limited use or disclosure of call detail is planned. There is nothing in the notice requirements for obtaining opt-in approval to use call detail that prevents a company from informing a customer of the limits to which call detail will be put to use. Because we require that notice be comprehensible and not misleading, companies must adhere to self-imposed limits. We were not asked to make a specific change, and we believe the rules permit companies to tailor notices to self-imposed limits on use, disclosure, and access, and therefore we make no change to the rules on this topic. *See WAC 480-120-209 and 212.*

- **Notice Concerning Entities to Which Call Detail May Be Disclosed:** Another suggestion in the comments is that it is unnecessary to provide the names of affiliates and subsidiaries in the opt-in notice because they are often unknown to customers who are accustomed to brand names. We think customers may be interested in the names of the firms that may receive call detail information, but nevertheless make a change in this subsection. After reflection, we think

disclosure of all affiliates, subsidiaries, and companies under common control would be an impractical requirement to place on companies because they form an ever-changing group. We also think that companies, in order to convince customers to opt-in to the use of their most sensitive personal telecommunications information, will have to find some level of revelation of who may receive the information that satisfies customers' curiosity about who will have access to their information. Accordingly, we have reduced the disclosure requirement to whether the information will be used, disclosed, or access permitted to an entity or person other than the company. *See WAC 480-120-212(3)(d).*

- **Notice Concerning Availability of Name, Address, and Telephone Number to Telemarketers:** One commenter raised a concern that the notice requirements in the proposed rule concerning availability of name, address, and telephone number (subscriber list information) suggested companies must provide this information to all types of telemarketers. In the adopted rule we have made a change so that the notice must inform customers that name address and telephone number are not private information and may be used by telemarketers even if the customer opts-out. The revised notice requirement more correctly informs customers that choosing to opt-out is not the same as eliminating telemarketing. *See WAC 480-120-209(5)(a).*

- **Notice That No Action Is necessary to Protect Call Detail Disclosure to Third Parties:** A concern was expressed that this requirement could lead to confusion. We think it is important for customers to know that they need not take any action to protect the most sensitive information (call detail) about them. No commenter suggested precisely how this would confuse customers, and we do not think it will. *See WAC 480-120-212(3)(f).*

- **Include A Copy of the Chart that Shows the Application of the Rules to Certain types of information:** In the proposed rules we included a chart labeled "Customer Approval Method Depends on the Type of Information." Consumer advocates suggested that a copy of this chart (which is revised in the adopted rules) be required to be included with opt-out notices. Because the chart would not necessarily

be correct when a company chooses self-imposed limits on the use, disclosure, and access that it will permit and its notice reflects those self-imposed limits, we do not think we should require inclusion of the chart. Companies may find that inclusion of a chart is a good idea and may include a comprehensible and not misleading chart with a notice.

- **Some Notice Requirements Are Incompatible with Notice and Approval for the Duration of a Telemarketing Call:** Company criticism of the proposed rules is correct on this point. The adopted rules provide exemptions from the notice rule when the notice and approval extend only for the duration of a telemarketing call. *See WAC 480-120-213(2).*

- **Opt-out Approval Will Burden Consumer Organizations Rather Than Companies:** Consumer advocates suggested that the use of an opt-out approval mechanism for some information will burden consumer organizations that will be asked to assist customers in understanding their options, while companies will not bear this burden. In essence, this is another suggestion that customers will be easily confused and was presented as an argument for an all opt-in approach. We believe our notice requirements are sufficiently strong to require companies to send notices that will inform rather than confuse, so we make no change in the adopted rules based on this comment. *See WAC 480-120-209 and 212.*

- **Rules will Require Costly New Processes:** Companies commented that the administrative aspects of the new rule (notice and opt-out mechanisms) will increase costs for companies. This may be, but the purpose of these rules is to strike a balance between company concerns and customers' interests in privacy, speech, and association. There is a threshold of privacy protection below which we will not go, even if that protection means increased costs will result. With respect to imposing costs on customers or companies, these rules are not different from any other rules, any of which may cause an increase in cost to customers or to companies. *See WAC 480-120-209, 211, and 212.*

18 **Multiple Opt-Out Mechanisms:** Companies commented in opposition to multiple opt-out mechanisms while consumer advocates commented in support

of the rules on this subject. Most comments in opposition state, in essence, that the multiple methods we require for exercising an opt-out opportunity are too many and unnecessarily costly. Some commenters relied upon the FCC record to support the position that fewer methods are needed. We respond that our experience, borne out in our record, is different from the FCC's.

