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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VERIZON NORTHWEST, INC., et al.,

Plaintiffs,

v.

MARILYN SHOWALTER, Chairwoman, et al.,

Defendants.

NO. C02-2342R

ORDER GRANTING PRELIMINARY INJUNCTION

THIS MATTER comes before the court on Plaintiff Verizon Northwest's motion for preliminary injunction. Having reviewed the pleadings filed in support of and in opposition to this motion, and having heard oral argument, the court finds and rules as follows:

I. BACKGROUND

On November 7, 2002, the Washington Utilities and Transportation Commission ("WUTC") adopted new regulations limiting a telecommunications carrier's ability to use Customer Proprietary Network Information ("CPNI") without the express authorization of its customers. Generally, CPNI is information collected by telecommunications service providers in the process of delivering

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their service.[1] For instance, CPNI includes information about calls made and received such as whether they were local or long distance, time of day of the call, the originating and destination phone numbers, and whether the call was answered or the line was busy. CPNI also includes information about the services to which a customer subscribes such as call forwarding or caller-identification. Under the WUTC's rules, CPNI consists of both "call detail" and "private account information." Call detail is

> [a]ny information that identifies or reveals for any specific call, the name of the caller (including name of a company, entity, or organization), the name of any person called, the location from which a call was made, the area code, prefix, any part of the telephone number of any participant, the time of day of a call, the duration of a call, or the cost of a call
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> . . .
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> [and] information associating a specific customer or telephone number with the number of calls that are answered or unanswered, correlated with a time of the day, day of the week, week or weeks, or by any time period shorter than one month.

WAC § 480-120-201 (2003). Private account information is other

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[1] As defined under federal law, CPNI is

> (A) 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
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> (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.

47 U.S.C. § 222 (2001).

information that a carrier has access to regarding its customers that uniquely identifies customers but that is not call detail. Id. Such information includes the customer's name or address.

Under the new regulations, a telecommunications carrier cannot disclose either "call detail" or "private account information" to third parties outside the carrier's organization without explicit authorization. As to in-company use, carriers must provide customers the opportunity to opt-out of that carrier's use of "private account information" for "out-of-category" marketing.[2] Use of private account information for "same-category" marketing is not restricted. A carrier must first obtain a customer's explicit approval ("opt-in") before using "call detail" for any purpose other than billing.

A. FCC regulation of CPNI and *U.S. West*

In U.S. West v. FCC, 182 F.3d 1224 (10th Cir. 1999), the Tenth Circuit struck down FCC regulations that closely resemble the WUTC's. 182 F.3d at 1239. The FCC's regulations required customer opt-in approval for the use of CPNI for out-of-category marketing.[3] The regulations also required opt-in approval for

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[2] "Out-of-category" marketing is the marketing of a category of services to which a customer does not already subscribe. "Same category" marketing is the marketing of a category of services to which a customer already subscribes.

[3] In contrast, the WUTC rules require only opt-out approval for use of "private account" information for "out-of-category" marketing. On the other hand, while the FCC regulations had no restriction on "same-category" marketing, the WUTC rules require opt-in approval for the use of "call detail" information.

the use of CPNI to 1) market customer premises equipment or information services, 2) identify or track customers that call competitors; and 3) regain the business of customers who have switched to another carrier.

In considering the constitutionality of the FCC's rules, the Tenth Circuit first found that the marketing activities impacted by the FCC's rules were commercial speech subject to constitutional protection. U.S. West v. FCC, 182 F.3d 1224, 1232-33 ("Because petitioner's targeted speech to its customers is for the purpose of soliciting those customers to purchase more or different telecommunications services . . . the targeted speech in this case fits soundly within the definition of commercial speech."). Moreover, the court also held that any intra-carrier speech that is implicated by the rules is also protected commercial speech. U.S. West, 182 F.3d at 1233 n.4 ("When the sole purpose of the intra-carrier speech based on CPNI is to facilitate the marketing of telecommunications services to individual customers, we find the speech integral to and inseparable from the ultimate commercial solicitation [such that] the speech is properly categorized as commercial speech").

Next, the Tenth Circuit applied the test from Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y., 477 U.S. 557 (1980). Under Central Hudson, non-misleading commercial speech regarding a lawful activity is a form of protected speech under the First Amendment. Central Hudson, 477 U.S. at 562-63; accord Florida Bar v. Went For It, Inc., 515 U.S. 618, 623

(1995). A restriction on lawful, non-misleading commercial speech is valid if the government establishes (1) that there is a substantial state interest in regulating the speech; (2) the regulation directly and materially advances that interest; and (3) the regulation is no more extensive than necessary to serve the interest. Central Hudson, 477 U.S. at 564-65.

In applying this test, the Tenth Circuit found that though privacy may rise to the level of a substantial state interest, the FCC had failed to establish that interest in the administrative record. U.S. West, 182 F.3d at 1234-35 ("the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity"). The court also found that even assuming a substantial state interest, the regulations were unconstitutional because the FCC had failed to "demonstrate that the harms [the FCC] recites are real and that [the FCC's] restriction will in fact alleviate them to a material degree." Id. at 1237 (quoting Edenfield v. Fane, 507 U.S. 761, 7771 (1993)) ("the government presents no evidence showing the harm to either privacy or competition is real.").

