THE HONORABLE BARBARA ROTHSTEIN

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. CV02-2342R

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

NOTED ON MOTION CALENDAR:
Friday, December 13, 2002

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I. INTRODUCTION

The plaintiff Verizon companies (collectively referred to as Verizon) seek a preliminary injunction against the members of the Washington Utilities and Transportation Commission (WUTC) to enjoin enforcement of the WUTC's new rules protecting consumer privacy. The WUTC rules protect the details of one's personal and confidential telephone usage. Under certain circumstances, a telephone company may not use "customer proprietary network information" (CPNI) without customers' express consent. Verizon contends that such regulation of CPNI infringes on its right to engage in commercial speech with its customers and to discuss CPNI within its related companies to market and develop products.[1]

As articulated below, the WUTC rules reasonably protect consumers' legitimate expectation of privacy in their private information, such as whom they call and when. They implicate no First Amendment commercial speech rights. However, even if they were to implicate the First Amendment, they are fully consistent with the decision of the Tenth Circuit Court of Appeals in *U. S. West, Inc. v. Federal Communications Comm'n*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied sub nom. Competition Policy Inst. v. U. S. West*, 530 U.S. 1213 (2000). Finally, applying the Ninth Circuit's tests for a preliminary injunction, the harms alleged by Verizon are either non-existent or minimal and are outweighed by the harm to consumers should the rules' effective date be deferred. Accordingly, the Plaintiffs' Motion for a Preliminary Injunction (Verizon Motion) should be denied.[2]

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[1] In their complaint, Verizon also makes a takings claim, stating: "CPNI is property belonging to the carriers . . . ." Complaint for Declaratory and Injunctive Relief (Verizon Complaint) ¶ 98. Verizon does not make that argument in the context of this motion, but this notion that Verizon, and not its customers, owns CPNI permeates its argument.

[2] The evidence of Verizon's alleged harm is contained in the Declaration of Maura Breen (Breen Decl.). In response to the filing of this motion, we sought to depose Ms. Breen. For the reasons described in our Motion

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II. STATEMENT OF THE CASE

A. History of Federal Regulation of CPNI Prior to *U. S. West v. FCC*

Under the Federal Telecommunications Act of 1996 ("1996 Act"),[3] the term "Customer Proprietary Network Information" (CPNI) denominates private information that telecommunications companies gain about their customers as a result of providing service to them.[4] The FCC has stated that "CPNI includes information that is extremely personal to customers . . . such as to whom, where and when a customer places a call, as well as the types of service offerings to which the customer subscribes and the extent the service is used."[5]

In Section 222 of the 1996 Act, 47 USC § 222, Congress required carriers to obtain customer approval before using, disclosing, or permitting access to the customer's CPNI for any purpose other than providing service to the customer.[6] However, a company need not obtain such approval to use, disclose, or permit access to CPNI to (1) initiate, render, bill, or collect for services, (2) protect the carrier's rights or property, or (3) market, refer, or provide

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to Compel Discovery, we were unable to do so. Accordingly, though we believe that even without the benefit of cross-examination of Ms. Breen, the Court should deny Verizon's motion, the Court could continue this motion until we have that discovery opportunity.

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[4] Under 47 U.S.C § 222, customer proprietary network information means: "information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and information contained in the bills of pertaining to telephone exchange service or telephone toll service received by a customer of a carrier . . . . "

[5] Second Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Implementation of Telecommunications Act of 1996: Telecommunication's Carrier's Use of Customer Proprietary Information and Other Customer Information, 13 F.C.C.R. 8061, ¶ 2 (Feb. 19, 1998).

[6] 47 U.S.C. § 222, under the heading "(c) Confidentiality of Customer Proprietary Network Information,. – (1) Privacy requirements for telecommunications carriers," states:

> Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of telecommunications services shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

administrative services to the customer during a telephone call that was initiated by the customer to the carrier. Congress further exempted: (1) "subscriber list information," (information published in the telephone directory), and (2) "aggregate customer information," (collective information about customers "from which individual customer identities and characteristics have been removed." 47 U.S.C. § 222(f)(2). Congress uses the term "individually identifiable CPNI" to distinguish aggregate information, to which privacy protections do not apply, from the type of CPNI to which privacy protections do apply. 47 U.S.C. §222(c)(1).

The FCC divided "telecommunications service" into three categories: local, interexchange (long-distance), and commercial mobile radio service (wireless). The FCC allowed carriers to use, disclose, or permit access to a customer's CPNI, without soliciting approval in any form from the customer, for marketing purposes within the category of service to which the customer had already subscribed.[7] Where customers had not subscribed to a service within a category, the regulations prohibited carriers from using CPNI for marketing purposes in that category unless they obtained express prior customer approval (opt-in).[8]

B. The Tenth Circuit's Decision in *U. S. West v. FCC*

U. S. West, Inc. challenged the FCC's 1998 rules in the Tenth Circuit primarily on First Amendment grounds. Vacating the portion of the FCC's 1998 rules that required customer opt-in before carriers could use or disclose CPNI, the court first determined that the restrictions on carriers' use of CPNI implicated U. S. West's First Amendment rights of commercial

[7] *Id*. ¶¶ 27-30.

