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AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
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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

*C. J. R., BJR*

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1 their service.<sup>1</sup> For instance, CPNI includes information about  
2 calls made and received such as whether they were local or long  
3 distance, time of day of the call, the originating and destina-  
4 tion phone numbers, and whether the call was answered or the line  
5 was busy. CPNI also includes information about the services to  
6 which a customer subscribes such as call forwarding or caller-  
7 identification. Under the WUTC's rules, CPNI consists of both  
8 "call detail" and "private account information." Call detail is

9 [a]ny information that identifies or reveals for any  
10 specific call, the name of the caller (including name  
11 of a company, entity, or organization), the name of any  
12 person called, the location from which a call was made,  
13 the area code, prefix, any part of the telephone number  
14 of any participant, the time of day of a call, the  
15 duration of a call, or the cost of a call

16 [and] information associating a specific customer or  
17 telephone number with the number of calls that are  
18 answered or unanswered, correlated with a time of the  
19 day, day of the week, week or weeks, or by any time  
20 period shorter than one month.

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

22 <sup>1</sup> As defined under federal law, CPNI is

23 (A) information that relates to the quantity, technical  
24 configuration, type, destination, location, and amount  
25 of use of a telecommunications service subscribed to by  
26 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

(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).

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

4 Under the new regulations, a telecommunications carrier  
5 cannot disclose either "call detail" or "private account informa-  
6 tion" to third parties outside the carrier's organization without  
7 explicit authorization. As to in-company use, carriers must  
8 provide customers the opportunity to opt-out of that carrier's  
9 use of "private account information" for "out-of-category"  
10 marketing.<sup>2</sup> Use of private account information for "same-cate-  
11 gory" marketing is not restricted. A carrier must first obtain  
12 a customer's explicit approval ("opt-in") before using "call  
13 detail" for any purpose other than billing.

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

15 In U.S. West v. FCC, 182 F.3d 1224 (10th Cir. 1999), the  
16 Tenth Circuit struck down FCC regulations that closely resemble  
17 the WUTC's. 182 F.3d at 1239. The FCC's regulations required  
18 customer opt-in approval for the use of CPNI for out-of-category  
19 marketing.<sup>3</sup> The regulations also required opt-in approval for  
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21 <sup>2</sup> "Out-of-category" marketing is the marketing of a category  
22 of services to which a customer does not already subscribe.  
23 "Same category" marketing is the marketing of a category of  
services to which a customer already subscribes.

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

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

5 In considering the constitutionality of the FCC's rules, the  
6 Tenth Circuit first found that the marketing activities impacted  
7 by the FCC's rules were commercial speech subject to constitu-  
8 tional protection. U.S. West v. FCC, 182 F.3d 1224, 1232-33  
9 ("Because petitioner's targeted speech to its customers is for  
10 the purpose of soliciting those customers to purchase more or  
11 different telecommunications services . . . the targeted speech  
12 in this case fits soundly within the definition of commercial  
13 speech."). Moreover, the court also held that any intra-carrier  
14 speech that is implicated by the rules is also protected commer-  
15 cial speech. U.S. West, 182 F.3d at 1233 n.4 ("when the sole  
16 purpose of the intra-carrier speech based on CPNI is to facili-  
17 tate the marketing of telecommunications services to individual  
18 customers, we find the speech integral to and inseparable from  
19 the ultimate commercial solicitation [such that] the speech is  
20 properly categorized as commercial speech").

21 Next, the Tenth Circuit applied the test from Central Hudson  
22 Gas & Electric Corp. v. Public Service Comm'n of N.Y., 477 U.S.  
23 557 (1980). Under Central Hudson, non-misleading commercial  
24 speech regarding a lawful activity is a form of protected speech  
25 under the First Amendment. Central Hudson, 477 U.S. at 562-63;  
26 accord Florida Bar v. Went For It, Inc., 515 U.S. 618, 623

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

7 In applying this test, the Tenth Circuit found that though  
8 privacy may rise to the level of a substantial state interest,  
9 the FCC had failed to establish that interest in the administra-  
10 tive record. U.S. West, 182 F.3d at 1234-35 ("the government  
11 must show that the dissemination of the information desired to  
12 be kept private would inflict specific and significant harm on  
13 individuals, such as undue embarrassment or ridicule, intima-  
14 tion or harassment, or misappropriation of sensitive personal  
15 information for the purposes of assuming another's identity").  
16 The court also found that even assuming a substantial state  
17 interest, the regulations were unconstitutional because the FCC  
18 had failed to "demonstrate that the harms [the FCC] recites are  
19 real and that [the FCC's] restriction will in fact alleviate them  
20 to a material degree." Id. at 1237 (quoting Edenfield v. Fane,  
21 507 U.S. 761, 7771 (1993)) ("The government presents no evidence  
22 showing the harm to either privacy or competition is real.").

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

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

9 B. Verizon's motion

10 In light of the outcome in U.S. West and the similarities  
11 between the FCC's and WOTC's regulations, Verizon Northwest  
12 ("Verizon"), plaintiff in this case, contends that the WOTC's new  
13 rules are an unconstitutional limitation of its commercial speech  
14 rights. According to Verizon, the new rules restrict its ability  
15 to use CPNI for targeted marketing and product development and,  
16 therefore, unduly limit its exercise of protected commercial  
17 speech. Accordingly, Verizon seeks a preliminary injunction  
18 enjoining enforcement of these rules.<sup>5</sup>

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22 <sup>4</sup> As a consequence of U.S. West, the FCC reconsidered its  
23 record and found that an opt-out approach was sufficient to  
24 protect the privacy interests at stake.

25 <sup>5</sup> Verizon also contends that the rules are void for  
26 overbreadth and vagueness.

1 II. DISCUSSION

2 A. Preliminary injunction standard

3 To obtain a preliminary injunction, Verizon must show  
4 "either (1) a likelihood of success on the merits and the possi-  
5 bility of irreparable injury, or (2) the existence of serious  
6 questions going to the merits and the balance of hardships  
7 tipping in their favor." S.O.C., Inc. v. County of Clark, 152  
8 F.3d 1136, 1142 (9th Cir. 1998). "These two formulations repre-  
9 sent two points on a sliding scale in which the required degree  
10 of irreparable harm increases as the probability of success  
11 decreases." A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004,  
12 1013 (2001) (internal citation and quotation omitted).

13 B. Serious questions going to the merits

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

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22 <sup>6</sup> E.g., both regulations require opt-in approval for the use  
of some CPNI for "out-of-category" marketing.

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24 <sup>7</sup> The Tenth Circuit left open the possibility in U.S. West  
that regulations such as the FCC's would pass constitutional  
25 argument exactly within that holding, arguing that its record  
26 succeeds where the FCC's failed. Order Adopting and Repealing  
Rules Permanently, General Order No. R-505, WUTC Docket No. UT-

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

7 C. Balance of hardship<sup>9</sup>

8 Given that Verizon has raised serious questions on the  
9 merits, it has also demonstrated sufficient irreparable injury to  
10 merit temporary relief. Sammartano v. First Jud. Dist. Ct., 303  
11 F.3d 959, 973 (9th Cir. 2002) ("a party seeking a preliminary  
12 injunction can establish irreparable injury sufficient to merit  
13 the grant of relief by demonstrating the existence of a colorable  
14 First Amendment claim."); S.O.C., 152 F.3d at 1146 ("[a]ny loss  
15 of First Amendment freedoms, even briefly, can constitute irrepar-  
16 able injury").

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

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23 990146, at 10 ("We consider a record different from the FCC's").

24 <sup>9</sup> This discussion subsumes a consideration of the public  
25 interest, which Ninth Circuit precedent requires this court to  
26 ~~examine in determining the appropriateness of a preliminary~~  
injunction. Sammartano v. First Judicial Dist. Ct., 303 F.3d  
959, 974 (9th Cir. 2002).

ORDER

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

17  
18 III. CONCLUSION

19 For the foregoing reasons, the court finds that Verizon has  
20 raised serious questions about the constitutionality of the  
21 WUTC's new regulations and that the balance of hardships tips in  
22 Verizon's favor. Accordingly, the court GRANTS Verizon's motion  
23 for a preliminary injunction [docket no. 2-1]. The court reminds  
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26 <sup>9</sup> Under the regulations, carriers can use CPNI for "same-  
category" marketing without customer approval.

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

5 DATED at Seattle, Washington this 10<sup>th</sup> day of February,  
6 2003.

7   
8 BARBARA JACOBS ROTHSTEIN  
9 UNITED STATES DISTRICT JUDGE

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