BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Rule-Making Proceeding Related to Telecommunications Companies – Chapter 480-120 WAC	DOCKET NO. UT-990146

Comments of
Public Counsel
Attorney General of Washington

January 31, 2002

Public Counsel files these comments in response to the Commission's January 14, 2002 Notice of Opportunity to File Comments. We look forward to working with Commission Staff and all stakeholders during the entirety of this process and at the upcoming open meeting scheduled for February 5, 2002.

Fundamental to Public Counsel's comments is the belief that "opt-out" privacy regimes do not adequately protect a consumer's reasonable expectation of privacy. In addition to the comments below, Public Counsel has answered the questions proffered in the commission's January 14, 2002 Notice. Also attached is a copy of the filing made at the Federal Communications Commission by the National Association of Attorney's General on behalf of the Washington state Attorney General and 38 other state Attorneys General regarding the FCC's ongoing rulemaking process regarding Customer Proprietary Network Information (CPNI).

I. The Attorney General supports an "Opt-in" privacy policy and the current WUTC CPNI rules.

The Attorney General's Office has consistently recommended to the WUTC that it require telecommunications carriers (hereafter carriers) to obtain their customer's written, oral, or electronic authorization prior to sharing CPNI. *Comments of Public Counsel* in Docket UT-971514 (January 8, 1998) and *Additional Comments of Public Counsel* (May 20, 1998). As detailed in the attached comments of Attorneys General filed with the FCC, the Attorney General's position remains the same. Carriers should obtain their customers' express consent before using CPNI for a purpose other than those necessary to provision service and maintain competitive fairness.

II. Legal Background

The question of whether carriers must obtain their customers' express consent prior to using CPNI data or may, through an "opt-out" approach take silence as "approval," arises as a result of the Telecommunications Act of 1996. 47 USC §222. It may be helpful to the commission's consideration of this issue to have a brief review of the legal framework and background of the CPNI issue as it is now before the commission.

The Act states in relevant part:

> 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 a telecommunications service 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. 47 USC §222(c)(1).[1] (emphasis added)

The Act defines "customer proprietary network information" as:

(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

(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 USC §222((h)(1). (emphasis added)

Two important requirements of the federal law are clear, the carrier must obtain its customer's "approval" and CPNI is the customer's information made available to the carrier only as a result of their service relationship.

Pursuant to the authority delegated to it in the Act the FCC engaged in rulemaking to define the parameters of how carriers may use CPNI data and, critically, whether they must obtain their customer's express approval for using the data other than to provision the existing service (Opt-In) or whether they could take silence as "approval" (Opt-Out). The FCC enacted a set of rules that created a framework for carriers' use of CPNI. 47 CFR §64.2003-.2009. The FCC required that carriers obtain the express approval of its customers before using CPNI for other purposes and permitted them to do so by written, oral, or electronic means. 47 CFR §64.2007(b). In essence, the FCC said that when Congress used the term "approval" it meant affirmative consent and not mere silence.

[1] The Act provides for a number of limited exceptions not relevant to this discussion such as permitting disclosure for 911 and emergency purposes, in order to bill a customer, and the marketing of a limited list of specific services.

The WUTC also enacted a set of CPNI rules creating the same requirements under state agency rule as those set forth by the FCC. WAC 480-120-151 - 154. It is important to note that the WUTC's CPNI rules have never been challenged before the agency or a court of law and that they continue to be in effect today.

Qwest Communications (f/k/a U.S. West, Inc.) challenged the FCC's rules in the 10th circuit and on appeal the FCC's CPNI rule relating to Opt-in was vacated for failure to consider the constitutional implications of the Opt-in rule. *U.S. West, Inc. v. Federal Communications Commission*, 182 F.3d 1224, 1240 (August 18, 1999). In a divided opinion (2:1) the 10th circuit appellate panel decided that the FCC had not adequately considered the first amendment implications of its rulemaking and had failed to develop an adequate record to support its rule. *Id.* at 1239. The majority held that the FCC had not adequately developed its rulemaking record in considering "opt-out" and demonstrating why it was inadequate.[2] It is also clear that the majority in the 10th circuit appellate panel did not prefer Opt-out over Opt-in. *Id.* at 1240, FN 15. The dissent in the 10th circuit panel would have dismissed U.S. West's appeal after finding the FCC's interpretation of "approval" as requiring knowledge and consent, i.e. Opt-In, a reasonable interpretation of law and finding U.S. West's constitutional arguments frivolous. *Id.* at 1241-1248.

Subsequent to the 10th circuit decision the FCC issued an order and notice of proposed rulemaking that permitted carriers to pursue either Opt-In or Opt-out. *In the Matter of Implementation of the Telecommunications 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*

[2] The court held that the CPNI regulation implicated the first amendment by constituting a restriction on commercial speech. *Id.* at 1233. As such, the agency must justify its regulation by demonstrating it has a substantial interest in regulating CPNI speech, that the regulation directly and materially advances the state interest, and that the regulations are narrowly tailored. *Id.* at 1234-1239. (the *Central Hudson* test)

Amended, Clarification Order and Second Further Notice of Proposed Rulemaking, CC Docket No.s 96-115, 96-149 (August 28, 2001).