19 Our experience, and the record on which we act, demonstrate that multiple methods are needed to ensure ease of opting out. Many customers report that they attempted to opt-out in a situation in which a company sent an opt-out notice, but found they were thwarted in doing so when calls went unanswered and when they were told there was no address to which a written opt-out directive could be sent. A particularly troublesome example of the difficulties customers encountered concerned a company that did not accept opt-out requests by telephone on Saturdays, but mailed notices that arrived on Saturdays. The same company did not accept opt-out calls in the evening, thwarting the efforts of those who open mail in the evening after work and would like to take immediate action to opt out.

20 As we discuss in the order, in one sense companies have an incentive to make it difficult for customers to opt-out. (In another sense, as Qwest learned, their long-term incentive is to maintain cordial relations with their customers.) The order and this response discuss some of the problems. We have provided in this rule the methods that we consider appropriate to guard against these problems occurring again. While they may be multiple, their multiplicity does not necessarily make them expensive. We decline to make changes based on the comments on this subject. *See WAC 480-120-211.*

21 **Opting-Out by Marking a Box or Blank on the Monthly Bill:** In some draft version of these rules we included marking a box or blank on the monthly bill as a means for a customer to opt-out. We did not include this as a method for opting out in our proposed rules because we were persuaded that it would be difficult to inform customers that they did not need to check the box every month and because we were persuaded by companies that it could interfere with bill processing, an important business function. In consumer comments on the proposed rules we were encouraged to once again include this option. We adhere to the position we took when we eliminated it from draft rules and excluded it from our proposed rules. *See WAC 480-120-211.*

22 **Limited Requirements for Companies With Fewer Than 50,000 Access Lines:** Comments from smaller companies suggest that it is inefficient to have a 1-800 line with access to a live or automated operator at all times when it may only be called a few times per year. They do not recommend an alternative. This comment misreads the rule to mean that toll-free must be a 1-800 number. Companies can meet this requirement by having a local telephone number for which a toll is not charged. If a message (voice, voice activated, or touch-tone) can be left by a caller when not answered, and if that opt-out request is confirmed as required by our rules, then a company will have met the requirements of this rule. For those reasons, we decline to provide fewer opportunities for opting-out to customers of small companies as those of larger companies. A customer's interests in privacy, speech, and association are not reduced by the size of the company providing telecommunications service. *See WAC 480-120-211.*

23 **The Opt-In Notice Should Not Require a Description of Each Purpose for Which Information May Be Used, Disclosed or Accessed:** We receive oral comments prior to publishing the proposed rules recommending that we not require a description in the notice of each purpose for which call detail might be used. The same comment was made in response to the proposed rule. Because it is not reasonable to expect every possible purpose to be listed, we have altered the adopted rules and now require that opt-in notices provide a description of the general purposes for which the information may be used, disclosed, or for which access may be permitted. *See WAC 480-120-212(3)(e).*

24 **Written Confirmation:** We received company comments opposed to our requirement for written confirmation when a company receives a customer's opt-out or opt-in directive (other than a directive received during a telemarketing call). Our experience is that companies cannot be depended on to follow the instructions accurately at all times. Our record includes statements from customers that their opt-out directives were not implemented. Accordingly, we think it is important that customers receive confirmation of their opt-out approval so errors can be detected before personal customer data is disclosed.

25 Written confirmation of opt-in approval is also important to prevent errors. The reason for confirmation of opt-in approval is that an error by a company in perceiving it has opt-in approval when it does not would expose customers'

most sensitive information (e.g., whom they call and who calls them) to, among other things, disclosure to third parties. We believe the confirmation requirement is an important safeguard, and our record supports this conclusion. *See WAC 480-120-213(1).*

26 **Oral Confirmation of Opt-Out or Opt-In Approval:** Companies commented that oral confirmation should be permitted as well as written approval. No reason was given for this suggestion but we infer that it might be less expensive and easier to provide oral confirmation. Because our confirmation requirement is aimed at detecting errors and providing customers an opportunity to correct them, we are concerned that oral confirmation, even with instructions about correcting an error, would be less effective than written confirmation. An automatically-dialed announcement that includes confirmation and instructions on what to do if the customers believes there has been an error places the burden on customers to be ready to receive the instructions and make notes at the company's convenience. A written confirmation provides a customer with information on how to correct an error without requiring the customer to attend to the circumstances immediately by taking notes. We believe written confirmation assists customers and that oral confirmation would place a burden on customers. Accordingly we make no change in the adopted rules on this subject. *See WAC 480-120-213.*

27 **Twenty-One Day Delay Before Acting on Opt-In Directives:** Company comments opposed the proposed rule's requirement that carriers must delay taking action approved by a customer's opt-in directive until twenty-one days after a confirmation has been sent to the customer. We have not changed the proposed rule.