Despite these shortcomings, the Tenth Circuit finally invalidated the regulations because the FCC had failed to demonstrate that the opt-in strategy was no more extensive than necessary to achieve the government's goals in light of the

possible use of an opt-out strategy. Id. at 1238-39 ("based on the record before us, the agency has failed to satisfy its burden of showing that the customer approval regulations restrict no more speech than necessary to serve the asserted state interests"). According to the court, the absence in the record of any consideration of less restrictive approaches such as an opt-out approach indicated that the regulations could not possibly be narrowly tailored.[4] Id.

B. Verizon's motion

In light of the outcome in U.S. West and the similarities between the FCC's and WUTC's regulations, Verizon Northwest ("Verizon"), plaintiff in this case, contends that the WUTC's new rules are an unconstitutional limitation of its commercial speech rights. According to Verizon, the new rules restrict its ability to use CPNI for targeted marketing and product development and, therefore, unduly limit its exercise of protected commercial speech. Accordingly, Verizon seeks a preliminary injunction enjoining enforcement of these rules.[5]

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[4] As a consequence of U.S. West, the FCC reconsidered its record and found that an opt-out approach was sufficient to protect the privacy interests at stake.

[5] Verizon also contends that the rules are void for overbreadth and vagueness.

II. DISCUSSION

A. Preliminary injunction standard

To obtain a preliminary injunction, Verizon must show "either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in their favor." S.O.C., Inc. v. County of Clark, 152 F.3d 1136, 1142 (9th Cir. 1998). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (2001) (internal citation and quotation omitted).

B. Serious questions going to the merits

The court finds that, in light of U.S. West, Verizon raises serious questions concerning its First Amendment claims. The WUTC's rules, while differing in some aspects from the FCC's regulations, are substantially similar to those rules and, therefore, warrant constitutional analysis.[6] Though the outcome in U.S. West does not warrant a finding that the WUTC's rules are unconstitutional,[7] that case makes clear that opt-in approaches

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[6] E.g., both regulations require opt-in approval for the use of some CPNI for "out-of-category" marketing.

[7] The Tenth Circuit left open the possibility in U.S. West that regulations such as the FCC's would pass constitutional muster on a different record. In fact, the WUTC fits its argument exactly within that holding, arguing that its record succeeds where the FCC's failed. Order Adopting and Repealing Rules Permanently, General Order No. R-505, WUTC Docket No. UT-

on the use of CPNI raise serious constitutional issues. At the least, U.S. West highlights the fact that this court must closely inspect the record to determine whether the WUTC's rules are constitutional under Central Hudson. Such an inspection is best accomplished after the parties complete discovery and are prepared to present a complete record to the court.

C. Balance of hardship[8]

Given that Verizon has raised serious questions on the merits, it has also demonstrated sufficient irreparable injury to merit temporary relief. Sammartano v. First Jud. Dist. Ct., 303 F.3d 959, 973 (9th Cir. 2002) ("a party seeking a preliminary injunction can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim."); S.O.C., 152 F.3d at 1148 ("[a]ny loss of First Amendment freedoms, even briefly, can constitute irreparable injury").

The WUTC asks the court to balance this hardship with the potential injury to the public's privacy interest if the new rules are enjoined. However, even if Washington's rules are enjoined, the public's privacy interest will still be protected by the FCC's rules promulgated in response to U.S. West. See 67

990146, at 10 ("We consider a record different from the FCC's").

[8] This discussion subsumes a consideration of the public interest, which Ninth Circuit precedent requires this court to examine in determining the appropriateness of a preliminary injunction. Sammartano v. First Judicial Dist. Ct., 303 F.3d 959, 974 (9th Cir. 2002).

Fed. Reg. 59211 (Sept. 20, 2002). Those rules, which operate nationwide, require customer approval for the use of CPNI for "out-of-category" marketing.[9] 47 C.F.R. § 64.2005 (2002). Furthermore, the rules mandate certain safeguards for the disclosure of CPNI to third-parties. Id. § 64.2007(b)(2). Under these regulations, consumers retain control over the use of their CPNI, protecting their privacy interest. Inasmuch as a preliminary inspection of the record before the court does not reveal any irreparable harm to the public under the FCC's regulatory regime (fear, shock, and outrage do not amount to irreparable injury where such injury can be avoided by opting out), it cannot be said that the potential harm to Verizon's right to free speech is outweighed by the harm to the public's privacy interest pending a determination founded on a more complete record. The court finds, therefore, that the balance of hardships tips in Verizon's favor.

III. CONCLUSION

For the foregoing reasons, the court finds that Verizon has raised serious questions about the constitutionality of the WUTC's new regulations and that the balance of hardships tips in Verizon's favor. Accordingly, the court GRANTS Verizon's motion for a preliminary injunction [docket no. 2-1]. The court remands

[9] Under the regulations, carriers can use CPNI for "same-category" marketing without customer approval.

the parties that the court has ordered them to expedite filing their motions for summary judgment regarding a permanent injunction in which the parties shall present specific evidence from the record (or lack thereof) to support their claims.

DATED at Seattle, Washington this 10th day of February, 2003.

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE