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. _____ **PLAINTIFFS' MOTION AND MEMORANDUM OF LAW IN SUPPORT OF A PRELIMINARY INJUNCTION** **NOTE ON MOTION CALENDAR: Friday, December 13, 2002** **ORAL ARGUMENT REQUESTED**

I. INTRODUCTION

This case involves severe restrictions on Plaintiffs' ability to speak with their own customers regarding the products and services they provide. It also involves unprecedented restrictions on Plaintiffs' ability to discuss and analyze customer information internally and among affiliates, agents, independent contractors and joint venture partners. On November 7, 2002, the Washington Utilities and Transportation Commission ("WUTC") adopted the most speech-restrictive rules in the nation regarding telecommunication carriers' rights to analyze

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

customer consumption data and discuss that data with their customers. These new rules do not advance any recognized privacy interest; they are overbroad in many respects and underinclusive in others; and they contain vague and self-contradictory definitions that do not provide adequate notice of what speech is authorized and what speech is prohibited.

A federal appeals court previously struck down substantially less speech-restrictive federal regulations as contrary to the First Amendment. *See U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). In response to that decision, the Federal Communications Commission ("FCC") rejected precisely the kind of speech restrictions contained in the WUTC rules at issue in this case, finding them contrary to both the First Amendment and the interests of consumers. The new WUTC rules fail all three prongs of the First Amendment test for restriction of commercial speech established by the Supreme Court in *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). In addition, because the new rules restrict a substantial amount of Plaintiffs' non-commercial speech and because they constitute a prior restraint on truthful speech, they must also satisfy heightened First Amendment scrutiny. Finally, the vague, confusing and self-contradictory definitions contained in the rules will have a substantial chilling effect on carrier speech even beyond their express prohibitions. For this reason, the WUTC rules are also void for vagueness under well-established Supreme Court and Ninth Circuit precedent.

Absent intervention by this Court, these new restrictions on Plaintiffs' commercial and non-commercial speech will go into effect on January 1, 2003. Because the loss of First Amendment freedoms is per se irreparable injury, and because enforcement of the new rules will irreparably damage Plaintiffs' relationships with their customers and corporate goodwill, Plaintiffs will suffer irreparable harm if the rules are allowed to go into effect. Because Plaintiffs will adhere to the FCC's national rules regarding use and disclosure of customer information *pendente lite*, the WUTC will suffer no injury if the effective date of the new rules is postponed to allow this Court to pass on the important constitutional and statutory claims presented in

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

Plaintiffs' complaint. In addition, the public interest will be served by delaying implementation of the new rules (and the complex and confusing customer notifications those rules require) pending this Court's examination of their legality. For these reasons, Plaintiffs respectfully request that this Court enter a preliminary injunction, pursuant to Fed. R. Civ. P. 65, enjoining Defendants from implementing or enforcing the rules pending final judgment in this litigation.

II. BACKGROUND

In the course of providing their customers with telecommunications services, carriers capture and organize information regarding local and long distance calling patterns, unanswered calls, and use of services such as caller-identification, call forwarding, private line and data services. This information is defined under federal law as "Customer Proprietary Network Information" ("CPNI"). *See* 47 U.S.C. § 222. Carriers use this information to communicate with their customers to maintain and improve their ongoing business relationship. This communication includes the use of CPNI to develop and market enhancements to existing services and to offer new communications-related products and services to existing customers. *See* Declaration of Maura Breen, Senior Vice President & Chief Marketing Officer of Retail Markets at Verizon Services Corporation, ¶¶ 6-10, 14, 23-24 ("Breen Dec.") (Exhibit 1 to this Motion).

Plaintiffs presently speak to their customers through a variety of national marketing campaigns that rely upon use of CPNI as authorized by existing federal regulations. For example, by using CPNI, Verizon was able to identify customers with high toll usage who might be better served and obtain significant savings by utilizing Verizon's Local Package Plus plan, which includes unlimited toll calls. (*Id.* ¶ 14). Similarly, Verizon has a long distance retention program, where by it analyzes each customer's long distance calling patterns and provides the customer with information regarding the best and most cost efficient calling plan for the customer. (*Id.*). As discussed below, the WUTC's new rules would have the practical effect of banning these and other marketing programs in Washington State.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

Congress first defined and addressed the handling of CPNI gathered by telecommunications carriers in the Telecommunications Act of 1996. *See* 47 U.S.C. § 222. In 1998, the FCC promulgated implementing regulations that (a) permitted carriers to use CPNI, without express customer approval, "to market offerings that are related to, but limited by, the customer's existing service relationship with their carrier," and (b) required carriers to obtain express customer approval prior to using CPNI to market new services to existing customers or to market services provided by third parties (referred to herein as "opt-in"). *See Implementation of the Telecommunications Act of 1996*, Second Report & Order, CC Nos. 96-115, *et al.* (Feb. 26, 1998) ("*1998 CPNI Order*") (Exhibit 2 to this Motion).

