BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Rulemaking To Consider Possible Corrections And Changes in Rules in Chapter 480-120 WAC and Chapter 480-80 WAC	)	DOCKET NO. UT-040015

Second Comments of Public Counsel
Attorney General of Washington

June 30, 2004

I. INTRODUCTION

Public Counsel files these second round comments in response to the Washington Utilities and Transportation Commission's (Commission) June 9, 2004, Notice of Opportunity to File Written Comments. The comments primarily address Customer Proprietary Network Information (CPNI) issues, but also address other elements of the rules.

Public Counsel has previously advocated for a comprehensive opt-in method of approval for using, disclosing or providing access to Customer Proprietary Network Information (CPNI). Public Counsel continues to believe that an all-inclusive opt-in approach provides the best protection for a customer's private account information and is most consistent with the customer's inherent right to control his or her own private information. In the alternative, if the Commission chooses an approach along the lines of the Federal Communications Commission (FCC) rules, we recommend additions and clarifications to the proposed draft rules that would provide additional safeguards for consumer's private information.

These are preliminary comments and will be supplemented as the proceeding develops. The regulation of CPNI has raised a number of complex practical, technical, and policy questions

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in past proceedings, and this draft does likewise. Public Counsel commends the Commission for returning to this important topic.

II. COMMENTS ON CPNI

A. The Commission Should Adopt An "All Opt-In" Regime.

Public Counsel previously filed comments in this docket recommending that the Commission consider a broad opt-in approach to approval of CPNI. This was consistent with our advocacy in the prior CPNI rulemaking We recognize that the federal district court has enjoined the "split-regime" rules previously adopted by the Commission which contained a form of opt-in. *Verizon v. Showalter*, 282 F.Supp.2d 1187 (W.D. Wash. 2003). We do not read the decision in *Verizon v. Showalter* as precluding the Commission from adopting a comprehensive opt-out regime on an appropriate record. Public Counsel continues to believe that rules providing for opt-in approval methods are the most effective means of protecting consumer privacy, the most consistent with the Telecommunications Act of 1996, and the most consistent with the customer's right to control the customer's own information.

For these reasons, the Commission should consider amending the proposed rules to incorporate an opt-in approach that would meet these objectives and also be consistent with federal law. The opt-in method is preferred by the vast majority of customers.[1] Further, the FCC expressly permits states to promulgate more restrictive rules for protecting CPNI than the FCC has adopted. *In the Matter of Implementation of the Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Section 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,*

[1] *See* Interagency Public Workshop, "Consumer Privacy Attitudes and Behaviors Survey Wave III, Harris Interactive," http://www.ftc.gov/bcp/workshops/glb/> (last accessed June 29, 2004).

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Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115, 96-149, 00-257, Adopted: July 16, 2002, Released: July 25, 2002, ¶7.

These comments are built around a number of policy principles which are important to Public Counsel:

- Customers have, and value, the right to control the use of their own private information.
- Approval given by customers for use of their information should only occur as a result of an informed consent, affirmatively exercised in advance of the use, by some verifiable customer action such as a written consent.
- Customer subscription to a telecommunications service is related to service provision and does not constitute a broad consent to use of CPNI for communications marketing purposes of any kind, or to information sharing of any kind.
- Telecommunications companies have legitimate needs to use CPNI to provide service, maintenance and security. Any "right to market" possessed by the telecommunications carrier does not by definition include a right of access to and use and sharing of private customer information.
- Disclosure of CPNI by telecommunications providers to any affiliate, agent, joint-venturer, or independent contractor for any purpose is not consistent with the customer's expectation of privacy, and has inherently increased risks for customers.
- "Negative check-off" passive approval methods such as "opt-out" approval are inherently flawed and harmful to customers.
- If "opt-out" methods of approval are permitted, they are only as effective as the quality and content of the notice given.

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Public Counsel recognizes that the Commission has proposed to essentially incorporate current FCC rules into the Washington Administrative Code. Adopting rules consistent with current FCC rules at least provides a minimum baseline for enforcement in Washington of existing limited federal-style protections. In the event the Commission chooses that direction, we recommend, however, that the Commission consider improvements, clarifications and refinements to the proposed draft rules, consistent with the FCC rules and Commission authority, to provide for broader use of opt-in methods and to address such issues as proper form, content, and timing of opt-out notices.

B. Use Of Customer Proprietary Network Information (CPNI) Without Customer Approval (WAC 480-120-X02)

Public Counsel believes that WAC 480-120-X02(1) should incorporate a policy statement adopting the premise that a customer's information belongs to the customer, and CPNI may not be used except to provide the customer with telecommunications service.

Public Counsel recommends that a company be required to provide, at a minimum, notification and opt-out opportunities to a customer before that company uses a customer's CPNI information for any marketing, whether in or "out-of-category".[2] The court in *Verizon v. Showalter* clearly saw a need for consumers to be able to have a say in the use of their private information when it found a substantial state interest in "ensuring that consumers be given an opportunity to approve uses of their CPNI." *Verizon v. Showalter,* 282 F. Supp.2d at 10. Similarly, the FCC concluded that a privacy interest exists not just regarding use of private information by an affiliate, but for use by a carrier itself. *Id.* at 9, quoting from *In re: Implementation of the Telecommunications Act of 1996,* 17 F.C.C.R. 14, 860 ¶ 31 (July 25, 2002). Such a limitation would be consistent with the express terms of Section 222 of the

[2] "Out-of-category" marketing refers to a category of services to which a customer does not already subscribe.

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Telecommunications Act of 1996 which by its terms appears to limit use, disclosure or access to CPNI to situations related to provision of service, with no reference to marketing,

C. Approval Required For Use Of CPNI (WAC 480-120-X03)

Public Counsel has two general concerns in this section of the rule. First, we recommend that opt-in approval only be available via written or electronic, rather than oral means, with the possible exception of one-time use in calls initiated by the customer under Section 222(d)(3) of the Telecom Act. Second, the area of disclosure to third parties, such as agents, independent contractors, and joint-venturers is fraught with peril and deserves special scrutiny. This is one of the issues of strongest public unease.

Public Counsel recommends that a company should be required to obtain a customer's express written or electronic, rather than oral, approval before disclosing that customer's CPNI to the company's agents, affiliates that provide communications-related services, joint venture partners, or independent contractors. The Commission has an opportunity to improve upon the federal rules by requiring opt-in approval before a company discloses a customer's CPNI to any third parties for the purpose of marketing service categories to which the customer does not subscribe. WAC 480-120-X03(2), as proposed, allows a company to disclose or permit access to a customer's CPNI to other companies for marketing communications services with merely opt-out approval, regardless of which category of service the customer subscribes. The inclusion of "communications related services" at all in permitted marketing is a matter of concern, given that it appears to broaden the permitted uses of CPNI well beyond those listed in Section 222.

D. Notice Required For Use Of CPNI (WAC 480-120-X04)

Public Counsel recommends that WAC 480-120-X04(3), Content of Notice, include more specific notice requirements in order to allow consumers to make an informed decision as to whether to permit a company to use, disclose, or permit access to the customer's CPNI. The court in *Verizon v. Showalter* recommended that the Commission "more stringently regulate the

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form and content of opt-out notices". *Id.* at 14. Public Counsel recommends that the following refinements to the notice requirements be adopted:

- All notices should be in plain language at an average reading level.
- While notice in the proposed rules is required to be in "sufficiently large type", the rules should be more specific, requiring language describing opt-out procedures to be in larger font than the surrounding text, with a minimum font size specified, and other standard consumer protection notice language prominence requirements.
- Notice requirements specific to opt-out, WAC 480-120-X04(4), should be amended to require annual notification, rather than notification every two years.
- Public Counsel commends the Commission in proposing WAC 480-120-X04(4)(v), which requires that any customer be able to opt out at any time at no cost to the customer. The proposed rules, however, do not specify any method to accomplish this requirement when the notification is written. If the notification is written, both the initial and each repeated notification should include a postage paid reply card enabling the customer to opt out.
- In addition, the Commission should require companies to provide a toll-free phone number that allows the customer to opt out by phone 24 hours a day, seven days a week.
- Billing statements should include a box on the face of the payment coupon to check off to allow a customer to opt out.

Public Counsel is concerned with a company's ability to state in the notification any persuasive language intended to encourage a customer to permit the company to use, disclose or permit access to the customer's CPNI. Specifically, if a company is allowed to provide language in the notification pursuant to WAC 480-120-X04(3)(g), then the company should also be required to specifically state in the notification that giving permission to use, disclose, or provide access to CPNI may result in direct solicitation to the customer regarding communications services and products. Finally, as the court in *Verizon v. Showalter* suggested, the Commission

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should consider rules that would require a company to implement educational campaigns to inform consumers of their rights. *Id.*

III. OTHER RULES

A. WAC 480- 120-122 Establishing Credit – Residential Service

With respect to subsection (5) of this rule, regarding the customer option to pay fifty percent of a deposit or select toll restriction, Public Counsel encourages the Commission to consider whether applicants or customers are sufficiently informed of these options, and whether the rule should be further modified to require companies to inform customers and applicants of these alternatives to payment of a full deposit amount.

B. WAC 480-120-133 Response Time For Calls To Business Office Or Repair Center

Public Counsel has concerns with some of the proposed draft language of this rule. In particular, we oppose the weakening of subsection (2)(b) to allow an average answer time of 90 seconds (instead of 60 seconds) from the time of the last menu selection to reach a live representative. It is our understanding that at the CR-102 phase during the UT-990146 rulemaking, this rule provided for an average wait time of 30 seconds to reach a live representative. However, in the rule adoption order, the Commission increased this duration to 60 seconds.[3] We oppose further weakening of this standard from 60 to 90 seconds. To the extent any modifications are made to this rule, we encourage the Commission to request that companies provide answer time data to the Commission as part of this rulemaking record. Indeed, it may be the case that upon reviewing such data, the Commission determines that an average wait time of 30 seconds is most appropriate. In addition, we object to the final sentence in subsection (2)(b), which creates a loophole that would further weaken the answer time standard.

[3] *In the Matter of Amending, Adopting and Repealing: Chapter 480-120 WAC Relating to Telephone Companies,* UT-990146, General Order No. R-507, December 16, 2002, at ¶ 72.

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C. WAC 480-120-161 Form Of Bills

Public Counsel supports the proposed requirement in subsection (4)(e), but we seek clarification as to whether the intent is to provide the Internet address of the company's web site, or to provide an address that takes a customer directly to the page with tariffs or price lists. We recommend the latter approach.

D. WAC 480-122-020 Washington Telephone Assistance Program (WTAP) Rate

Public Counsel does not yet have a specific recommendation regarding the proposed modifications to this rule. Certainly, at a minimum it is appropriate to require eligible telecommunications carriers (ETCs) to offer the WTAP rate. However, we have a couple of concerns with limiting participation to ETCs. First, do all parts of the state have at least one designated ETC? Second, to what extent would WTAP customers have any competitive choices if only ETCs are required to offer the WTAP rate? We believe these issues should be explored as part of this rulemaking.

IV. CONCLUSION

We look forward to providing additional comments at future opportunities, in particular on the important issue of CPNI. We also look forward to working with Commission Staff and stakeholders during the remainder of this rulemaking.

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