[8] *Id*. ¶ 66. For example, a telephone company could not use CPNI generated from local telephone service to market long-distance service to a customer who did not already subscribe to long-distance service from that carrier, unless the customer first granted express permission to use her CPNI.

speech.[9] It then applied the test for permissible regulation of commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Under *Central Hudson*, the government may restrict speech only if: (1) the commercial speech concerns lawful activity and is not misleading; (2) the government has a substantial state interest in regulating the speech; (3) the regulation directly and materially advances that interest; and (4) the regulation is no more extensive than necessary to serve the interest. The last two prongs are sometimes collectively referred to as the "narrow tailoring" test. The court focused on the "substantial interest" and "narrow tailoring" tests, concluding that the FCC had failed to satisfy these elements, primarily because the FCC had not clearly articulated the specific notion of privacy it sought to advance. 182 F.3d at 1237.

However, the Tenth Circuit did not hold that an opt-in approach would necessarily violate the First Amendment, nor that an opt-out approach was the only mechanism available that satisfied the requirements of the Constitution:

> The dissent accuses us of "advocating" an opt-out approach. We do not "advocate" any specific approach. We merely find fault in the FCC's inadequate consideration of the approval mechanism alternatives in light of the First Amendment.

Id. at 1240, n.15. Thus, although the Tenth Circuit vacated the opt-in requirement of the FCC's 1998 rules, it did not hold that privacy protections on CPNI can only be opt-out. Rather, it vacated the rules because the FCC did not adequately articulate the specific interest it sought to protect and to weigh the costs and benefits of its regulations in relation to a specific privacy interest.

[9] Judge Briscoe, in dissent, attacked the majority's constitutional analysis, maintaining that "[t]he CPNI Order does not . . . directly [or indirectly] impact a carrier's expressive activity . . . in such a manner as to warrant First Amendment scrutiny." 182 F.3d at 1244.

C. FCC Regulation of CPNI After *U. S. West v. FCC*

In July 2002, the FCC adopted new rules interpreting section 222.[10] As under its prior rules, no approval of any kind is required for the carrier to use CPNI to market services to a customer within the same category to which the customer already subscribes. However, the FCC required carriers to obtain a customer's express, opt-in approval to disclose a customer's individually identifiable CPNI to third parties or to use it to market non-communications-related services or goods.

The FCC allowed an opt-out scheme (1) when a carrier wishes to use CPNI to market communications-related services outside of the category to which the customer subscribes and (2) when a carrier wishes to disclose individually identifiable CPNI to the carrier's affiliates, independent contractors, and "joint venture partners" for the purpose of marketing. The FCC expressly left the door open to more stringent state protection for CPNI.[11]

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[10] In the Matter of Implementation of Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, 2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Third Report and Order and Third Further Notice of Proposed Rulemaking (Released: July 25, 2002). 17 F.C.C.R. 14820 (July 2002).

[11] *Id.* ¶¶ 69-74. The FCC stated at ¶ 71:

> We conclude that carriers can use opt-out for their own marketing of communications-related services, as described above, which is less burdensome than opt-in. We reach this conclusion based on the record before us, but must acknowledge that states may develop different records should they choose to examine the use of CPNI for intrastate services. They may find further evidence of harm, or less evidence of burden on protected speech interests. Accordingly, applying the same standards, they may nevertheless find that more stringent approval requirements survive constitutional scrutiny, and thus adopt requirements that 'go beyond those adopted by the Commission.' While the Commission might still decide that such requirements could be preempted, it would not be appropriate for us to apply an automatic presumption that they will be preempted. We do not take lightly the potential impact that varying state regulations could have on carriers' ability to operate on a multi-state or nationwide basis. Nevertheless, our state counterparts do bring particular expertise to the table regarding competitive conditions and consumer protection issues in their jurisdictions, and privacy regulation, as part of general consumer protection, is not a uniquely federal matter. We decline, therefore, to apply any presumption that we will necessarily preempt more restrictive requirements.

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D. Regulation of CPNI by the WUTC

1. History of WUTC Regulation

The WUTC first protected CPNI in 1997, prohibiting its use for marketing.[12] In 1999, the Commission replaced that rule with rules identical in substance to those adopted by the FCC in 1998.[13] After the FCC's decision to reinterpret its partly invalidated 1998 rules in response to the Tenth Circuit's *U. S. West* decision, Verizon asked the WUTC either to eliminate its rules or to conform them to the new FCC interpretation.

2. The WUTC Consumer Privacy Rule

After an extensive rule-making proceeding (WUTC Order ¶¶ 12-15 (copy attached to Verizon Complaint)), on November 7, 2002, the WUTC issued an order adopting the rules at issue in this case.[14] (A copy of the rules is attached to the WUTC Order.)

a. Structure of the Rule – Comparison to the FCC Rule

Consistent with the federal act, the WUTC defines a category of CPNI termed "individually identifiable CPNI" (I-CPNI).[15] The WUTC's rules make only one refinement to Congress's categories of information; they created a subcategory for the most sensitive types of individually identifiable CPNI, denominated "call detail." For clarity, the rules then refer to individually identifiable CPNI that is not call detail as "private account information." WAC 480-120-201.

Schematically, the categories are thus:

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[12] 97-18-056 Wash. St. Reg., § 480-120-139(5) (General Order No. R-442, Docket No. UT-960942) filed August 27, 1997.

[13] 99-05-015 Wash. St. Reg., § 480-120-151 et seq. (General Order No. R-459, Docket No. UT-971514) filed February 25, 1999.

[14] The administrative record in the WUTC proceeding was 1407 pages long. Declaration of Michael Sommerville (Sommerville Decl.) ¶4. Under the Washington Administrative Procedure Act rules are effective thirty days after filing of the rule with the Code Reviser. RCW 34.05.380(2). Though the new rules were filed with Code Reviser on November 8, 2002, the Adoption Order set a delayed effective date of the new rule of January 1, 2003. However, the Commission failed to also apply this delayed effective date to the repeal of the preexisting rule. This error was corrected by an Order Correcting Repeal Date in General Order No. R-505 (December 6, 2002). Sommerville Decl., Ex. 1.