28 In essence, commenters suggested that the waiting period required for acting on opt-in approval is unnecessary and that customers who opt-in often want the company to act immediately. The waiting period applies when the company wants to use, disclose, or permit access to call detail information (e.g., whom the customer calls and who calls the customer) unrelated to direct contact between the company and the customer through a telemarketing call. The purpose of the waiting period is to give the customer time to receive the confirmation of opt-in approval and, if an error has been made, time to contact the company and correct the error. Company concerns that they would not be able to respond to a customer's immediate need are not correct because an

immediate response can be provided if the company is in direct contact with its customer. We provide for immediate use of call detail information (the subject of opt-in approval) during inbound and outbound telemarketing calls.

29 Commenters also suggest that the 21-day waiting period prior to acting on a customer's opt-in approval is inconsistent with the requirement that a company must provide a customer with the customer's CPNI upon written request. When a company asks customers to opt-in so the company can use, disclose, or permit access to customers' CPNI, the waiting period is to protect customers against the possibility of erroneous disclosure of very sensitive personal information. Companies confuse their desire to have customer approval to use CPNI for a commercial purpose with customer requests. A request by a customer for the customer's own information does not carry with it the same concern for an erroneous disclosure that exists with a company's request.

30 We have made a change in the adopted rules that relieves companies of the obligation to provide written confirmation and wait twenty-one days to respond to customers when they are in direct contact with the customer during inbound and outbound telemarketing calls. *See WAC 480-120-213(1).*

31 **Training for Customer Service Personnel with Access to CPNI:** Consumer comments were made evidencing a concern that training for customer service personnel may not be sufficient to protect the privacy of customers. These comments were made in support of an all opt-in regime. We did not adopt an all opt-in regime, but our proposed rules, and now our adopted rules, require companies to use training and other safeguards to protect customer privacy. We believe that the adopted rules address the concern. *See WAC 480-120-215(1).*

32 **Commission Lacks Authority to Require Companies Serving Fewer than Two Percent of the States Access Lines to File an Annual Certificate of Compliance and Statement Regarding Compliance:** Smaller companies object to the requirement for a company officer to file a compliance certificate on an annual basis stating the officer has personal knowledge that the company has established operating procedures that are adequate to ensure compliance with rules concerning CPNI, and to file a statement accompanying the certificate explaining how its operating procedures ensure that it is or is not in compliance with the rules on this topic. Companies claim an exemption to this

requirement based on RCW 80.04.530(2). The Commission has added a new subdivision (4) to the rule that provides that Class B companies need not report to the Commission as required by subsection (3) of WAC 480-120-215.

33 **Notice Related to Privacy Listings for Telephone Solicitation:** One of our proposed rules concerns telephone solicitation calls to customers with non-published and unlisted telephone numbers. The rule requires that customers must be informed that inclusion in a solicitation list may be declined, and if declined, the company must not make any additional solicitation. This rule implements RCW 80.36.390, which permits people to indicate they would not like to receive any more solicitations. The commenter's concern is that the notice requirement is confusing, but no commenter stated how this notice requirement would be confusing. Because there is no clear statement of how the notice requirement might be confusing, and because we do not think it will cause confusion, we decline to make any change. *See WAC 480-120-217*.

34 **CPNI is a National Issue Best Left to the FCC:** Companies commented that control of CPNI is a national issue that should be left to the FCC to provide uniform regulations. We respond that control of CPNI is an issue of direct and substantive concern to customers and that it is appropriate for state commissions to adopt rules to balance customer privacy, speech, and association interests with the commercial speech interests of companies in a manner that is consistent with state law. Further, the FCC acknowledged in its rule that some state variation might be appropriate.

35 **Customers Should Have the Opportunity to Correct Inaccurate Information:** Consumers suggest that customers should have the opportunity to correct inaccurate information collected by a company. Unlike credit bureaus that collect information from others, the information with which we are concerned here is information in the possession of the telecommunications companies. Because the information at issue here would be collected directly from company sources, we are not concerned that it will be inaccurate. (Indeed, the concern for customer privacy, speech, and association interests arises precisely because of its accuracy in revealing sensitive personal communications and living habits.) We made no changes to the proposed rules as a result of this comment.