THE HONORABLE _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Verizon Northwest Inc., Bell Atlantic Communications, Inc., d/b/a Verizon Long Distance, NYNEX Long Distance d/b/a Verizon Enterprise Solutions, Verizon Select Services Inc., and Verizon Services Corporation, Plaintiffs, v. Marilyn Showalter, Chairwoman; Patrick Oshie, and Richard Hemstad, Commissioners, in their official capacities as members of the Washington Utilities and Transportation Commission, and Washington Utilities and Transportation Commission, Defendants.	No. _____ **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

I. INTRODUCTION

A. Overview

1. Plaintiffs Verizon Northwest Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, NYNEX Long Distance d/b/a Verizon Enterprise Solutions, Verizon Select Services Inc., and Verizon Services Corporation (collectively "Verizon" or "Plaintiffs") bring

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this action against Defendants Marilyn Showalter, Patrick Oshie, and Richard Hemstad, in their official capacities as Commissioners on the Washington Utilities and Transportation Commission ("WUTC"), and the WUTC itself (collectively, the "WUTC" or "Defendants").

2. Plaintiffs provide local and long distance telephone service, as well as related services such as voice mail, caller identification and directory services, within Washington State and elsewhere. In the course of their ongoing business relationships with their customers, Plaintiffs gather, organize, and analyze information about their customers' use of Verizon's services, including local and long distance calling patterns and customers' use of ancillary services such as Caller Identification and Call Waiting. This information is defined under federal law as "Customer Proprietary Network Information" ("CPNI").

3. Plaintiffs use CPNI for billing and customer services purposes. Plaintiffs also use CPNI to formulate new products and services and to communicate those new offerings to the particular customers most likely to benefit from them. For example, Verizon might use CPNI to develop special long-distance calling plans and then selectively market these new plans to specific customers whose CPNI indicates that they would benefit from them.

4. Section 222, enacted as part of the Telecommunications Act of 1996 (the "Act"), governs telecommunications carriers' use of CPNI. *See* 47 U.S.C. § 222. In 1998, the Federal Communications Commission ("FCC") promulgated rules implementing Section 222. These rules were very restrictive of carrier speech. If a carrier wanted to use a customer's CPNI to discuss new communications-related services with that customer, the carrier was required to obtain express customer approval before using that customer's CPNI. This approval process is known as the "opt-in" approach, *i.e.*, the customer must register affirmative consent before the

carrier may use or speak to the customer about his or her CPNI. By contrast, the substantially less restrictive "opt-out" approach allows carriers to use and speak to customers regarding their own CPNI unless the customer affirmatively requests that his or her CPNI not be used for marketing purposes after being properly informed of this option.

5. The Court of Appeals for the Tenth Circuit struck down the FCC's opt-in rules on First Amendment grounds. Specifically, the court held that (a) carrier speech regarding CPNI constitutes 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 a substantial state interest. The court also held that the FCC failed adequately to consider an opt-out approach, noting that such a provision is inherently less restrictive of protected speech. *See U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). In response to the Tenth Circuit's decision, the FCC adopted new CPNI rules that permit the opt-out approach. In July of this year, the FCC specifically found that an opt-in restriction on carriers' internal and external speech regarding customer information could not pass First Amendment scrutiny.

6. The State of Washington participated in the FCC's CPNI proceedings, and urged the FCC to reject the opt-out approach. Failing in this effort, the WUTC has now adopted its own CPNI rules, which require opt-in consent for many expressive uses of CPNI and impose significant additional restrictions on the ability of telecommunications carriers to engage in speech regarding CPNI within corporate units and among affiliates, agents, independent contractors and joint venture partners. *See Order Adopting and Repealing Rules Permanently*, Docket No. UT-990146, General Order No. R-505 (Nov. 7, 2002) ("*WUTC Order*") (adopting Wa. Admin. Code

§§ 480-120-201 *et seq.*) (attached as Exhibit A to this Complaint and incorporated herein). The WUTC's new rules are substantially *more* restrictive than those that were struck down by the Tenth Circuit. The WUTC's new rules are scheduled to take effect on January 1, 2003.

7. The WUTC's new rules violate Plaintiffs' First Amendment rights to communicate with their customers, the rights of their customers to receive Plaintiffs' speech, and Plaintiffs' rights to engage in non-commercial speech within corporate units and among affiliates, agents, independent contractors and joint venture partners. The practical effect of the rules is to ban all analysis and discussion of individual customer consumption patterns, both for research and development purposes and for target marketing to particular customers. No recognized privacy interest is served by restricting the ability of telecommunications carriers to speak with their own customers about improvements to existing services or new communications-related services.

8. The WUTC's new rules are also void for vagueness under the Due Process Clause of the Fifth Amendment. Key definitions in the rules are either unclear, self-contradictory, or both, such that Plaintiffs cannot tell what expressive conduct is authorized and what expressive conduct is forbidden. The dissenting Commissioner on the WUTC described the new rules as "remarkably complex" and predicted that they would be "daunting for the affected companies to internalize and implement" and "incomprehensible to even well-informed consumers." *WUTC Order*, at 42. As the Supreme Court and the Ninth Circuit have repeatedly made clear, vague and inconsistent standards of this type cannot be tolerated in the context of regulation of First Amendment freedoms.

9. Given that both the Tenth Circuit and the FCC already have concluded that the restrictive opt-in approach taken by the WUTC is contrary to the First Amendment, and given that even the

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temporary loss of First Amendment rights constitutes irreparable injury, Plaintiffs seek both preliminary and permanent injunctive relief preventing the WUTC's new rules from going into effect.

10. Plaintiffs also seek to enjoin enforcement of the WUTC rules because they: (1) are preempted by a federal statute which dictates a uniform national definition of CPNI for both intrastate and interstate services; (2) work a taking of Plaintiffs' property that does not substantially further a legitimate government interest in violation of the Takings Clause of the Fifth Amendment; and (3) violate the Commerce Clause by purporting to regulate the marketing of interstate and international telecommunications services and by frustrating lawful transactions beyond the borders of Washington State.

B. Parties

11. Plaintiffs 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. are affiliated telecommunications companies registered to do business, and doing business, in the State of Washington. Verizon Services Corporation, their marketing affiliate, is a Delaware Corporation providing marketing support and other services to its affiliates in all 50 states.

12. Plaintiff Verizon Northwest Inc. is a Washington corporation, with its principal place of business in Everett, Washington. Verizon Northwest is an incumbent local exchange carrier providing local, long distance and other telephone service to customers within certain parts of the State of Washington. Verizon Northwest is the state's second largest local phone carrier, serving approximately 950,000 lines in Washington State, including the communities of Redmond,

Kirkland, Bothell, Everett, Marysville, Anacortes, Mount Vernon, Wenatchee, Pullman, Richland and Kennewick. Verizon Northwest also does business in Idaho and Oregon, and its subsidiary, Verizon West Coast Inc., does business in California adjacent to Verizon Northwest's Oregon operation.

13. Plaintiff Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance ("VLD"), is a Delaware Corporation with its principal place of business in New York. VLD provides intrastate, interstate and international long distance service to telecommunications customers in the State of Washington. It also does business in 43 other states.

14. Plaintiff NYNEX Long Distance d/b/a Verizon Enterprise Solutions, ("VES"), is a Delaware Corporation with its principal place of business in New York. VES also provides intrastate, interstate and international long distance service to telecommunications customers in the State of Washington. VES does business in 40 other states.

15. Plaintiff Verizon Select Services Inc. ("VSS") is a Delaware Corporation with its principal place of business in Texas. VSS provides large business customers with intrastate, interstate and international long distance services, prepaid calling cards, and customer premises equipment. VSS is registered to do business, and does business, in the State of Washington. VSS does business in all 50 states and the District of Columbia.

16. Plaintiff Verizon Services Corporation ("VSC") is a Delaware Corporation with its principal place of business in Virginia. VSC provides marketing and other services to the other Plaintiffs named herein, as well as to other Verizon local service operating companies, long distance affiliates, Verizon Wireless, and Verizon On-Line. Its services include advertising, direct mail marketing, telemarketing and marketing over the Internet within all 50 states.

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17. Defendant Marilyn Showalter is the Chairwoman of the WUTC, and is named herein in her official capacity only. She can be served personally with this Complaint at 1300 S. Evergreen Park Dr., SW, Olympia, WA 98504-7250.

18. Defendant Patrick J. Oshie is a Commissioner on the WUTC, and is named herein in his official capacity only. He can be served personally with this Complaint at 1300 S. Evergreen Park Dr., SW, Olympia, WA 98504-7250.

19. Defendant Richard Hemstad is a Commissioner on the WUTC, and is named herein in his official capacity only. He can be served personally with this Complaint at 1300 S. Evergreen Park Dr., SW, Olympia, WA 98504-7250.

20. The Washington Utilities and Transportation Commission is also named as a party defendant.

C. Jurisdiction and Venue

21. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337, 1343(3), and 2201 in that whether the WUTC's new CPNI rules violate the United States Constitution or are preempted by the Telecommunications Act of 1996, codified at 47 U.S.C. §§ 151 *et seq.*, are questions of federal law and in that this action seeks to redress the deprivation, under color of state law, of rights secured by the United States Constitution and federal law. *See* 42 U.S.C. § 1983.

22. The WUTC enacted its new rules on November 7, 2002, and by their terms, unless enjoined, the rules will take effect on January 1, 2003. Absent intervention by this Court, as of that effective date, Plaintiffs' ability to communicate with their customers in Washington State will be severely curtailed by the new rules. Plaintiffs' ability to discuss and analyze CPNI

internally and with affiliates, agents, independent contractors and joint venture partners will also be severely restricted. Hence, there is an actual controversy over which this Court has jurisdiction to award declaratory and injunctive relief under 28 U.S.C. §§ 2201-02.

23. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1) because, upon information and belief, each of the Defendants resides in this district. In the alternative, venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) because "a substantial part of the events or omissions giving rise to the claim occurred" in this district.

24. This action properly is brought in this division because Plaintiff Verizon Northwest Inc.'s principal place of business in the State of Washington is located within this district.

II. BACKGROUND

25. Telecommunications carriers and providers, such as Plaintiffs, gather and analyze customer call information, such as information about customers' respective local and long-distance calling patterns, received calls, and the amount of time spent using telephone services, in order to develop and improve services, to learn valuable information about the telecommunications needs of their customers, and to target market new services to their customers based on those needs. Verizon does not now share such carrier-collected customer information with unaffiliated third parties, except as permitted under the FCC's rules (such as with agents, independent contractors and joint venture partners in order to provide or offer Verizon services). *See* 47 C.F. R. § 64.2007(b). Verizon does not sell CPNI to third parties and does not have any plans to do so in the future.

26. The use and disclosure of CPNI is critical to Verizon's internal communications regarding the development of new products and services and to its ability to market those

products and services to the most likely buyers within its customer base. For example, Verizon used CPNI, including call detail, to develop and implement Call Intercept, which requires callers whose numbers are not pre-programmed to pass through to announce themselves before the call is passed to the subscriber. Verizon is also in the planning stages of developing software, using contractors employed in-house, to create CPNI-based, and in particular call detail-based, pop-up marketing that would enable customers who communicate with Verizon via the Internet for on-line billing and bill payment to receive specially tailored product and service offerings. Verizon also internally uses CPNI on a nationwide basis, both to gain an understanding of which products and services or service bundles its customers may be interested in and to market those products and services to particular customers who are most likely to benefit from them.

27. Verizon also communicates CPNI to outside consulting and product development firms, pursuant to confidentiality agreements, for the development of new Verizon products, marketing strategies, and consumer surveys. These uses of CPNI are critical to Verizon's ability to develop enhancements to existing service and new communications-related products and services and to market them effectively to existing customers. For example, Verizon has, pursuant to a confidentiality agreement, communicated CPNI, including call detail, to a technology equipment contractor to introduce Talking Call Waiting to Verizon customers. Talking Call Waiting is a service that provides the name of the caller audibly instead of textually on a Caller-ID box. Verizon has also used CPNI, including call detail, in working with an outside contractor to introduce Call Manager to Verizon customers, a service that provides Caller ID and Internet Call Management functionality to the customer while he or she is on a dial-up Internet connection.

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28. Verizon has already initiated a variety of national marketing campaigns based upon the use of CPNI in the manner authorized by the FCC rules. For example, by using CPNI, Verizon was able to identify customers with high toll usage who may be better served by Verizon's Local Package Plus plan, which includes unlimited toll calls. Similarly, Verizon has a long distance retention program, whereby it analyzes each customer's long distance calling patterns and provides the customer with information regarding the best calling plan for the customer. Verizon communicates this kind of CPNI-based information to its customers through telephone contacts, or through direct mail, and is in the planning stages for the use of CPNI-based Internet communications. These garden-variety marketing efforts are severely restricted by the WUTC's new rules.

A. The FCC's CPNI Rules

29. Section 222 of the Telecommunications Act of 1996 provides in pertinent part that telecommunications carriers have a "duty to protect the confidentiality of proprietary information of, and relating to, . . . customers." 47 U.S.C. § 222(a). The federal statute contains a definition of CPNI, *see id.* § 222(h)(1), which by its terms applies to both interstate and intrastate telecommunications services.

30. The FCC, pursuant to its authority under 47 U.S.C. § 201(b), enacted rules implementing Section 222. *Implementation of the Telecommunications Act of 1996*, Second Report & Order, CC Nos. 96-115, 96-149 (Feb. 26, 1998) ("*1998 CPNI Order*"); *See also Implementation of the Telecommunications Act of 1996*, Third Report & Order, CC Nos. 96-115, 96-149, 00-257 (July 25, 2002) ("*2002 CPNI Order*").

31. As enacted in 1998, the FCC's original CPNI rules required either opt-in approval or no approval at all, depending on the type of service being marketed by the carrier:

FCC's 1998 CPNI Rules

Type of Offering	Type of Approval Required
Carrier markets the same type of service to which the customer already subscribes (*i.e.*, local, long distance or wireless) or other local services that the carrier may offer	No approval required
Carrier markets services that are not the same type of service but that are "necessary to or used in" the provision of service to which the customer already subscribes	No approval required
Carrier markets services that are unrelated to the customer's existing service relationship	Opt-in approval required

See 47 C.F.R. §§ 64.2001-2009 (1998), *in 1998 CPNI Order*, at App. B.

32. Upon review, the Tenth Circuit struck down the opt-in requirement contained in the FCC's 1998 regulations on First Amendment grounds, concluding that the FCC had failed to carry its burden of demonstrating that its regulations either materially advanced the interest claimed or were narrowly tailored. *See U.S. West*, 182 F.3d 1224. The court of appeals concluded that the FCC did not base its regulations on any evidence of real harm to consumers arising from the use of customer information and that the FCC did not carry its burden of showing that the restrictions were drawn narrowly so as to restrict only that speech necessary to achieve the stated goal. *See id.* at 1237, 1239.

33. After the Tenth Circuit's ruling declaring the FCC's opt-in rules unconstitutional, the FCC conducted an exhaustive proceeding to examine whether any empirical evidence existed to

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support an opt-in regime. *See 2002 CPNI Order*, Statement of Chairman Michael K. Powell. On July 25, 2002, it concluded that no such evidence existed and therefore found that an opt-in regime was overly restrictive of carrier speech and could not survive First Amendment scrutiny. *Id.* ¶ 1. The State of Washington participated, through the comments of its Attorney General, in that proceeding. *See Ex Parte Letter of the Attorneys General of the State of Alaska, et al.*, CC Docket Nos. 96-115 & 96-149 (filed Dec. 26, 2001).

34. In its *2002 CPNI Order*, the FCC reaffirmed its rule that a carrier need not obtain any customer approval in order to use and discuss CPNI in offering services of the same type as those to which the customer already subscribes. *2002 CPNI Order*, ¶ 83. Nor do carriers need any customer approval to use CPNI to provide or market services that are used in or necessary to existing service. Thus, under the federal rules, carriers may use individual customer data without any restriction to offer customers a new or improved service or billing option within the general categories of service (*e.g.*, local service, interexchange service, or wireless service) to which the customer already subscribes. The FCC found that no privacy interests were implicated for this category of activity because customer consent was implicit in the formation of the business relationship itself. *See 1998 CPNI Order*, ¶ 23 ("[C]ustomer approval for carriers to use, disclose, and permit access to CPNI can be inferred in the context of an existing customer-carrier relationship. This is so because the customer is aware that its carrier has access to CPNI, and, through subscription to the carrier's service, has implicitly approved the carrier's use of CPNI within that existing relationship."); *id.* ¶ 24 ("We are persuaded that customers expect that CPNI generated from their entire service will be used by their carrier to market improved service within the parameters of the customer-carrier relationship."). Moreover, this use of CPNI did not

implicate the dissemination of private information outside of the pre-existing relationship between the customer and the carrier or affiliate actually providing service. *See id.* ¶ 51.

35. For all other communications-related services, the FCC required only that carriers allow customers to "opt-out" of use of their customer data, that is, affirmatively signal that they do not wish their information to be used by the carrier for marketing purposes. The FCC concluded that carriers' speech interests, as well as customers' interests in receiving targeted information, outweighed any alleged privacy interest beyond that protected by the opt-out regime. The FCC found that "carriers have provided evidence that their commercial speech interest in using 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." *2002 CPNI Order*, ¶ 40. In fact, the FCC recognized that "consumers may profit" from target-marketing efforts because they "result in more efficient and better-tailored marketing" thus reducing use of broadcast marketing techniques such as junk mail. *Id.* ¶ 35; *see also id.* ¶ 36 ("[A] large percentage of telecommunications customers . . . expect that carriers will use CPNI to market their own telecommunications services and products, as well as those of their affiliates.").

36. The FCC also rejected the imposition of an opt-in restriction on carriers' disclosure of CPNI to their agents, independent contractors, and joint venture partners who participate in the marketing of communications-related services. The Commission found that customer privacy interests were protected by "the same or equivalent safeguards as those that exist when carriers use CPNI themselves." *Id.* ¶ 45. These included the carriers' obvious incentive to protect customer goodwill and the fact that carriers themselves could be punished for any improper use

or disclosure of CPNI by their agents or independent contractors. The FCC noted that many carriers use agents and independent contractors to perform some or all of their marketing functions, and thus an opt-in requirement for disclosure to these entities would immediately curtail a significant amount of carrier speech. For this reason, the FCC found that an opt-in approach would not pass First Amendment scrutiny: "Many carriers use telemarketers to conduct portions of their marketing business, and so long as adequate safeguards are in place, we believe that a narrowly tailored requirement should not dictate that these carriers change their existing business practices." *Id.* ¶ 49. Thus, the FCC required only opt-out consent in these circumstances, with the additional safeguard of mandatory confidentiality agreements in the case of independent contractors and joint venture partners.

37. The FCC only required the more onerous opt-in consent for the disclosure of CPNI to third parties for the marketing of non-communications-related services. The FCC found that " in contrast to intra-company use and disclosure of CPNI, there is a more substantial privacy interest with respect to third-party disclosures." *Id.* ¶ 51. At the same time, carriers' speech interests were small because no carrier had indicated that it presently shared CPNI with third parties for the marketing of non-communications-related services.

38. The FCC also declined to "differentiate[] among different types of CPNI for the purpose of applying the opt-in/opt-out methodology or other requirements of section 222." *2002 CPNI Order*, ¶ 121. The FCC reasoned that such an approach

> runs contrary 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,

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> and billing systems, where facilities information and call detail all may reside without distinction.

Id. ¶ 121 n. 279.

39. In sum, the FCC made four critical findings in its *2002 CPNI Order*: (a) it reaffirmed that carriers need not obtain any consumer consent for use of CPNI to market products or enhancements within the same general service category to which a customer already subscribes; (b) it rejected an opt-in regime for other carrier uses of CPNI to market communications-related services as overly restrictive of carrier speech; (c) it rejected an opt-in restriction on carriers sharing of CPNI with affiliates, agents, independent contractors, and joint venture partners as not narrowly tailored under the First Amendment; and (d) it rejected the establishment of new definitions or sub-categories of CPNI as contrary to Section 222 and administratively unworkable.

B. The WUTC's More Restrictive CPNI Rules

40. In 1999, Washington State adopted CPNI regulations that were essentially identical to the 1998 FCC rules that were invalidated by the Tenth Circuit because the opt-in approach was contrary to the First Amendment. *See* Wa. Admin. Code § 480-120-151 *et seq.* (effective Mar. 8, 1999).

41. On January 14, 2002, in Docket No. UT-990146, the WUTC issued a Notice of Opportunity to File Written, E-Mail and Telephone Comments on Telecommunications Carriers' Use of Customer Information, and sought comments to "help [it] determine whether we need to revise our current rules." *Id.* at 2. The WUTC received written comments and held several workshops regarding its CPNI rules. Much of the evidence and public comment before the WUTC was directed to the privacy interests implicated by the disclosure of CPNI to third parties.

No evidence was produced to establish that carriers' use of CPNI to develop and market communications-related services to existing customers had caused any consumer harm within the State of Washington. Nor was any evidence produced that the sharing of CPNI among affiliated companies, agents, independent contractors, or joint venture partners had caused any consumer harm within the State of Washington.

42. On November 7, 2002, over the objections of Plaintiffs and others, and despite the FCC's *2002 CPNI Order*, the WUTC adopted its new more restrictive CPNI regime by a vote of two to one, with one Commissioner dissenting. The WUTC also repealed its pre-existing CPNI rules by the same order. The repeal of the prior rules is not challenged in this proceeding. Absent judicial intervention, the new rules will go into effect on January 1, 2003.

43. The WUTC's new rules are substantially more restrictive than federal law and federal regulations in several ways. First, they differentiate among types of CPNI for the purposes of applying the opt-in and opt-out approaches, even though the FCC held that such differentiation "runs contrary to Congress' unambiguous intent in defining all types of customer proprietary network information under one definition of CPNI in section 222." *2002 CPNI Order*, ¶ 121 n. 279. Specifically, the WUTC's rules create two new sub-categories of CPNI denominated "call detail" and "private account information" and impose different restrictions on carrier speech as to both new categories. *See* Wa. Admin. Code § 480-120-201.

44. The new rules define "call detail" to include, among other things, the name of the caller, the name of the person called, the location from which a call was made, any part of the telephone number of any participant, the time of day of the call, the duration of a call, or the cost of a call. Call detail is also defined to include aggregate data on a particular customer's calls to a specific

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area code or prefix (including monthly or even annual data), general calling patterns for particular days of the week or times of day, as well as data regarding answered or unanswered calls by time of day or day of the week. Wa. Admin. Code § 480-120-201. At the same time, "call detail" does not include monthly data on the amounts spent for long distance, intrastate, or intraLATA toll calls, or the number of unanswered calls per month for a particular telephone. *Id.*

45. The new rules define "private account information" as the subset of CPNI that does not include call detail but "is associated with an identifiable individual." *See* Wa. Admin. Code § 480-120-201. "Individually Identifiable Customer Proprietary Information" ("I-CPNI"), as defined under the new rules, comprises call detail and private account information. *Id.*

46. The new WUTC rules expressly reject the conclusions of both the Tenth Circuit and the FCC by adopting stringent opt-in restrictions on both the commercial and non-commercial speech of telecommunications providers. By their terms, these rules are meant to override the less speech-restrictive FCC rules for all telecommunications customers in the State of Washington. The WUTC's new rules also purport to apply to the marketing of both intrastate and interstate services within the State of Washington, and the WUTC does not attempt to distinguish between intrastate and interstate services within the new rules. *See* WUTC Press Release, "Washington Regulators Adopt Nation's Strongest Telephone Customer-Privacy Rules," at 2 (Nov. 7, 2002) (attached as Exhibit B to this Complaint and incorporated herein) ("The WUTC rules apply to local and long-distance communications companies providing service in Washington."). They also apply to local voice and data services such as DSL, private line, exchange access, special access, voice, ISDN, and caller identification, the overwhelming majority of which are used for and may carry both intrastate and interstate telecommunications

services. Indeed, the WUTC suggested that, to avoid consumer confusion, carriers should ignore the federal law and regulations regarding CPNI and simply send out customer notices that comply with the new WUTC rules. *WUTC Order*, App. A at 6 (because consumer confusion would result from sending out two different CPNI notices, carriers should "follow[] the rule that provides the greater privacy protection" *i.e.*, the WUTC rules).

47. At the heart of the WUTC's new rules is a blanket prohibition on the use of "call detail" for the development and marketing of communications-related services without the prior written or recorded opt-in consent of the customer. *See* Wa. Admin. Code §§ 480-120-204, 212. The WUTC found that carriers' use of customer information to design and market enhancements of existing services or to design and market new communications-related services to existing customers constituted an invasion of consumer privacy. *WUTC Order*, at 24 ("The creation of [customer use] profiles without consumer consent is, in itself, an invasion of privacy, even if the information never makes it into the hands of a third party.").