[15] Almost without exception, when parties (including the WUTC in its rule adoption order) refer to CPNI, they really mean individually identifiable CPNI or what the WUTC's rule denotes as I-CPNI.

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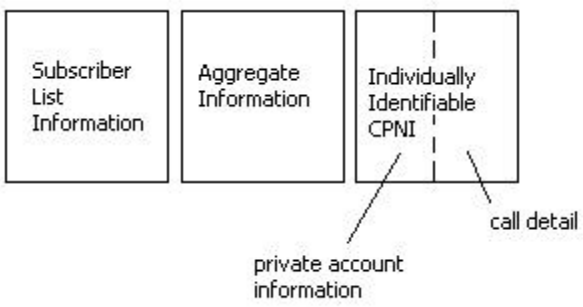

As under the federal scheme, the WUTC rules place only limited restrictions on the use of subscriber list information (the "telephone directory") or aggregate customer information. The WUTC rules also mirror, with exceptions described below, the federal rules' allowance that companies may use CPNI for marketing within the same category of service to which the customer already subscribes without notice to, or approval from, the customer.

As a consequence of a process of weighing costs and benefits like that described by the Tenth Circuit, the WUTC rules *liberalize* the current WUTC rules' opt-in requirement for companies' own out-of-category marketing use of private account information by requiring only that companies provide customers with notice and an opportunity to opt-out of the company's proposed use. The need to obtain a customer's express, opt-in, approval will remain in place with respect to use of CPNI that meets the definition of "call detail." This is a departure from the new FCC rules and is the focus of Verizon's complaint.

The new rules also extend this opt-in requirement for use or disclosure of call detail to the companies' "same category" marketing. This change is the only way in which the WUTC rules can be said to be more restrictive of company activities than the WUTC's existing rules.

The WUTC's rules also differ from the federal rules in how they define the corporate "family" within which non-call-detail CPNI ("private account information") can be disseminated without express, opt-in approval. The WUTC rules define "associated company" as one not under common control or ownership with the company that holds the information,

WAC 480-120-201, while the FCC rules allow disclosures to other entities, including independent contractors and "joint venture partners," subject only to the customer's ability to opt-out, 47 C.F.R. § 64.2007.

b. The Basis for the WUTC's Opt-In Requirement for Use of Call Detail and for Disclosures of I-CPNI to Third Parties

The WUTC had before it real world evidence of an opt-out notice scheme. Qwest had sent opt-out notices to its customers (in violation of the WUTC rules and in reliance on the Tenth Circuit's decision), resulting in significant adverse public reaction. The WUTC received some 600 written comments from consumers and also received oral comments from consumers at two public comment hearings. The WUTC concluded that customers clearly felt harmed as a result of an opt-out system. WUTC Order ¶¶ 13, 77-81.

In developing its rules, the WUTC assumed that *U. S. West v. FCC* was correctly decided. WUTC Order ¶ 32. Accordingly, the WUTC balanced consumers' interests in maintaining actual control over the privacy of their phone records and possible First Amendment rights of companies, taking a far more exacting approach to these competing interests than did the FCC in its 1998 rules. The WUTC evaluated existing state law concerning the privacy of, and the right to control the dissemination of information about private communications, finding that customers' expectations, as expressed in comments to the WUTC, were supported by state law. WUTC Order ¶¶ 66-71; *see* Part II.B.2.a., *supra*.

III. ARGUMENT

A. Standard for Issuing a Preliminary Injunction

To obtain a preliminary injunction, Verizon must show "either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 965 (9th Cir. 2002), *quoting A & M Records v. Napster, Inc.*,

239 F.2d 1004, 1013 (9th Cir. 2001). These two tests "represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Napster*, 239 F.2d at 1013.[16] However, where, as here, the public interest is involved, the Court must determine whether the public interest favors the plaintiff. *Sammartano*, 303 F.3d at 965.[17] Accordingly, in the sections below, we address the three factors the court must consider: (1) the merits of Verizon's constitutional claims; (2) the relative hardships of the interested parties; and (3) the public interest.

B. The WUTC Consumer Privacy Rule Does Not Unconstitutionally Abridge Verizon's Right to Freedom of Expression

In the unregulated competitive marketplace, access to, and use of, a customer's personal information is governed by contract or tort law. Even in a competitive marketplace, Congress and the states have intervened to limit certain uses of information by companies.[18] *See* WUTC Order at ¶ 62, fn. 25. However, contracts between regulated telecommunications carriers and their customers are heavily regulated by statute. At the state level, the WUTC regulates the rates, services, and *practices* of telecommunications companies, including Verizon. RCW 80.36; *State ex rel. Public Service Comm'n v. Skagit River Telephone & Telegraph Co.*, 85 Wash. 29, 36, 147 P. 885 (1915) (describing authority as "plenary"). The WUTC approves tariffs which set the terms and conditions of service between company and

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[16] The Ninth Circuit has also articulated a "traditional test," involving four factors, including a "public interest" factor. *See, e.g., Cassim v. Bowen,* 824 F.2d 791, 795 (9th Cir. 1987). Whatever the nuances between the two tests, proper application of either should result in a denial of Verizon's motion.