The FCC's 1998 CPNI Rules were challenged by numerous telecommunications carriers and others as overly restrictive of carrier speech. In particular, carriers argued that the opt-in requirement for use and discussion of CPNI constituted a significant and unnecessary burden on a carrier's ability to speak with its own customers. *U.S. West*, 182 F.3d at 1239. Upon review, the Tenth Circuit agreed and found that the FCC's regulations violated the First Amendment's protection of commercial speech, because the regulations were not narrowly tailored to directly and materially advance a substantial state interest. Without deciding the issue, the court questioned whether a carrier's discussion of an existing customer's consumption patterns in the context of an ongoing business relationship with that customer implicated any privacy interest at all. *Id.* at 1235-36.

In response to the court's decision, the FCC revised its regulations. *See Implementation of the Telecommunications Act of 1996*, Third Report & Order, CC Nos. 96-115, *et al.* (July 25, 2002) ("*2002 CPNI Order*") (Exhibit 3 to this Motion). The FCC conducted an extensive review of evidence submitted by every sector of the telecommunications industry, privacy groups, and states, including Washington State, and concluded that the record before it did not justify "an opt-in role for intra-company use" of CPNI. *Id.* ¶ 31. The FCC adhered to its prior view that there was no privacy interest that justified restricting carriers' discussion of CPNI with existing

customers in the context of offering new or enhanced products within the same service category to which the customer already subscribed. *See 2002 CPNI Order*, ¶ 83; *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 . . . 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."). Thus, carriers remain free under federal law to analyze and discuss CPNI for marketing products and services in the same category (*e.g.*, local, long distance or wireless) without prior customer approval. *Id.* ¶ 24.

As to all other carrier uses of CPNI to discuss or market communications-related products and services, the FCC found that the evidence supported only "opt-out," a mechanism by which the carrier provides notice to the customer of the opportunity to request that his or her CPNI not be used in certain ways. If the customer does not request any limitations, then the carrier is generally allowed to use the customer's information to discuss communications-related services with the customer. As both the FCC and the courts have repeatedly recognized, an opt-in mechanism is substantially more burdensome and curtails significantly more carrier speech than an opt-out system. *See 2002 CPNI Order*, ¶¶ 31, 44; *U.S. West*, 182 F.3d at 1238-39. This has been Plaintiffs' experience as well; very few customers will undertake the effort to provide opt-in consent for use of CPNI. (Breen Dec. ¶ 15.)[1]

In January 2002, the WUTC solicited comments as to whether it should change its existing CPNI rules in order to conform to the *U.S. West* decision. At no time during the rulemaking did anyone tender any evidence that consumers had been or were likely to be harmed by telecommunications carriers' use of CPNI to speak with them regarding improvements to existing service or new communications-related products and services. No party submitted any

[1] The FCC's selection of the less burdensome opt-out approach for the use of CPNI for most marketing speech was expressly based upon First Amendment concerns. It 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 (emphasis added).

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

empirical evidence supporting an objective "privacy interest" in CPNI as between a carrier (or its related business entities) and an existing customer. The potential harm that dominated participant comments in the WUTC proceedings was disclosure of CPNI to third parties for marketing non-telecommunications related products.

Defendants published proposed rules in April 2002 and adopted a substantially modified version of them on Nov. 7, 2002. *See Order Adopting and Repealing Rules Permanently*, No. UT-990146, Order No. R-505 (Nov. 7, 2002) (Compl. Ex. A, hereinafter "*WUTC Order*") (adopting Wa. Admin. Code §§ 480-120-201 *et seq.*[2]). The new rules are scheduled to go into effect on January 1, 2003. Defendants' new rules are substantially different and more restrictive of carrier speech than the nationwide rules adopted by the FCC in July of 2002. Contrary to federal law, which contains one unitary definition of CPNI, the WUTC's rules create new subcategories of customer information denominated "individually identifiable CPNI" ("I-CPNI"), "private account information" and "call detail." Call detail is private account information that identifies specific calls placed, including the location from which a call was placed, time of day, duration and cost of a call.[3] Wa. Admin. Code. § 480-120-201. Private account information is "CPNI that does not include call detail but is associated with an identifiable individual." *Id.* I-CPNI comprises call detail and private account information. *Id.*

The WUTC's rules impose new and unprecedented restrictions on Plaintiffs' ability to use CPNI to decide which customers to speak to and what to say to those customers. The new rules also substantially restrict the ability of Plaintiffs to speak within corporate units or among affiliates, agents, independent contractors and joint venture partners regarding these categories of customer information. Central to the rules is a total ban on the use of call detail for the

---

[2] Citations hereinafter to Wa. Admin. Code §§ 480-120-201 *et seq.* are to the rules scheduled to become effective on January 1, 2003.

[3] Call detail also includes aggregate data on a particular customer's calls to a specific 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.

development and marketing of communications-related services without the prior written, electronic, or recorded opt-in consent of the customer. Wa. Admin. Code §§ 408-120-204, 408-120-212. Because experience demonstrates that few customers will expend the time and effort to opt-in, and that many who do not do so are nonetheless interested in and willing to receive carrier speech regarding new or improved services, the WUTC's new rules will prevent Plaintiffs' from speaking to a large number of willing listeners in the State of Washington.

The new rules also significantly limit the ability of telecommunications carriers to communicate CPNI to affiliates, agents, independent contractors and joint venture partners for the development and marketing of communications-related services. 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.* § 480-120-201. 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, even if these other entities are used to provide 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. *See also* Compl. ¶ 51 (chart comparing the WUTC's new speech restrictions to current FCC regulations).

III. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

A. Standards For Injunctive Relief

To obtain injunctive relief, Plaintiffs need show only "(1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in [their] favor." *Stuhlberg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839-40 (9th Cir. 2001). These standards represent two points on a sliding scale in which "the required degree of irreparable harm decreases as the

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

probability of success increases," *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993), and vice versa, *Gorbach v. Reno*, 181 F.R.D. 642, 648 (W.D. Wa. 1998), *aff'd*, 219 F.3d 1087 (9th Cir. 2000). Plaintiffs here present a compelling case for preliminary relief on either end of the "continuum," *Int'l Jensen, Inc. v. Metrosound U.S.A.*, 4 F.3d 819, 822 (9th Cir. 1993).

B. There Is A Strong Likelihood That Plaintiffs Will Prevail On The Merits.

1. Defendants' Rules Unconstitutionally Restrict Carriers' Speech.

Plaintiffs use CPNI to design new products and services and to craft targeted messages to their customers. CPNI is thus an essential component in Plaintiffs' decision-making process regarding the audience to whom it speaks and the message it communicates. (Breen Dec. ¶¶ 6-10, 14, 23-24). This use of CPNI to discuss customer needs and offer new products and services is protected speech under the First Amendment. *See Edenfield v. Fane*, 507 U.S. 761, 765-66 (1993).[4] 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); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976).

Because they do not permit Plaintiffs to speak internally or to their own customers without satisfying a highly burdensome prior approval regime, the WUTC rules constitute a restriction on both the First Amendment rights of Plaintiffs to speak and on the First Amendment rights of their customers to receive that speech. A requirement of prior written or otherwise verified approval to speak, combined with a burdensome notice requirement and a post-authorization waiting period, is obviously a substantial burden on carrier speech. (Breen Dec. ¶¶ 11, 15-17). Indeed, opt-in consent alone, as distinguished from a no prior approval or opt-out

[4] *See also Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects [the speaker's] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so."); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 473-74 ("[T]he First Amendment does not permit a ban on certain speech merely because it is more efficient . . .").

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

regime, constitutes a significant prior restraint on carriers' First Amendment rights.[5] It is also clear that under an opt-in regime, customers may not "opt-in" even though they are willing listeners who desire and would benefit from both CPNI-designed products and services and target marketing. (*Id.* ¶¶ 15-16, 26.)[6] 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.").

Beyond the express restrictions on Plaintiffs' speech contained in the WUTC's new rules, the Court must also consider the practical effects on Plaintiffs' First Amendment rights. *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977). First, although the opt-in requirement applies on the face of the WUTC rules only to the use of certain types of call detail, the practical effect is to force carriers to use the opt-in approach for all types of individually identifiable customer information in Washington State. This is so because Verizon is not presently able to prevent those employees who have electronic access to the CPNI data system

---

[5] The numerous administrative requirements connected with the WUTC's opt-in regime that must be satisfied *before* a carrier has the right to speak to its customers regarding certain subjects form a prior restraint on carriers' speech. The effect is the same as an onerous or complex permit or licensing regime imposed as a predicate to particular types of speech. *See, e.g.*, *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988) ("[A] licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). Such a prior restraint "'bear[s] a heavy presumption against its constitutional validity,'" *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975), and "'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system,'" *id.* at 559 (citations omitted). Because it is clear that there are non-privacy related reasons why customers may choose not to opt-in and the WUTC rules themselves will be "incomprehensible to even well-informed consumers," *WUTC Order*, at 42 (Hemstad, dissenting), they will inevitably lead to arbitrary censorship and silence more speech than necessary. They therefore cannot satisfy the rigorous test applied to prior restraints.

[6] Both the FCC and the Ninth Circuit have recognized this fact. *See Computer III Remand Proceedings*, Report & Order, 6 F.C.C.R. 7576, 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 were required to take an affirmative step of authorizing access to their information, they are unlikely to exercise this option . . . .").

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

from accessing the subcategory of call detail. (Breen Dec. ¶¶ 12-13.). Indeed, the FCC has expressed doubt that the segregation of subcategories of CPNI within a telecommunications carrier's operations is technically feasible. *2002 CPNI Order*, ¶ 121 n.279.

Second, the WUTC's new rules will restrict marketing practices beyond the borders of Washington State. Plaintiffs do not segregate customer information by state or engage in marketing activities limited to single states. (Breen Dec. ¶¶ 10, 12, 18-19.) On the contrary, Plaintiffs use a centralized marketing organization that serves all of its states, which reduces costs and facilitates the development of national or regional marketing plans. (*Id.* ¶ 10) Moreover, Plaintiffs design specially tailored products and services using CPNI collected from all of their customers, not only those that reside within a particular jurisdiction. (*Id.* ¶ 14.) Thus, in order to comply with the WUTC rules, Plaintiffs must either separate their Washington-based marketing and product-design components from their regional and national marketing and design segments, or adopt the WUTC's most restrictive approval mechanism with respect to *all* call detail-related CPNI used for marketing purposes. (*Id.* ¶¶ 14, 18-20.)

Finally, because the opt-in regime is itself so costly to administer, yields very low customer approval, and by its very nature erodes customer goodwill, Plaintiffs will likely be forced to forego use of CPNI altogether, thus effecting a total ban on CPNI-based speech in the State of Washington. (*Id.* ¶ 21.)

2. Defendants' Rules Unconstitutionally Restrict Commercial Speech.

Plaintiffs' communications with customers for the purpose of proposing further commercial transactions are constitutionally protected commercial speech. *See Va. State Bd.*, 425 U.S. at 762; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. at 410, 422-23 (1993). Under the Supreme Court's standards for restricting commercial speech, if the regulated speech is not misleading and does not concern unlawful activity, then the government must: (1) assert a substantial interest in restricting the speech; (2) demonstrate that the regulation directly advances the asserted interest; and (3) show that the restriction is not more extensive than necessary to

achieve the asserted governmental interest. *Western States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1093 (9th Cir. 2001) (applying *Central Hudson*, 447 U.S. at 556), *aff'd*, __ U.S. __, 122 S. Ct. 1497 (2002); *see also WUTC Order*, at 16 (same). The government bears the burden on each of these inquiries. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (plurality opinion); *Edenfield*, 507 U.S. at 771. Thus, if Defendants cannot satisfy any one of the three *Central Hudson* prongs, Plaintiffs will succeed on the merits.

a. *The government cannot demonstrate any substantial state interest in the specific restrictions contained in the WUTC's new rules.*

"When faced with a constitutional challenge, the government bears the responsibility of building a record adequate to clearly articulate and justify the state interest." *U.S. West*, 182 F.3d at 1234; *see Thompson v. W. States Med. Ctr.*, __ U.S. __, 122 S. Ct. 1497 (2002). Defendants have not and cannot articulate a substantial state interest furthered by the new rules.

The precise contours of the new speech restrictions are: (1) to bar Plaintiffs from using call detail in developing improvements in existing service or new communications-related products and services; (2) to bar Plaintiffs from using call detail to decide which customers are likely to benefit from a particular product or service and to further bar them from discussing call detail with those customers in the context of offering that product or service; and (3) to bar Plaintiffs from discussing any I-CPNI with agents, independent contractors, and joint venture partners for the development and marketing of communications-related services. Defendants must show that there is a "particular notion of privacy" that is served by the specific contours of these new burdens placed upon speech and that this privacy interest is a substantial one. *U.S. West*, 182 F.3d at 1235; *see 44 Liquormart*, 517 U.S. at 505; *Edenfield*, 507 U.S. at 771; *Thompson*, 122 S. Ct. at 1504-07.

There is no privacy interest—substantial or otherwise—as between a telecommunications carrier and its related entities, and an *existing* customer, regarding that customer's usage of the carrier's services. Such a right is not recognized at common law or in any state or federal statute

of which Plaintiffs are aware. Its existence has been expressly rejected by the FCC, which found, based upon an extensive nationwide record, that there is no substantial privacy interest implicated by carrier's using CPNI to communicate with existing customers regarding communications-related products and services.[7] Indeed, because carriers use exactly this same data to bill and provide service, they already have access to and discuss this data with the customer in these contexts. Thus, the peculiar privacy interest asserted by the WUTC is not in denying access to private information, but limiting its *use* to one type of speech as opposed to another.

Not surprisingly, the WUTC was unable to find any legal or factual support for the existence of this rather arcane conception of privacy. Each of the examples given in its order is either wrong, or inapposite, or both. Much of the *WUTC Order* is taken up with discussion of case law regarding constitutional limits on the *government* under the Fourth Amendment and analogous state constitutional protections. *See WUTC Order*, at 27-29. But the WUTC's rules do not limit governmental conduct; rather they limit communications among private parties. Moreover, these private parties are already in a contractual relationship and, as the FCC found, part of their contractual understanding is that customer consumption patterns will be used to communicate regarding enhancements and new communications-related services. *See supra* at 4. The WUTC is not protecting citizens from governmental intrusion on their privacy—it is imposing its unprecedented conception of privacy on private parties.

Second, the WUTC attempts to distinguish its position from the FCC's by alleging that Washington State recognizes a more expansive notion of privacy. *See WUTC Order*, at 24-27. This assertion is neither relevant nor borne out by state law. To the contrary, the WUTC

---

[7] The WUTC's new rules thus reject the FCC's consistent position since 1998 that there is *no* discernible privacy interest in limiting carrier speech regarding new products or enhancements within the existing service relationship. Instead, as to the category of "call detail" carriers are forbidden to use or disclose CPNI in developing or marketing enhancements to services to which the customer already subscribes. Thus, in a situation where the FCC has repeatedly found that *no privacy interest is implicated* and no consumer consent of any kind is required, the WUTC has chosen to impose a highly-speech restrictive opt-in regime.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

concedes in its own order that a fair reading of current Washington law is that, "because there is no specific prohibition on *disclosing* [CPNI], it would not be unlawful for the phone company to *use* . . . call detail information that it has already recorded in the ordinary course of providing telecommunications services." *Id.* Thus, it is clear that the WUTC is unable to root its new speech restrictions in any recognized conception of privacy under pre-existing Washington law.

Third, the WUTC attempts to posit First Amendment rights that favor restrictions on speech as between carriers and their customers. "If citizens fear that their use of the telephone will result in disclosure of very personal information," they will be reluctant to exercise those rights through telephone use. *See WUTC Order*, at 11-12, 19. Again, the WUTC ignores the fact that carriers are not state actors and therefore cannot infringe the First Amendment rights of anyone. It also ignores the fact that the customer *has chosen* a relationship with the particular carrier—and that under either an opt-in or opt-out approach carriers must inform their customers of intended uses of CPNI. The WUTC also completely ignored the FCC's express finding that consumers expect and welcome CPNI-based contacts by carriers and that such contacts do not involve dissemination of CPNI beyond the carrier-customer relationship. There is no evidence that carriers' target marketing of new service plans based upon past consumption patterns "chills" customers' telephone usage. In fact, presumably better-tailored and less costly service plans and bundles *increase* consumer satisfaction and use of telecommunications services.

Finally, the bulk of the WUTC's discussion of privacy in its order is devoted to concerns associated with the dissemination of CPNI to unrelated third parties for the marketing of non-communications-related services.[8] *See WUTC Order*, at 15-23. However, Plaintiffs do not

[8] The WUTC also proffers a few sentences from consumer complaints as evidence that customers do not expect their CPNI to be disclosed, *see WUTC Order*, at 31-32, with "no attempt at explanation or context." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 819 (2000). The bulk of these comments expressed concerns over third-party disclosure. Moreover, even had all 600 citizen comments included a statement as to those self-selected citizens' expectation of privacy vis-à-vis their carriers, this "paucity of evidence" in the face of the millions of Washington citizens who voiced no complaint cannot support a substantial state interest. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 667 (1994); *see Playboy*, 529 U.S. at 821-22 ("Without some sort of field survey, it is impossible to know how widespread the problem in fact is . . . ."). In any event, none of the quoted

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

currently engage in such dissemination, nor do they intend to do so in the future. (Breen Dec. ¶ 25). In addition, FCC rules already require opt-in consent for this type of disclosure. Concerns about disclosure to third parties provide no justification for rules that restrict communication between carriers and existing customers.[9]

Nor is it surprising that the WUTC could not identify a substantial privacy interest in limiting carrier communication with existing customers regarding information already known to both parties. No court, to Plaintiffs' knowledge, has ever recognized a protected privacy interest in the communication of information that is compiled by a service provider as between that provider and an existing customer. The Supreme Court and Ninth Circuit cases recognizing a substantial government interest in the protection of privacy typically involve repeated contacts that are "pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient." *Edenfield*, 507 U.S. at 769. They also address contacts during time periods of particular vulnerability, *see Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (permitting restrictions on solicitation that was "willful and knowing affront to or invasion of the tranquility of bereaved individuals" in the wake of an accident); or broadcast marketing efforts, *Project 80s Inc. v. City of Pocatello*, 857 F.2d 592, 596 (9th Cir. 1988) (substantial governmental interest in protecting privacy of citizens in their homes from uninvited door-to-door solicitation), *vacated on other grounds*, 493 U.S. 1013 (1990). These cases involve "the protection of *potential* clients' privacy" in their homes from intrusive marketing. *Edenfield*, 507 U.S. at 769 (emphasis

---

statements suggested that any customer interests would remain unprotected if carriers were required to follow the FCC-prescribed opt-out procedures.

[9] At one point in its order the WUTC suggests that limiting carriers' use of CPNI in communicating with customers might reduce the number of persons within the carrier with access to such information and therefore lessen the likelihood of unintentional disclosure to third parties. *See WUTC Order*, at 20 n.20, 24. Besides lacking a shred of factual support, limiting one type of speech because of collateral consequences it might have, is precisely the kind of overbroad regulation the First Amendment forbids. *See infra* at 18-20. If inadvertent disclosure to third parties is the problem the WUTC wishes to address, it should do so directly, not forbid speech between carrier and customer based upon rank speculation that it might have some unknown effect on the primary problem.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

added). They do not recognize any interest in protecting existing clients from targeted contacts from a service provider with whom they have an ongoing contractual relationship.

b. *The WUTC's new rules do not directly and materially advance any alleged state interest.*

To meet the "direct advancement" requirement, the government must prove "that the challenged regulation advances the government's interest 'in a direct and material way.' " *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995). This burden "is not satisfied by mere speculation or conjecture; [the government] must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71. Restrictions will fail this prong if they "provide[] only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564.

Even assuming Defendants could establish a substantial privacy interest in protecting consumers from unwanted "profiling" or undesired intrusion by telemarketers, the regulations, far from directly advancing these interests "to a material degree," *Western States*, 238 F.3d at 1094-95, work directly against them. In fact, the WUTC's new rules will fuel the "emerging market" for information profiling, *WUTC Order*, at 16, that the WUTC decries. They will also cause more undifferentiated and unwanted solicitation of consumers than would occur absent the rules. First, the opt-in approval regime itself requires Plaintiffs to make numerous unsolicited contacts with customers just to discuss opt-in approval. Second, if Plaintiffs must forego use of CPNI-based marketing altogether, more calls and direct mail must be directed at a larger, undifferentiated audience. (Breen Dec. ¶¶ 16-17.) Third, in lieu of using CPNI derived from their carrier-customer contractual relationships, Plaintiffs will be forced to purchase customer "profiles" from outside sources that may have no ongoing relationship to which customers have consented. Perversely, the WUTC's new rules will expand the market for "data mining" and other types of profiling in the name of consumer privacy.

In addition, the new rules are "so riddled with exceptions that it is unlikely that the speech restrictions would actually succeed" in protecting any purported privacy interest that the WUTC seeks to protect. *Western States*, 238 F.3d at 1095. That is, under the WUTC's new rules, Plaintiffs can continue to collect CPNI, and nothing in those rules prevents Plaintiffs from accessing and using call detail to, *inter alia*, administer billing for the customer's telecommunications services, resolve customer complaints, or provide records to a data base management service for 911 purposes. Wa. Admin. Code § 480-120-205. Nor do the rules preclude Plaintiffs from calling customers directly, based on customer profiles developed by third parties, to offer new services. The rules only restrict the use of call detail for purposes of developing new products and services and target marketing new services to customers.

The distinction, for privacy purposes, between use of call detail by Plaintiffs to provide an accurate bill or resolve a consumer complaint as opposed to offering a new, lower cost service plan is indecipherable. Moreover, the WUTC rules allow Plaintiffs to obtain one-time only consent for use of call detail during incoming and outgoing telemarketing calls. Wa. Admin. Code § 480-120-206. "When exceptions and inconsistencies counteract the alleged purpose of a speech restriction," as in the case of the WUTC rules, "the restriction fails the direct advancement test."[10] *Western States*, 238 F.3d at 1095; *see Rubin*, 514 U.S. 476.

[10] These significant exceptions also render the WUTC rules unconstitutionally underinclusive in violation of the First Amendment. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987). Moreover, to the extent Defendants attempt to defend the new rules based upon a supposed privacy interest in limiting companies that gather consumer consumption data from using those data for target marketing, the restrictions are radically underinclusive in singling out the speech of telecommunications carriers for unique burdens. Washington State does not similarly restrict the First Amendment rights of other utilities. *See, e.g.*, Wa. Admin. Code § 480-70-421 (permitting waste collection companies to use customer information for "[m]arketing new services or options to its customers"); *id*. § 480-100-153 (permitting electric companies to use private consumer information, without prior approval, to target market customers for new services); *id*. § 480-90-153 (permitting gas companies to do the same). Accordingly, the discriminatory treatment of telecommunications carriers' commercial speech cannot pass constitutional muster. *See S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1146-47 (9th Cir. 1998); *City of Ladue*, 512 U.S. at 51; *Nollan*, 483 U.S. at 837; *Turner*, 512 U.S. at 660 (distinctions "among different *speakers* within a single medium, often present serious First Amendment concerns" (emphasis added)); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

c. *Washington's CPNI regulations are not narrowly tailored.*

Opt-in approval is clearly more restrictive than the alternative opt-out mechanism recently adopted by the FCC. In assessing the FCC's 1998 opt-in regime, the Tenth Circuit found that "the FCC's failure to adequately consider an *obvious and substantially less restrictive alternative, an opt-out strategy*, indicates that it *did not narrowly tailor* the CPNI regulations regarding customer approval." *U.S. West*, 182 F.3d at 1238-39 (emphases added). Even if the Court finds a substantial state interest in protecting customers' privacy from their own carriers, there is not a "reasonable fit" between that interest and the means chosen to accomplish that end. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001). By adopting a default presumption that *all* customers prefer privacy and are automatically "opted-out" of any use of CPNI unless they affirmatively manifest preferences to the contrary, Defendants restrict substantially more speech than is necessary to protect the alleged privacy interest at stake.

The only justification proffered by the WUTC in its order for choosing opt-in over opt-out is the unsupported assertion that under an opt-out regime carriers do not have sufficient incentive to provide clear notice to their customers regarding carriers use of CPNI. *See WUTC Order*, at 33-35. The WUTC makes no attempt to suggest, however, that the FCC's notice requirement is inadequate. Moreover, the "obvious and substantially less restrictive alternative" is to strictly enforce the FCC's or even new WUTC opt-out notice requirements and not to ratchet up the approval requirement as an indirect incentive to entice carriers to adhere to the notice rules.[11] Similarly, with respect to the communication of CPNI to affiliates, agents, independent contractors and joint venture partners, the WUTC did not even consider the substantially less restrictive option of directly punishing those individuals or companies that

[11] The WUTC makes much in its order of Qwest's alleged problems in administering the FCC's opt-out regime, including confusing notices and failure to maintain a 24-hour toll free hotline for customers to opt-out. *WUTC Order*, at 12, 21, App. A, 9-10. However, problems in administration can occur in either an opt-in or opt-out regime, and those problems are properly dealt with through enforcement measures. They do not provide a principled basis for selecting a more restrictive opt-in regime. In fact, Verizon has no doubt that the highly complex and confusing opt-in notices mandated by the WUTC's new rules would cause customer consternation and frustration beyond anything previously experienced in any state. (Breen Dec. ¶ 20).

disclose CPNI to third parties and non-communications-related entities, or the option employed by the FCC, requiring strict non-disclosure agreements in non-agency relationships.

The WUTC's approach is particularly indefensible given the nationwide rules adopted by the FCC. The FCC specifically found that its "no approval approach" for marketing improvements to existing services combined with an opt-out regime for other carrier and related entity uses of CPNI was sufficient to protect consumer privacy and "no more extensive than necessary to serve the government interest," *2002 CPNI Order*, ¶ 31. Moreover, the FCC also found that on the record it had compiled (one substantially more extensive than that before the WUTC) further restrictions could not be justified under the First Amendment. The fact that the body charged by Congress with creating nationwide rules for protection of CPNI has rejected the WUTC's approach as unnecessarily restrictive is powerful evidence that the WUTC has not adequately considered less restrictive means.

3. Defendants' Rules Are Unconstitutionally Overbroad.

Defendants' rules not only prohibit Plaintiffs from using CPNI to solicit customers to purchase their services, but they reach into the Plaintiffs' organizations and seek to restrict internal speech among its employees and affiliates when that speech includes discussion of call detail for purposes of product development or marketing. Wa. Admin. Code § 480-120-204. At the same time, Plaintiffs may discuss call detail internally for other purposes, including billing and resolution of customer complaints. *Id.* § 480-120-205. Thus, the WUTC's new rules constitute a content-based restriction on Plaintiffs' freedom of speech. *See Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 643 (1994) ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based."); *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998) (same).

Plaintiffs' right to use CPNI to engage in internal communications, which do not propose commercial transactions to their own employees, agents, affiliates, and joint venture partners, is protected by the First Amendment. Although Plaintiffs may have an ultimate, or even central,

economic motivation for the speech, that in and of itself is insufficient to render these internal communications commercial speech. *See Bolger v. Youngs Drug Prods., Inc.*, 463 U.S. 60, 67 (1983); *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (describing the proposal of a commercial transaction as "*the test* for identifying commercial speech" (emphasis added)); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184-85 (9th Cir. 2001). As the Supreme Court has recognized, commercial and non-commercial speech may co-exist in any given circumstance, and it is the duty of a court to ensure that non-commercial speech is not swept up with commercial speech for purposes of constitutional analysis.[12] *Bolger*, 463 U.S. at 66 (examining pamphlets "carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed").

Because the WUTC's new rules are content-based restrictions on Plaintiffs' protected speech, they are presumptively unconstitutional; Defendants bear the burden of proving that the restrictions are constitutional. *See R.A.V.*, 505 U.S. at 382; *Foti*, 146 F.3d at 637. That burden entails proving that the restrictions are narrowly tailored to further a compelling state interest. *See Crawford v. Lungren*, 96 F.3d 380, 386 (9th Cir. 1996). Defendants simply cannot meet this burden because they have not demonstrated any compelling state interest in preventing Plaintiffs from using the CPNI in internal discussions within corporate units or affiliates and among agents, independent contractors, and joint venture partners. Moreover, even if Defendants could identify and substantiate a compelling state interest in regulating Plaintiffs' internal business communications, they have offered no proof that their choice in preventing Plaintiffs from engaging in discussions regarding CPNI is the least restrictive means of protecting consumers'

[12] Plaintiffs' internal business communications, regardless whether they deal exclusively with marketing strategy, are no different from the internal brainstorming sessions of an advertising firm, a type of speech that has never been held by the Supreme Court to constitute commercial speech. Indeed, the very purpose of lesser protection for commercial speech—to protect consumers from the risk of deceptive advertising or other peculiarly commercial harms, *See R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992), —is inapplicable to speech conducted within and between Plaintiffs' organizations. *See 44 Liquormart*, 517 U.S. at 501 (opinion of Stevens, J.) ("[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.").

privacy. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (plurality opinion); *Sable Communs. of Cal. v. FCC*, 492 U.S. 115, 126 (1989).

4. Defendants' Rules Are Unconstitutionally Vague.

The WUTC's new rules are also void for vagueness under the Due Process Clause of the Fifth Amendment to the United States Constitution. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1962). Given the Byzantine and self-contradictory definition of "call detail," which draws lines between private and non-private information that have no rational relationship to privacy interests, 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. It is thus impossible to know, for example, if Plaintiffs' accessing of call detail in order to compile aggregate monthly data is prohibited by the rules.[13] In addition, the definition of "associated company" is also vague, as what constitutes "control" of another entity is nowhere defined or subject to further specification anywhere in the WUTC's new rules.

Because carriers face significant penalties for violations of these rules, *see* RCW § 80.04.387, and they are unclear as to what conduct is forbidden or punishable, the rules violate the Due Process Clause. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (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. 1996); *Grayned*, 408 U.S. at 108-09. That is, because any vagueness or uncertainty in the rules will result in further chilling of carrier speech, this Court must require a heightened degree of clarity and precision in the WUTC rules. *Bullfrog Films*, 847 F.2d at 512; *see also Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603-04 (1967).

---

[13] The definition of "call detail" purports to exclude "the amount spent monthly by a specific customer on long distance calls. Wa. Admin. Code § 480-120-213(2). The only way a carrier could compile such information, however, would be to examine the actual call records and numbers called, *e.g.*, use information that appears to be defined as "call detail." (Breen Dec. ¶ 22).

C. Enforcement Of The New Rules Will Cause Plaintiffs Irreparable Harm.

As the Supreme Court has recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *see also Foti*, 146 F.3d at 643; *Jacobsen v. U.S. Postal Serv.*, 812 F.2d 1151, 1154 (9th Cir. 1987). This is equally true when the protected speech is commercial speech. *See S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998). Indeed, just as restrictions on publishing a newspaper constitute irreparable harm even when applied for a single day, "the prevention of [Plaintiffs'] access to [a potential customer] is, each day, an irreparable injury: the ephemeral opportunity to present one's [proposed commercial transaction] to an interested audience is lost and the next day's opportunity is different." *Jacobsen*, 812 F.2d at 1154. Because enforcement of the new rules threatens to curtail Plaintiffs' rights to engage in protected commercial speech with their customers and in non-commercial speech within and among their organizations, application of the WUTC's new rules undoubtedly will cause irreparable injury.

In addition, the WUTC's new rules would require Plaintiffs to send highly complex and confusing notices to their customers regarding the new protections for call detail and private account information as a condition of their ability to speak to those customers regarding call detail. Wa. Admin. Code §§ 480-120-209, 480-120-212. As the dissenting Commissioner rightly observed, these notices will be "incomprehensible to even well-informed consumers," *WUTC Order*, at 42 (Hemstad, dissenting). Moreover, if Plaintiffs send the WUTC-mandated notices to customers, and this Court subsequently concludes that the WUTC scheme violates Plaintiffs' constitutional or statutory rights, it will be well-nigh impossible to "unring the bell" and obtain customer consent under the FCC's less restrictive approach without substantial consumer confusion. This "threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm." *Stuhlberg*, 240 F.3d at 841; *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

Plaintiffs only other alternative is to forego all speech regarding individually identifiable CPNI in Washington State, which will also result in lost goodwill, reduced customer satisfaction, and unrecoverable monetary damages.

D. The New Rules Raise Serious Constitutional Questions And The Balance Of Hardships Tips Decidedly in Plaintiffs' Favor.

Even were this Court not convinced of Plaintiffs' high likelihood of success on the merits, injunctive relief is appropriate because the WUTC's new rules raise serious constitutional questions and the balance of hardships tips decidedly in Plaintiffs' favor. To raise a "serious question going to the merits," the Court need decide only that Plaintiffs "ha[ve] a fair chance of success or one serious enough to require litigation." *Benda v. Grand Lodge of the Int'l Assoc. of Machinists Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978). Given the Tenth Circuit's decision in *U.S. West* striking down federal regulations less restrictive than the WUTC's rules at issue here, and the FCC's determination in July of 2002 that there was insufficient factual predicate under *Central Hudson* for adoption of the opt-in approach chosen by the WUTC here, there is no question that Plaintiffs' First Amendment claims at the very least have a fair chance of success.

Furthermore, in light of the negligible evidence of harm to the public by virtue of Plaintiffs engaging in commercial speech with their customers, and the complete lack of evidence of harm stemming from Plaintiffs' communications with their related entities, there is nothing to weigh against the constitutional and financial harms Plaintiffs will suffer if the WUTC's new rules are enforced. Indeed, the opt-out approach adopted by the FCC is presently applied nationwide without any showing of ensuing harm to consumers. Moreover, the WUTC voluntarily delayed enactment of these rules for over six months to await and then analyze the FCC's action. Thus, Defendants cannot plausibly argue that a limited delay while this Court adjudicates Plaintiffs' constitutional and statutory claims causes them any harm at all, let alone

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

irreparable injury. For these reasons, the balance of hardships tips decidedly, and indeed completely, in Plaintiffs' favor.[14]

E. Enjoining Enforcement of The New Rules Will Advance the Public Interest.

In determining whether to grant a preliminary injunction, where the public interest is involved, a court must consider whether the balance of public interests weighs in favor of granting or denying injunctive relief. *See Westlands Water Dist. v. Natural Res. Def. Council*, 43 F.3d 457, 459 (9th Cir. 1994); *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992). If the new rules are enforced, the public interest will most definitely be harmed above and beyond the constitutional violations and financial harm that will befall Plaintiffs.

It is well established that allowing enforcement of unconstitutional laws does not advance the public interest. "Curtailing constitutionally protected speech will not advance the public interest, and 'neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.' " *ACLU v. Reno*, 217 F.3d 162, 180-81 (3d Cir. 2000), *vacated on other grounds*, *Ashcroft v. ACLU*, __ U.S. __, 122 S. Ct. 1700 (2002).

[14] The Court must also weigh the rights of Plaintiffs' customers who welcome commercial speech regarding new communications services and products but will be confused by, or will not make the effort to respond to, the WUTC-mandated opt-in notice. These consumers have a constitutional right to receive Plaintiffs' messages that will also be stifled during this litigation absent preliminary relief. *Thompson*, 122 S. Ct. at 1503.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

IV. CONCLUSION

For the reasons set forth above, as supported by the materials filed concurrently with this Motion, the Court should enter a preliminary injunction pursuant to Fed. R. Civ. P. 65 preventing Defendants and any officer or employee of the State of Washington from enforcing any portion of the WUTC's new CPNI rules pending this Court's final judgment in this action.

Respectfully submitted this 21st day of November, 2002.

STOEL RIVES LLP

Timothy J. O'Connell, WSBA #15372
Kendall J. Fisher, WSBA #28855

Of Counsel:
Andrew G. McBride
Kathryn L. Comerford
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
(202) 719-7049 (facsimile)

Attorneys for Plaintiffs