48. The WUTC expressly recognized that its approach would significantly restrict carriers' ability to study customer information and target market services such as call-forwarding, new flat-rate calling plans, and route specific discounts. *Id.* at 23. In response to comments, the WUTC further acknowledged that its rules would prevent the development and marketing of "Friends and Family" type calling plans for long distance services in Washington State. *WUTC Order*, App. A at 2 ("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."). Thus, by design, the WUTC regime

restricts substantially more carrier speech than the 1998 FCC rules struck down by the Tenth Circuit or the FCC's present CPNI rules.

49. The new WUTC rules also significantly limit the ability of telecommunications carriers to share CPNI with affiliates, agents, independent contractors and joint venture partners for the development and marketing of communications-related services. *See* Wa. Admin. Code §§ 480-120-201 *et seq*. Under the new WUTC rules, disclosure of both "call detail" and "private account information" is limited to "associated companies," which are defined as "any company that controls, is controlled by, or is under common control with, another company." *Id.* The definition of "associated company" is substantially different and substantially less precise than that used by the FCC. *Compare* Wa. Admin. Code § 480-120-201 (defining "Associated company"), *with* 47 C.F.R. § 64.2003(a) (defining "Affiliate" by cross-reference to definition in 47 U.S.C. § 153(1)). Unlike the FCC rules, the word "control" is not defined or subject to further specification anywhere in the WUTC's new rules. Thus, any disclosure of CPNI to affiliates that do not meet the definition of "associated company" as well as to agents, independent contractors and joint venture partners is treated as a disclosure to an unrelated third party requiring opt-in consent. This is true even if the affiliate, agent, independent contractor or joint venture partner is used to provide telecommunications service or communications-related services to the customer, and even if the carrier has bound the third party to a confidentiality agreement as required by the FCC. This constitutes a significant additional restriction on carriers' commercial and non-commercial speech with third parties who assist them in the development and marketing of interstate and intrastate communications-related services.

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50. The WUTC's new rules will restrict the marketing of telecommunications services that are interstate in nature. This is true even though a particular service may be tariffed only as an intrastate service. For example, caller-identification service is classified as a local service subject to a Washington intrastate tariff, but the service carries caller-identification information associated with interstate as well as intrastate calls. Another example would be private lines, which are tariffed as an intrastate service but may also carry interstate traffic. Because the intrastate and interstate components of these services cannot be extricated, as a practical matter the more restrictive WUTC rules will apply to them.

51. The chart below graphically demonstrates the speech-restrictive nature of the new WUTC rules in comparison to the present FCC rules:

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Comparison of Key Provisions of FCC and WUTC Rules

Type of Offering	FCC Rule	WUTC Rule
Carrier markets the same type(s) of service to which the customer already subscribes	No approval required	If carrier uses call detail, opt-in approval required
Carrier markets services that are not the same type of service but that are necessary to or used in the provision of existing service	No approval required	If carrier uses call detail, opt-in approval required
Carrier markets services that are unrelated to the customer's existing service relationship	Opt-out approval required to offer communications-related services; opt-in approval required to offer services that are not communications-related	If carrier uses call detail, opt-in approval required even for the marketing of communications-related services
Carrier discloses CPNI to affiliate, agent, independent contractor or joint venture partner for the marketing of communications-related services with proper confidentiality protections	Opt-out approval required	Opt-in approval required, except for affiliates that qualify as an "associated company" under new WUTC definition

C. The WUTC's Rules Would Severely Curtail Plaintiffs Ability to Engage in Truthful Commercial and Non-Commercial Speech.

52. Each of the Plaintiffs operates in multi-state areas and serves thousands of customers outside of the borders of Washington State.

53. Plaintiffs use "private account information" and "call detail," as defined by the WUTC, to develop and design new products and services. Under the FCC's present rules, Plaintiffs may discuss and analyze this information with respect to communications-related services within corporate units and among affiliated entities with, at most, a requirement of opt-out consent. Under the new WUTC rules, any such internal or inter-affiliate communications require prior opt-in consent as to the new category of "call detail."

54. Plaintiffs also use private account information and call detail, as defined by the WUTC, to market new versions of existing services to their customers. Under the FCC's present rules, they can do so without any restriction or prior approval requirement. Again, under the new WUTC rules, any such communications require prior opt-in consent as to the new category of "call detail."

55. Plaintiffs also use private account information and call detail, as defined by the WUTC, to market new telecommunications services and communications-related services to their existing customers. Under the FCC's present rules, this use of customer information requires the less restrictive opt-out approval from customers. Again, under the new WUTC restrictions, any such communications require prior written opt-in consent as to the new category of call detail.

56. Plaintiffs also use private account information and call detail, as defined by the WUTC, to communicate with affiliates, agents, independent contractors, and joint venture partners to develop new communications-related products and marketing strategies and to target market those products to existing customers. Under the FCC's present rules, this use of customer information requires only opt-out approval and, in some cases, additional privacy safeguards.

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Under the new WUTC restrictions, sharing of CPNI with any entity that does not meet the definition of "associated company" requires prior opt-in approval.

57. An opt-in consent requirement curtails significantly more carrier speech than an opt-out regime. *See, e.g., U.S. West*, 182 F.3d at 1238-39 (finding that an "opt-out" strategy is a "substantially less restrictive alternative" to "opt-in"); *2002 CPNI Order*, ¶¶ 31, 44 (finding that the record does not support the "more stringent opt-in rule"). Many customers who do not object to, or in fact affirmatively welcome, speech regarding improvements to existing services or new product offerings simply will not take the time to provide the necessary consent to use their account information for these purposes.

58. It is clear that under an opt-in regime, customers may not opt-in even though they are willing listeners who desire and would benefit from target marketing. *See U.S. West*, 182 F.3d at 1239 (low opt-in rate "may simply reflect that a substantial number of individuals are ambivalent or disinterested in the privacy of their CPNI"); *Computer III Remand Proceedings*, Report & Order, 6 F.C.C.R. 7571, 7610 n.155 (1991) ("Under a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction . . . ."); *California v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994) ("If small customers are required to take an affirmative step of authorizing access to their information, they are unlikely to exercise this option . . . ."). In fact, the WUTC assumed that an opt-in regime would restrict substantially more carrier speech than necessary to protect consumer privacy. *See WUTC Order*, at 34 ("We accept for argument's sake that many customers who might not actually object to the proposed use will not take the time to read such a solicitation and register their approval.").

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59. The WUTC's opt-in regime by its nature places a prior restraint on carrier speech by erecting numerous barriers that forestall and prevent carriers' internal communications and their speech to their customers. The opt-in rules require a labor intensive and costly process before carriers may speak to their customers about certain subjects. Wa. Admin. Code § 480-120-212 (describing detailed opt-in notice). The new rules also mandate that opt-in consent be in writing or, if it is oral, that it be recorded or subject to independent third party verification. *Id.* § 480-120-212(4). Finally, the WUTC's opt-in rules impose a mandatory three-week waiting period before carriers can engage in speech regarding CPNI to even those customers who have given opt-in approval to carrier use of their CPNI. Wa. Admin. Code § 480-120-213(2). Even the FCC's 1998 opt-in requirement, which was vacated by the Tenth Circuit, did not impose such a waiting period on carriers and their customers. This "waiting period" runs from the time the carrier mails a confirmation of the customer's election to opt-in. *Id.*

60. Plaintiffs use a centralized marketing organization that serves all of the states in which they offer telecommunications service and related equipment and services. This substantially reduces costs and facilitates the development of national and regional marketing plans. As the FCC has found with respect to previous restrictions on use of CPNI: "Carrier implementation of a state prior authorization rule where it is not required under the federal rule would effectively require the separation of marketing and sales personnel." *Computer III Remand Proceedings*, 6 F.C.C.R. at ¶ 130. Thus, as a practical matter, Plaintiffs must either cease all target-marketing activity in Washington State or conform their regional or nationwide marketing efforts to the more restrictive WUTC rules.

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61. Plaintiffs do not presently segregate customer data as "private account information" or "call detail" within their data storage system and do not presently have the capability to do so. Accordingly, employees who have electronic access to the database that contains CPNI are not precluded from accessing call detail information. To establish a capability that segregates access to call detail from access to other types of CPNI would be extremely expensive and economically unjustifiable, requiring restructuring of the CPNI database, retraining of personnel, and the erection of electronic firewalls. For this reason, Plaintiffs will either have to abandon use of all customer information for marketing in Washington State or apply the more restrictive opt-in rules for all use of individually identifiable CPNI. The net effect of the WUTC's new rules will be to force Plaintiffs to abandon all use of customer information for marketing activity in Washington State. Plaintiffs will be forced to engage in more costly, less effective, and less consumer-friendly broadcast marketing. The federal statute and the FCC's rules will have been rendered nugatory, and Plaintiffs' speech will have been severely restricted.

62. The definition of "call detail" contained in the new WUTC rules is vague, confusing and self-contradictory, such that carriers cannot ascertain what speech is forbidden and what speech is permitted. For example, the definition of "call detail" purports to exclude "the amount spent monthly by a specific customer on long distance calls, including the amount spent monthly on intra-LATA toll, intra-state toll, and interstate toll; the amount spent on ancillary services; or the number of unanswered calls per month for a specific telephone number." Wa. Admin. Code § 480-120-201. However, the only way a carrier could compile such information would be to examine the actual call records and numbers called, *e.g.*, use information that is defined as "call detail." Nor is there any explanation as to why information regarding a customer's calling

patterns (*e.g.*, peak, off-peak, weekends) or unanswered calls is subject to maximum privacy protection if it pertains to a three-week period, but does not fall within call detail if it is for a period of one month or more. As the dissenting Commissioner noted in this regard, the WUTC's new CPNI regulations are "a remarkably complex set of rules" which will be "daunting for the affected companies to internalize and implement" and "incomprehensible to even well-informed consumers." *WUTC Order*, at 42.

63. It is impossible to separate the constitutional from the unconstitutional portions of the WUTC rules. The unconstitutionally vague definitions of "call detail" and "associated company" are woven throughout the rules as a whole. Moreover, at the heart of the regulations are the unconstitutionally restrictive opt-in regime for the use of call detail and an opt-in requirement for sharing CPNI beyond any associated companies. It is impossible to rewrite these rules or speculate as to whether they would have been adopted in the first place absent the unconstitutional provisions. Thus, despite the presence of a severability clause, *see* Wa. Admin. Code § 480-120-219, the court must declare unconstitutional and enjoin enforcement of the WUTC's new rules as a whole. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1080-81 (9th Cir. 2001).

III. CAUSES OF ACTION

Count 1

(Violation of First Amendment)

64. Plaintiffs incorporate Paragraphs 1 – 63 above as if fully restated herein.

65. The First Amendment to the United States Constitution provides that Congress shall make no law abridging the freedom of speech. It is applicable to the states, and to the WUTC,

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pursuant to the Fourteenth Amendment. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761-62 (1976).

66. The First Amendment protects Plaintiffs' right to choose the content of their speech and to choose their audience. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636-37 (1994); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

67. The First Amendment also protects the rights of willing listeners to receive Plaintiffs' speech. *See Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) (Kozinski, J., concurring); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Va. State Bd.*, 425 U.S. at 756-57; *Thompson v. Western States Med. Ctr.*, ___ U.S. ___, 122 S. Ct. 1497 (2002).

68. The First Amendment protects Plaintiffs' non-commercial speech within corporate units and among affiliates, agents, independent contractors and joint venture partners. *See Bolger v. Youngs Drug Prod., Inc.*, 463 U.S. 60, 66-67 (1983).

69. The First Amendment protects Plaintiffs' commercial speech to their existing and potential customers. *See Edenfield v. Fane*, 507 U.S. 761, 765-66 (1993); *U.S. West*, 182 F.3d at 1232; *see also Meyer v. Grant*, 486 U.S. 414, 424 (1988); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 473-74 (1988).

70. Plaintiffs' commercial speech based upon and regarding CPNI is truthful and not misleading. It is thus protected by the First Amendment. *See Va. State Bd.*, 425 U.S. 748; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). The state bears the burden of proving that its restrictions on commercial speech satisfy First Amendment scrutiny.