[17] In a First Amendment context, the Ninth Circuit has held that though the public interest in maintaining a free exchange of ideas is great, that interest may be "overcome by a strong showing of other competing public interests, especially where the First Amendment activities of the public are only limited, rather than entirely eliminated." *Sammartano*, 303 F.3d at 974. The only commercial speech case that Verizon cites for the proposition that even a day's interference with a protected speech interest constitutes irreparable injury is *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998). But the court in that case was concerned that the law in question restricted both commercial and fully protected speech that was subject to heightened protection. *Id.* at 1144. Such is not the case here.

[18] For a listing of some of those laws, and for a general discussion of the relative merits of opt-in and opt-out systems, *see* Jeff Sovern, *Opting In, Opting Out, or No Options at All, the Fight for Control of Personal Information*, 74 Wash. L. Rev. 1033, 1042 (1999).

customer (RCW 80.36.110, .130), and it regulates individual special contracts between the company and larger commercial customers. RCW 80.36.150. Therefore, the terms under which Verizon may acquire and use private consumer information is highly regulated "in the public interest" by the WUTC. See RCW 80.01.040(3). For this reason, among others, the WUTC's privacy rules do not implicate Verizon's First Amendment commercial speech rights. But, even if they are implicated, under the *U. S. West* case, the WUTC accommodated those interests appropriately in considering and adopting the Rule.

1. The WUTC's Regulation of Telecommunications Companies' Mining of Consumers' Individually Identifiable Call Detail Records Does Not Implicate any Recognized Speech Right of Verizon

Verizon argues that the WUTC rules restrict its First Amendment rights by restricting its communications with its customers and limiting internal discussions within the company. Verizon Motion at 8-18. However, there is nothing in the WUTC rules that restricts Verizon from proposing commercial transactions (the core of commercial speech) to existing or prospective customers. Nor is there any restriction on the means of communication among Verizon personnel. All that is restricted is the use of confidential information. Such restriction does not implicate the First Amendment.

Verizon relies on cases that involved government efforts to limit the means of communication. Verizon Motion at 8-11, *citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (advertising); *Edenfield v. Fane,* 507 U.S. 761, 765-66 (1993) (in person solicitation); and *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (direct mail). The WUTC rules do not prevent Verizon from any means of communication. Verizon may advertise, solicit customers in person, or send direct mailings.

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A better precedent is *Los Angeles Police Dept. v. United Reporting Corp.*, 528 U.S. 32 (1999), in which the Supreme Court held that no First Amendment right was implicated by a California statute's denial of access to arrestees' names and addresses by a private publisher that would sell the information. The Court agreed with the government that "the section in question is not an abridgement of anyone's right to engage in speech, be it commercial or otherwise, but simply a law regulating access to information in the hands of the police department." *Id.* at 40. The Court did state that "[t]his is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." *Id.* However, under Washington law, telecommunications companies are regulated, and the terms and conditions under which they contractually may acquire and use customer information is subject to WUTC regulation. They possess call detail information for a limited purpose—to use it in connection with providing service and to bill for that service. *See* Section II.B.2.b., *infra*. In short, call detail is not the phone companies' information to use for any purpose they find commercially advantageous.

Accessing information does not implicate the First Amendment except in very limited circumstances such as the right of the press to be present at trials. As the Supreme Court has stated: "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965); *cf. Seattle Times v. Rhinehart*, 467 U.S. 20 (1984) (upholding protective order forbidding newspaper from publishing information which it deemed newsworthy but had obtained through pretrial discovery in a libel suit); *Houchins v. KQED*, 438 U.S. 1, 15 (1978) ("Neither the First Amendment nor the Fourteenth

Amendment mandates a right of access to government information or sources of information under the government's control").

Verizon may argue that the regulation is not so much a restriction on sales agents' access to the information as a restriction on the agents' ability to talk to the customer about the information they already "know." But this theory is weakest as it concerns "call detail." It is one thing to regard as a burden on speech a rule that governs companies' use of information about the services a customer buys from that company and how much he or she spends on those services during a billing cycle (information that is not "call detail" and which the WUTC rules treat less restrictively). It is a significant leap, however, to say that all of the company's marketing personnel and sales agents (e.g., telemarketing firms) "know" the specific calls a customer makes and receives. In other words, with particular regard to call detail, which should not be within the general knowledge of sales agents, the express approval requirement is more accurately a restriction on access rather than a restriction on speech.

This argument was not before the *U. S. West* court because at issue there was the whole category of individually identifiable CPNI, including the types of service offerings to which the customer subscribes and the extent to which the service is used.[19]

Verizon also alleges harm to non-commercial speech: its ability to communicate within the companies to design new products.[20] Even if true, this too only concerns restrictions only on access to information; it does not implicate the First Amendment. Far from being entitled

[19] A number of commenters have criticized the *U.S. West* analysis. *E.g.*, Juli Tuan, *U.S. West v. FCC*, 2000 Berkley Tech. L. J., 353, 367; Andrew Dymek, *A Clash Between Commercial Speech and Individual Privacy: U.S. West v. FCC*, 2000 Utah Law Rev. 603.

[20] This argument is a red herring. Aside from asserting a harm that was never raised in *any* party's comments to the WUTC in the rulemaking before the Commission, it simply is incorrect that Verizon's product development will be limited without access to call detail information from its Washington customers. See Section III.D, *infra*.

to heightened protection as "non-commercial speech" (*see* Verizon Motion at 19), these activities are not even linked to any expression on the part of the company. At most, Verizon's allegations related to its product development activities raise commercial speech considerations no different than those raised with respect to internal company communications that are in aid of "the ultimate commercial solicitation." *See U. S. West*, 182 F.3d at 1233, n.4.[21]

2. Even if the WUTC Rules Implicate Verizon's Protected Speech Rights, the Rules Nonetheless Pass Muster under the *Central Hudson* Test for Regulation of Commercial Speech as Applied by the Tenth Circuit in *U. S. West v. FCC*

Following the *Central Hudson* test for determining whether a regulation of commercial speech is valid, 447 U.S. at 566, we argue: (1) the WUTC Rules advance a substantial governmental and public interest in maintaining confidentiality of call detail and limiting its use absent express approval; and (2) the rules are narrowly tailored to serve that interest.[22]

a. The WUTC Rules Advance a Substantial Interest

In recent years, there has been heightened public concern about disclosure of personal information. WUTC Order ¶¶ 45-46. The capabilities of companies or individuals to merge one data base with another can give rise to many potential abuses. *Id.* ¶¶ 46, 59, 60. The

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[21] *See also See Dun & Bradstreet v. Green Moss Builders*, 427 U.S. 749, 758-59 (1984) ("It is speech on matters of public concern that is at the heart of the First Amendment's protection . . . . In contrast, speech on matters of purely private concern is of less First Amendment concern."); *Trans Union v. FTC*, 267 F.3d 1138, 1139 (D.C. Cir. 2001) (credit reporting agency's development and sale of mailing lists of consumers who had engaged in certain transactions as evidenced in Trans Union's records, was only entitled to intermediate scrutiny because it concerned no public issue and was solely in the interest of the speaker and its specific business audience). Commercial speech that is twice removed from an actual commercial solicitation does not thereby become entitled to the same level of scrutiny as, for example, the speech on public issues that is at the heart of the First Amendment.

[22] Verizon attempts to characterize the rules as a prior restraint or a content-based regulation to which strict scrutiny should apply. Verizon Motion at 9. That argument is wholly at odds with the *U. S. West* case on which Verizon's arguments otherwise rely. The court in *U.S. West* analyzed the FCC's CPNI Order under *Central Hudson's* intermediate scrutiny analysis. Verizon's arguments also are at odds with a recent D.C. Circuit opinion analyzing the constitutionality of restraints on dissemination of individually-identifiable financial data. *Trans Union v. FTC*, 267 F.3d 1138 (2001) (applying intermediate scrutiny in upholding an order of the Federal Trade Commission directing Trans Union, a credit reporting agency, to stop selling mailing lists culled from credit information about individual consumers to target marketers).

simple fact is that consumers have an expectation that certain information about them and their activities is their personal business, and if someone obtains it and uses it without their permission, they are harmed. *Id.* ¶¶ 74-81.

Customers of telephone companies do not voluntarily disclose to the company the details of whom they call, who calls them, and for how long (i.e., call detail).[23] Call detail data is merely incidental (though administratively essential) to the relationship between the customer and the telecommunications company. The WUTC's Order points out that telecommunications companies are necessarily engaged in a kind of licensed wiretapping, owing to the necessities of technology, the way the industry is regulated, and the way billing traditionally has been handled for toll (long distance) service. *Id.* ¶¶ 38-44.

While call detail may appear benign, this data can be processed and translated into subscriber profiles that may contain information about the identities and whereabouts of subscribers' friends and relatives, which businesses patronize, about when subscribers are likely to be home and awake, product and service preferences, and about the subscriber's medical, business, client, sales, organizational, and political telephone contacts. WUTC Order ¶¶ 49-65; Juli Tuan, *Note: U.S. West, Inc. v. FCC*, 15 Berkeley Tech. L.J. 353, 369 (2000).

With specific regard to in-company use of CPNI, and particularly calling data, the WUTC found that the risk of disclosures that may result in embarrassment, pecuniary loss, or threats to safety is likely to increase the more the information is permitted to flow to additional company personnel and agents. *Id.* ¶ 56-57. Even if it were possible, however, to ensure that information would not be disclosed with these harmful results through the negligence or

[23] And, contrary to the assertion by Verizon, in the vast majority of cases, at least in the case of local service, the customer has not "chosen a relationship with the particular carrier." Verizon Motion at 13. For local service, local exchange companies such as Verizon are effective monopolies.

dishonesty of company employees or agents, the unexpected and un-consented-to invasion and appropriation of highly sensitive data about one's communications is itself a wrong. It is akin to, if not literally, an invasion of one's property.[24]

There have been many recent federal statutes limiting use of personal data by companies. *See* WUTC Order ¶ 62, n. 25.[25] Washington's statutes contain extraordinary privacy protection for telephonic communications.[26] It is both a criminal offense[27] and a basis for civil liability[28] for anyone to intercept or record private communications transmitted by telephone without the prior consent of all parties to the communication.[29] The "communications" covered include not just the content of the conversation between the parties, but also the dialing from one telephone number to another.[30]

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[24] *See Shulman v. Group W Production, Inc.*, 18 Cal.4th 200, 955 P.2d 469, 489, 74 Cal.Rptr.2d 843 (1998) ("It is in the intrusion cases that invasion of privacy is most clearly seen as an affront to individual dignity. A measure of control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts").

[25] For example, the Cable Privacy Act of 1984, 47 USC § 551, prohibits cable television providers from even collecting personally identifiable information concerning a subscriber without the prior written or electronic (i.e., opt-in) consent of the subscriber concerned except as necessary to render service. Additionally, the information that is collected as necessary to render service must be destroyed when it is no longer necessary for the purposes for which it was collected.

[26] Washington also has a strong constitutional protection of privacy interests. Article I, section 7, of the Washington Constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision has been interpreted to provide greater protection than the Fourth Amendment to the United States Constitution. *State v. Gunwall*, 106 Wn.2d 54 , 720 P.2d 808 (1986).

[27] Under RCW 9.73.080, anyone who violates RCW 9.73.030 (Violating Right to Privacy) is guilty of a gross misdemeanor.

[28] RCW 9.73.060.

[29] RCW 9.73.030 provides: "(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

> (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication"

[30] Private communication under RCW 9.73 includes "the dialing from one telephone number to another." *State v. Riley*, 121 Wn.2d 22, 34 (1993); *State v. Gunwall*, 106 Wn.2d 54, 69 (1986); RCW 9.73.260 specifically provides that a court order is required for any person to use a "pen register" (a device that identifies all outgoing local and long distance numbers dialed, whether the call is completed or not) or a "trap and trace

The law contains a limited exception for activities "in connection with services provided by a common carrier pursuant to its tariffs on file with the Washington utilities and transportation commission or the Federal Communication Commission."[31] In other words, Washington law recognizes that companies recording certain kinds of "call detail" can only do so pursuant to WUTC and FCC regulation. Part of the WUTC's intention in adopting its privacy rules was to reconcile the gap between Washington's statutory protections on the privacy of communications and the FCC's CPNI framework.

The WUTC explained that its objective is not to curb marketing *per se*, or even targeted marketing. WUTC Order ¶ 58. The WUTC rules seek to redress three different kinds of harm: (1) the potential for embarrassment, pecuniary loss, or threats to safety if one's telephone calling records become generally available, (2) regardless of whether such harm results, the harm of having one's private sphere invaded without one's consent, and (3) the consequent chilling effect on *customers'* free speech and free association over the telephone. *Id.* ¶ 35. In other words, the WUTC opt-in requirement seeks to allow customers to control the creation of new points of exposure to their privacy.

The *U. S. West* court agreed with the FCC "that privacy may rise to the level of a substantial state interest" for purposes of *Central Hudson's* intermediate scrutiny analysis. 182

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device" (a device to record the number of an incoming call) on someone's phone line, and only law enforcement officers may petition for such orders. Telecommunications companies' equipment is necessarily exempted from the definition of pen register:

> such term does not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

RCW 9.73.260(1)(d). What is noteworthy about this exemption is that it is not a blanket exception for phone companies, but an exception the companies are allowed for a limited purpose—specifically, billing and accounting.

[31] RCW 9.73.070(1).

F.3d at 1234. It found that "privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it." *Id.* at 1235. The WUTC has done exactly that.[32]

The record before the WUTC supports the Commission's finding of a substantial privacy interest. The WUTC heard from many members of the public, consumer organizations, and the Public Counsel Section of the Washington Attorney General's Office. Indeed, the Office of Public Counsel submitted a strong letter to the FCC from the Attorneys General of 38 states advocating for across the board opt-in rules.[33] Unlike the record at the FCC, the record at the WUTC contained actual experience, that of Qwest, of an opt-out mechanism. It ended in a public relations disaster.[34]

b. The WUTC's Regulations Are Narrowly Tailored to Advance the Privacy Interest that the WUTC Seeks to Protect

Unlike the FCC rules vacated in *U. S. West*, the WUTC rules are narrowly tailored to advance the privacy interest expressed. The WUTC crafted its rules with particular attention to the *Central Hudson* test, as applied in *U. S. West*. *See* WUTC Order ¶¶ 32-37. The rules seek to protect customers' reasonable expectation that their records of communications over

[32] Verizon's memorandum states that "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." Verizon Motion at 14. It is hardly surprising, and it is not particularly telling, that there is no First Amendment case law specifically holding that there is a "substantial" privacy interest, within the meaning of *Central Hudson*, as between a company and an existing customer. In order for there to be such a holding it would first be necessary for a litigant to successfully press the theory that a company has a First Amendment right to use, for its commercial purposes, any and all information it obtains as a result of providing a service to its customer, no matter how private the information. This paucity of decisions is not for lack of laws that protect confidential information from commercial uses that include marketing additional services to existing customers.

[33] WUTC Order ¶ 60. A copy of those comments is attached to the Sommerville Declaration as Exhibit 2. Many of the commenters advocated stronger opt-in rules. Indeed, Commissioner Richard Hemstad dissented ,expressing the view that the all I-CPNI should be subject to opt-in approval, adopting, and elaborating upon, the arguments of the dissenting judge in *U. S. West*. *WUTC Order* at 42-47.

[34] *Id.* ¶¶ 74-81. One angry member of the public told the WUTC: "I need a telephone; therefore I do business with Qwest. I did not ever grant them permission to make money off me, to solicit from me, to provide information about me to anyone for any reason." *Id.* ¶ 80; *see* Blackmon Decl. ¶ 21.

the telephone not be invaded without their consent. The only way to prevent this harm is to require express consent. Where a particular kind of use or access to data about one's self is clearly and reasonably beyond one's expectation, it is clearly inadequate to rely on some form of implied consent. But by carving out "call detail" from CPNI, and giving it more protection, the rules address the most telling privacy needs, while still accommodating the commercial needs of the companies. The companies retain a broad array of alternatives for obtaining the express consent that its rules require as well as broad avenues for product development and marketing. *See* Section III.D, *infra*. Blackmon Decl. ¶¶ 8-9. This tailoring of the WUTC rules addresses the third and forth prongs of the *Central Hudson* test.[35]

C. The WUTC Rules Are Not Unconstitutionally Vague

Verizon makes two allegations of vagueness: (1) it is impossible to know if plaintiffs' accessing of call detail in order to compile aggregate monthly data is prohibited; and (2) the definition of "associated company" is vague, because what constitutes "control" of another entity is not defined. Verizon Motion at 20.

In support of its first assertion, Verizon argues that the definition of "call detail" excluding "the amount spent monthly by a specific customer on long distance calls," (Wa. Admin. Code § 480-120-213(2)) makes no sense: "[T]he only way a company could compile

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[35] "Almost all of the restrictions disallowed under Central Hudson's fourth prong have been substantially excessive, disregarding 'far less restrictive and more precise means.'" *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469 at 479 quoting *Shapero v. Kentucky Bar Assoc*., 486 U.S. 466, 476 (1988). The tailoring effort by the WUTC did not result in an " substantially excessive" result. In a related context, the D.C. Circuit stated:

> Although the opt-in scheme may limit more [of the plaintiff's] speech than would the opt-out scheme the company prefers, intermediate scrutiny does not obligate courts to invalidate a remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests. So long as the means chosen are not substantially broader than necessary to achieve the government's interest, a regulation is not invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Trans Union Corp. v. FTC, 267 F.3d 1138, 1142 (D.C. Cir., 2001) (upholding Federal Trade Commission's order to stop selling target marketing lists based on data about consumers in the possession of credit reporting agencies, such as, possession of an auto loan, a department store credit card, or two or more mortgages).

such information would be to examine the actual call records and numbers called, *i.e.*, use information that appears to be defined as 'call detail.'" Verizon Motion at 20. However, the concept of using data that has been aggregated and stripped of personal identifers is not new. Congress utilizes the same idea in Section 222.[36] The obligation to obtain customer approval for use, disclosure, or permission of access to individually identifiable CPNI does not extend to "aggregate customer information" (47 USC § 222(c)(3)), defined as "collective data that relates to a group or category of service or customers, from which individual customer identities and characteristics have been removed." *Id.* (f)(2).

The WUTC incorporated, as a limitation on its definition of call detail, this same concept of aggregation. Both Congress and the WUTC recognize that this information about customers exists in a computer database as a result of the companies' operational activities. The question is, what kind of a report may the company ask that database to produce that the company may then use for marketing purposes and provide, for example, to its telemarketing agents? The WUTC has answered this question by restricting use of highly sensitive information, but permitting that same information to be aggregated into less personally sensitive data for more liberal use.

Verizon's second asserted claim of vagueness likewise should fail. The Commission's definition of "associated company" is identical to the definition of "affiliate" in one of the major pieces of federal privacy legislation—namely the provisions of the Gramm-Leach-Bliley Act governing financial institutions' disclosures of non-public personal information about their

[36]The concept is used in other privacy statutes as well. *E.g.*, Cable TV Privacy Act of 1984, 47 U.S.C. § 551(a)(2)(A) ("the term 'personally identifiable information' does not include any record of aggregate data which does not identify particular persons"); *see also* the federal department of health and human services rules concerning privacy of health related information. *See* definition of "summary health information" at 45 C.F.R. §164.504.

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customers. 15 U.S.C. § 6809(6). The WUTC chose to define the "corporate family" within which a telecommunications company may share non-call-detail CPNI (subject merely to the customer's opportunity to opt-out) with reference to "common control" to avoid a situation in which a company might exchange a relatively minor amount of stock with another company (and thereby meet the definition of an affiliate) and thereby gain the right to share information without express customer approval. *See e.g.* 45 C.F.R. § 164.504 (defining "common control" for purposes of federal rules implementing privacy provisions of Health Insurance Portability and Accountability Act). Further, the Supreme Court has held that, with respect to the closely related First Amendment principle of overbreadth, it "applies weakly, if at all in the ordinary commercial context." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). The justification for the overbreadth principle is absent in the context of commercial speech. Because "advertising is linked to commercial well-being, it [therefore] seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." *Id.* at 381.

D. Verizon Will Be Harmed Minimally, If at All, When The WUTC Rules Go Into Effect January 1, 2003

Citing to cases involving restrictions on newspapers, Verizon argues that loss of any opportunity to use call detail even for a "single day" constitutes "irreparable harm." Verizon Motion at 21. Putting aside the inapt analogy between the fully protected speech of a newspaper publisher and the use by a telephone company of private information to sell more products, the facts simply do not demonstrate that Verizon will suffer any significant harm, let alone "irreparable harm" commencing January 1, 2003.

Verizon alleges harm from the confusion to customers that would result if Verizon were to send opt-in notices to customers in January and later, assuming it prevails on the

merits, sends those same customers (or those who did not opt-in) notices letting them opt-out. We suspect this is fear not of confusion of a later opt-out notice, but a legitimate fear of the public outcry that such an opt-out notice will cause, as evidenced by the Qwest experience in early 2002. WUTC Order ¶¶ 74-81; Blackmon Decl. ¶¶ 20-21. In any event, the record shows that the majority of consumers who receive opt-out notices either do not notice or do not comprehend them. WUTC Order ¶¶ 85, 86 and fn. 45-48. Those people would not be confused. Any confusion to the remaining consumers, who do pay attention, could be minimized by appropriate wording and formatting of the notices by Verizon.[37]

Verizon's main evidence on harm is contained in the Declaration of Maura Breen. Virtually every use of CPNI that she identifies would not require any notice to the customer, whether opt-in or opt-out.

1. The Washington Privacy Rule Will Not Significantly Affect Verizon's Product Development Efforts

Ms. Breen states that Verizon uses CPNI to develop specially tailored products. "These uses of CPNI are banned under the WUTC rules absent prior written or otherwise verified opt-in consent." Breen Decl. ¶ 14. The perceived restrictions posed by the rules are not as insurmountable as Ms. Breen asserts. Verizon may use call detail as it wishes, with no approval by the customer, so long as it removes the identity of the specific customers from the data. Blackmon Decl. ¶ 6. Ms. Breen does not explain why individually identifiable information is required for product development, other than to make an unsupported assertion that Verizon's computer system lacks the capability to discern call detail from other types of

[37] For example, Verizon, in any opt-in notice, could include a paragraph that explains that Verizon is challenging the entire opt-in process in this litigation and inform the consumers that if Verizon is successful, it may send out an opt-out notice at a subsequent date.

CPNI. Breen Decl. ¶¶ 12-13. Further, presumably, Verizon develops products on a nationwide basis – what appeals to consumers in California likely would appeal to consumers in Washington.

2. The Washington Privacy Rule Will Not Significantly Affect Verizon's Marketing Efforts

Likewise, Ms. Breen overstates the effect the WUTC rules will have on Verizon's marketing activities. Marketing need not be "silenced." For example, the rules would allow outbound marketing (calls from the company to a customer) in which the telemarketer could provide oral notice and, if granted permission, call detail could be used. Blackmon Decl. ¶¶ 8-9. Verizon also wishes to use "pop-up" advertising in association with its web site, which it could do using personal information (but not call detail). Under the new rules, as long as the customer is on the web site, Verizon can use "pop-up" technology to ask if the customer would like to "opt-in" so that the company can use call detail to help guide the customer to a more economical set of Verizon services. With such approval, Verizon then could use call detail. *Id.* ¶ 12.

Dr. Blackmon sets forth an example of how Verizon may make full use of call detail under the WUTC rules in its commercial communication with customers.

> a. Verizon uses its call detail data with personal identifiers removed to develop various product offering. No notice or approval is required for this use.
>
> b. Verizon informs customers that it will be using personal account information (excluding call detail) for marketing purposes unless the customer opts out of this use. This notice uses the opt-out approach that Verizon favors. Depending on the service being marketed, even this opt-out notice may not be required.
>
> c. For those customers who do not object in response to the opt-out notice, Verizon uses the monthly data on calling patterns to produce a list of target customers for its telemarketing calls.
>
> d. Verizon makes telemarketing calls to those target customers. During the call the Verizon telemarketer provides oral notice and, if the customer approves, immediately uses call detail to market the service to the customer.

Blackmon Decl. ¶ 9. Of course, Verizon may not be able to do all it would like to do with call detail. It will not be able to merge call detail data with other data that it may obtain, such as financial and credit data, property ownership, and department store purchases. This is one area where the WUTC rules are stricter than the federal rule. Blackmon Decl. ¶ 6.

In sum, Verizon's commercial speech would not be silenced; its product development would not be "banned." Verizon can continue to advertise, use telemarketers, and otherwise exercise its commercial speech rights during the pendency of this litigation. In short, there is no irreparable harm.

E. If the WUTC Rules Do Not Take Effect on January 1, 2003, and Verizon Implements an Opt-Out Program for Use of Some CPNI, then Consumers Will Be Irreparably Harmed

If the preliminary injunction is granted and Verizon implements an opt-out program for use of some CPNI, then consumers will be irreparably harmed. There would be at least two types of actual harm.

First, there would be damage to the privacy interests described in Section III.B.2.a, above. The appropriation for a commercial use of one's private information is permanent; the damage would be irreparable. There is a reasonable expectation that the details of one's telephone calls are private. Indeed, there is tangible evidence of such harm. When Qwest sent out opt-out notices, there was a public outcry. Blackmon Decl. ¶ 21; WUTC Order ¶¶ 74-81.

Second, there would be damage to the First Amendment rights of consumers. As the WUTC described, Verizon's consumers use the telephone to communicate in confidence with others. To allow the detailed records resulting from those calls to be used by the telephone company – the conduit of the customers' communications – would violate the consumers' confidence that their calls are solely their personal affairs. WUTC Order ¶35.[38]

[38] Finally, there could be an economic incentive to mislead customers. CPNI could be used to "upsell"; the company could use call detail to help sell more and better products. While there is nothing necessarily wrong about that (except for the appropriation of private information), the incentive to "upsell" has in Washington has led to many consumer complaints against Qwest for selling products that customers do not need. Blackmon Decl. ¶ 13.

F. The Public Interest Favors Denial of Verizon's Motion

The significant rights of privacy associated with the right to communicate and associate with others require the public interest factor to weigh in favor of denial of Verizon's motion for a preliminary injunction.

G. Applying the Standards for a Preliminary Injunction, Verizon's Motion for a Preliminary Injunction Should Be Denied

Verizon's motion should be denied. It has demonstrated neither "probable success on the merits" nor "irreparable injury." Further, the WUTC acted well within the confines of the law as articulated by the Tenth Circuit in *U. S. West* and any balancing of the hardships favors the WUTC and the consuming public. Finally, the public interest in this case favors denial of Verizon's motion.

IV. CONCLUSION

Accordingly, the defendant Commissioners of the WUTC request that the Court deny Verizon's motion for a preliminary injunction. Alternately, should the Court have questions about the harm as alleged by Verizon, the Court could continue consideration of this motion to allow limited discovery as requested in our motion to compel discovery and then consider supplemental memoranda of the parties.

DATED this 9th day of December, 2002.

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