71. The new WUTC rules do not achieve any substantial state interest. There is no privacy or other valid governmental interest in limiting the sharing of customer information within a corporate unit or among affiliated entities that have access to the same information for service and billing purposes. Nor is any privacy interest served by restricting the use of customer information in discussing new versions of existing services with present customers.

72. The WUTC's new rules do not directly and materially advance any alleged government interest. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995); *Edenfield*, 507 U.S. at 771. By prohibiting the use of customer information to target the offering of new and improved services to existing customers, the rules actually discourage contacts that consumers wish to receive and force carriers to resort to less-targeted and more intrusive marketing methods.

73. The WUTC's new rules are not narrowly tailored to serve any substantial governmental interest. The FCC's finding that its no-approval approach with respect to marketing of enhancements within existing service categories, combined with opt-out consent for all other marketing of communications-related services, offers sufficient protection to consumers establishes as a matter of law that there are obvious less restrictive alternatives to the WUTC's approach. Opt-out mechanisms, as the FCC has found, are "no more extensive than necessary to serve the government interest . . . [and are] less burdensome on carriers than other alternatives such as opt-in." *2002 CPNI Order*, ¶ 31.

74. Similarly, the WUTC's new opt-in restrictions on the sharing of CPNI among affiliates, agents, independent contractors, and joint venture partners are not narrowly tailored. The FCC's approach of requiring opt-out approval, combined with confidentiality agreements for non-agency relationships offers an obvious less restrictive alternative.

75. Plaintiffs will be forced, at the very least, to apply the WUTC's most restrictive opt-in requirement to *all* categories of CPNI. Even worse, because of the cost associated with the WUTC's opt-in regime, Plaintiffs will most likely be forced to forego CPNI-based target-marketing altogether for the retail mass market. Thus, the practical effect of the WUTC's new rules is to ban altogether Plaintiffs' use of CPNI to speak to their customers in Washington State.

76. The WUTC's new rules are also substantially overbroad in that they reach speech internal to corporate units or among affiliates, agents, independent contractors and joint venture partners that cannot negatively affect consumers. Carriers are allowed to share customer information with these entities for the provision of service, for billing and for complaint resolution but are restricted in sharing the same information for developing new products or marketing strategies. This constitutes a content-based restriction on non-commercial speech between Plaintiffs' officers and employees and among Plaintiffs' affiliates, agents, independent contractors and joint venture partners. These restrictions are therefore subject to strict scrutiny under the First Amendment. *See Crawford v. Lungren*, 96 F.3d 380, 386 (9th Cir. 1996).

77. The WUTC's new rules are impermissibly underinclusive. Washington State has not similarly restricted the First Amendment rights of other entities that gather and use customer information, such as solid waste collection companies and other utilities. *See, e.g.*, Wa. Admin. Code § 480-70-421 (permitting waste collection companies to use customer information, without prior approval, for "[m]arketing new services or options to its customers"); *id.* § 480-100-153 (permitting electric companies to use private consumer information to target market customers, without prior approval, for new services); *id.* § 480-90-153 (permitting gas companies to do the same). The underinclusive nature of the WUTC's new rules renders them unconstitutional. *See*

City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Turner*, 512 U.S. at 660; *Rosenberger v. Univesity of Va.*, 515 U.S. 819, 828 (1995).

78. The WUTC's opt-in regime—by imposing numerous costly administrative requirements on carriers and their customers *before* a carrier may engage in target-marketing communications with even those customers who want to receive such communications—also constitutes a significant prior restraint on carriers' ability to speak with their customers. *See, e.g., Blount v. Rizzi*, 400 U.S. 410 (1971) (holding unconstitutional as a prior restraint provisions of postal laws that enabled the Postmaster General to halt delivery of mail to individuals). Such a prior restraint "'bear[s] a heavy presumption against its constitutional validity,'" *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)), and "'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system,'" *id.* at 559 (quoting *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)).

79. For the reasons set forth above, Plaintiffs are entitled to a declaration that the WUTC's new rules violate the First and Fourteenth Amendments to the United States Constitution and to preliminary and permanent injunctive relief against enforcement of those rules in their entirety.

Count 2

(Violation of the Due Process Clause)

80. Plaintiffs incorporate Paragraphs 1 - 79 above as if fully restated herein.

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81. The Due Process Clause of the Fifth Amendment of the United States Constitution states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." It is applicable to the States through the Fourteenth Amendment.

82. The WUTC's new rules are void for vagueness under the Due Process Clause. *See Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Given the Byzantine and self-contradictory definition of "call detail," it is impossible for carriers to determine what speech is subject to the onerous opt-in restrictions and what speech is subject to a less onerous regime. In addition, the definition of "associated company" is also vague, as what constitutes "control" of another corporate entity is nowhere specified or explained. Moreover, the definition of call detail draws lines between private and non-private information that have no rational relationship to privacy interests.

83. Because carriers face significant penalties for violations of these rules, and because they are unclear in what conduct is forbidden or punishable, they are void for vagueness. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *United States v. Wunsch*, 84 F.3d 1110, 1119-20 (9th Cir. 1996). Furthermore, because "the guarantees of the First Amendment are at stake, the Court [must] appl[y] its vagueness analysis strictly." *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1998); *Grayned*, 408 U.S. at 108-09.

84. For the reasons set forth above, Plaintiffs are entitled to a declaration that the WUTC's new rules violate the Due Process Clause of the United States Constitution and to preliminary and permanent injunctive relief against enforcement of those rules in their entirety.

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Count 3

(Statutory Preemption Under 47 U.S.C. § 222)

85. Plaintiffs incorporate Paragraphs 1 - 84 above as if fully restated herein.

86. The Supremacy Clause, Article 6, clause 2, of the United States Constitution, states that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any state to the contrary notwithstanding."

87. Congress enacted Section 222 to ensure that there was a "uniform national CPNI policy," and "to reduce confusion and controversy for customers and carriers regarding carrier use of CPNI." *Implementation of the Telecommunications Act of 1996*, Clarification Order, 16 F.C.C.R. 16506, ¶ 13 (2001).

88. In determining the scope of Section 222 and developing this national CPNI policy, Congress deliberately chose a single definition of CPNI. *See* 47 U.S.C. § 222(h)(1); *2002 CPNI Order*, ¶ 121 n. 279. This definition does not differentiate between "call detail" and "private account information."

89. In the *2002 CPNI Order*, the FCC specifically rejected any suggestion that different types of CPNI be treated differently for purposes of customer approval. *2002 CPNI Order*, ¶ 121 n. 279. The FCC was "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.*

90. Because the WUTC has chosen to define different categories of customer information and to subject them to disparate regulation, the WUTC's new rules are in direct conflict with

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Section 222. As a result, the WUTC rules stand as an obstacle to the full purposes and objectives of Congress. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153-54 (1982).

91. For the reasons set forth above, Plaintiffs are entitled to a declaration that the WUTC's new rules violate the Supremacy Clause of the United States Constitution and to preliminary and permanent injunctive relief against enforcement of those rules in their entirety.

Count 4

(Violation of the Commerce Clause)

92. Plaintiffs incorporate Paragraphs 1 – 91 above as if fully restated herein.

93. 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."

94. The Commerce Clause also prevents states from enacting laws and regulations that impose excessive burdens on interstate commerce in relation to local interests or benefits. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583-84 (1986); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

95. The WUTC's new rules burden the marketing of interstate services within Washington State. Moreover, the WUTC's new rules will force Verizon to exclude Washington customers and Washington-based CPNI from regional and national product development and marketing. For these reasons, the WUTC's new rules violate the dormant Commerce Clause.

96. For the foregoing reasons, Plaintiffs are entitled to a declaration that the WUTC's new rules violate the Commerce Clause of the United States Constitution and to preliminary and permanent injunctive relief against enforcement of those rules in their entirety.

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Count 5

(Taking of Property Without Advancing

A Legitimate State Interest)

97. Plaintiffs incorporate Paragraphs 1 – 96 above as if fully restated herein.

98. CPNI is property belonging to carriers, such as Plaintiffs, because it is information that is gathered, stored, analyzed and made usable by the carriers. CPNI "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use," and CPNI "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy" within carriers' collective organizations. *See* RCW § 19.108.010 (2002).

99. CPNI, in its gathered format, is not known outside of the carriers or their affiliates. Carriers are under a duty to maintain the confidentiality of CPNI. *See* 47 U.S.C. §§ 222(a), (c)(1). Carriers do not share CPNI with third parties without the protection of confidentiality or non-disclosure agreements. Carriers maintain the secrecy of CPNI, taking reasonable precautions to prevent its disclosure to third parties, except as required by law.

100. Carriers expend a great deal of time, effort and expense in creating CPNI in a usable format. CPNI, once gathered and put into a usable format, is extremely valuable in marketing to existing customers so as to expand business and to retain customers in a highly competitive environment.

101. The WUTC's rules deny Plaintiffs all economic benefit of CPNI by severely restricting its use for the development and marketing of new products and services within the State of Washington thereby working a taking of Plaintiffs' property.

102. Because of the severe economic impact of the rules, their interference with Plaintiffs' investment-backed expectations for the use of CPNI, and the severe and unprecedented character of the WUTC's restrictions on use of CPNI, the regulations work a taking of Plaintiff's property. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984).

103. The WUTC cannot demonstrate that its taking of carriers' CPNI property substantially advances a legitimate state interest for purposes of the Fifth Amendment. *See Daniel v. County of Santa Barbara*, 288 F.3d 375, 384-85 (9th Cir. 2001).

104. Where state regulations take private property without substantially advancing a legitimate state interest they violate the Takings Clause of the Fifth Amendment made applicable to the states by the Fourteenth Amendment. *See Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992); *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1033-34 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001).

105. For the foregoing reasons, Plaintiffs are entitled to a declaration that the WUTC's new rules violate the Fifth and Fourteenth Amendments to the United States Constitution and to preliminary and permanent injunctive relief against enforcement of those rules in their entirety.

Count 6

(Violation of Constitutional and Statutory Rights Under Color of State Law, 42 U.S.C. § 1983)

106. Plaintiffs incorporate Paragraphs 1 – 105 above as if fully restated herein.

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107. Title 42, U.S. Code, Section 1983 provides a civil cause of action to any person who has been deprived of rights guaranteed by the United States Constitution or laws by another under color of state law.

108. Defendants' new rules, if allowed to go into effect, will deprive Plaintiffs of their constitutional rights guaranteed by the First, Fifth and Fourteenth Amendments as more fully described in this Complaint. The WUTC rules also deprive Plaintiffs of statutory rights recognized in the Communications Act of 1934. In adopting and implementing the new rules, the Defendants, as officers of the State of Washington, have acted and will continue to act under color of state law in their official capacities.

109. For the foregoing reasons, Plaintiffs are entitled to a declaration that the Defendants have violated Plaintiffs' constitutional and federal statutory rights while acting under color of state law in violation of 42 U.S.C. § 1983 and to preliminary and permanent injunctive relief against enforcement of the WUTC's new rules in their entirety.

IV. PRAYER FOR RELIEF

WHEREFORE, based on the foregoing, Plaintiffs demand judgment against the Defendants as follows:

(i) For a declaratory judgment on Count 1 that the WUTC's new rules violate the First and Fourteenth Amendments of the United States Constitution;

(ii) For a declaratory judgment on Count 2 that the WUTC's new rules are void for vagueness under the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment to the United States Constitution;

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(iii) For a declaratory judgment on Count 3 that the WUTC's new rules violate the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and are preempted by 47 U.S.C. § 222;

(iv) For a declaratory judgment on Count 4 that the WUTC's new rules violate the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3;

(v) For a declaratory judgment on Count 5 that enforcement of the WUTC's new rules work an unconstitutional taking of property that does not substantially further a legitimate state interest in violation of the Fifth and Fourteenth Amendments to the United States Constitution;

(vi) For a declaratory judgment on Count 6 that Defendants' actions in adopting and threatening to enforce the rules against Plaintiffs constitute a violation of Plaintiffs' federal constitutional and statutory rights under color of state law in violation of 42 U.S.C. § 1983;

(vii) For preliminary and permanent injunctive relief on all counts enjoining the Defendants and any officers or employees of the WUTC or the State of Washington from taking any action to enforce any provision of the WUTC's new rules;

(viii) For reasonable attorney's fees on all counts to be awarded pursuant to 42 U.S.C. § 1988 and any other applicable law or doctrine and for all other costs of this action to be taxed against Defendants; and

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(ix) For such other and further relief on all counts as the Court may deem just and proper.

Respectfully submitted this 21st day of November, 2002.

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