The legal effect of the 10th circuit decision and the subsequent FCC order On Washington state's CPNI rules is debatable. However, it is clear that the WUTC's rules and its rulemaking record of reviewing Opt-In versus Opt-out was not before the 10th circuit. It is also not at all clear that the superior or federal courts of Washington state would reach the same conclusion as the 10th circuit panel. It is also important to note that unlike our federal constitution, the Washington state constitution has an express right of privacy.[3] This state constitutional right to privacy may well be relevant to a Washington court's review of the WUTC's rules under a similar constitutional challenge to the one raised in the 10th circuit, and is certainly a legal right the Commission should consider in its present review of these rules. In sum, a number of debatable legal questions are presented by the current circumstances.

What is not debatable is the legal status of commission's current CPNI rules. They are in effect and the commission should enforce them. No party has challenged the WUTC's rules, the agency has not vacated them, and they remain in effect today. Carriers operating in Washington must operate under "Opt-in" or be in non-compliance with the WUTC's CPNI rules.

The Attorney General encourages the WUTC to continue to require carriers operating in Washington state to obtain their customer's explicit "approval" via Op-in and not allow Opt-out. CPNI is the customer's private information and the commission should consider it the customer's property. The language of the Act is clear that this very personal information is only made available to the carrier by the customer for the purpose of provisioning service. Given the intimate nature of the information contained in CPNI, the commission should not consider silence (i.e. Opt-out) as "approval" under the Act. CPNI is the customer's information and the commission should consider it the customer's property. The relationship between the customer

[3] Article 1, §7 states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

and the carrier is analogous to that of a licensor and a licensee. The customer "licenses" the carrier to use the CPNI for purposes relating to provisioning service and not for marketing unrelated services. If the carrier wishes to extend the scope of the "license" it should be required to obtain affirmative consent before doing so unilaterally on its own (which is the effect of an Opt-out regime to most customers). For the reasons stated above, the Attorney General encourages the commission to maintain its current rules and require carriers to obtain their customer's explicit approval prior to using CPNI for purposes unrelated to existing service.

III. Answers to the Questions posed by the WUTC in the January 14, 2002 Notice.

Appended below are answers to the questions posed by the commission in its notice.

1A. If the method for determining customer approval for sharing or selling customer information is “opt-out” (that is, those who do not contact the company and “opt-out” are approving the use of their information), how many notices should be required before a carrier sells, shares, trades, or uses customer information? One notice? More than one? How many?

The Washington State Attorney General opposes the use of "opt-out" notices. If the commission decides to permit opt-out privacy regimes than the company in possession of the customer's private information should be required to give direct notice to the customer in a manner designed to adequately appraise the customer of the company's intention and the methods available to the customer for "opting out." Such notices should be plainly worded and titled "IMPORTANT PRIVACY INFORMATION" or use similar language to inform the customer of the importance of the notice. Multiple notices would better serve to provide notice to customers than a single notice.

1B. If you are a Qwest customer, were you aware that you received a notice on this topic with your bill that arrived between December 10 and January 10?

N/A

2A. Notices can be sent with bills or in separately marked envelopes. Which do you think is the better choice for a notice on the topic of sharing customer private information?

The best choice for providing notice to customers is the one which is effective. A notice sent with a bill can be misleading and ineffective, as was recently the case in Washington. Generally, a separate mailing which conspicuously notifies the customer that it is regarding their privacy is more likely to be effective notice.

2B. If you are a Qwest customer, did the statement on the notice that accompanied your bill which said "The following information does not impact your Qwest billing" make you more or less inclined to read it?

We believe the language Qwest chose for its initial notice discouraged customers from reading it.

3A. If the method for determining customer approval for sharing or selling customer information is "opt-out," should that approval be assumed even if it is very difficult to contact the company and "opt-out?"

No. If the commission permits the telecommunications companies it regulates to use an "opt out" regime it should also require that companies pursuing this path make every effort to make "opting out" as easy as possible for its customers. Washington state's recent experience with Qwest prior to its withdrawal of its plans to use "opt out" is illustrative of this in both positive and negative ways. After the initial expression of concern by the public, the commission itself, and the Attorney General, Qwest improved the three methods of opting out it had made available

to its customers. In addition to these methods of "opting out" the Attorney General would recommend that the commission require that companies pursuing an opt-out regime make available "check boxes" on the back of the customer's bill so that the customer can indicate whether he or she wishes to opt-out and additionally, be placed on a "do not call" list. This could be handled by the company in the same fashion as it currently does when customers update or correct errors in their mailing address (a similar function the returnable portion of the bill provides). Additionally, the company could place in the bill envelope along with the notice a returnable postcard which the customer could fill out and return. These additional methods would not only assure better notice, but provide better feedback to the company of its customers' preferences regarding its use of the customers' personal information.

3B. If you are a Qwest customer who “opted-out” or attempted to “opt-out,” was it easy or difficult? Was it time consuming? Did you consider giving up in your efforts? Did you actually give up?

The Attorney General's Office received numerous complaints from Qwest customers who had attempted to opt-out and were unable to due to the toll free number being busy, lengthy hold times, and Qwest representatives attempting to sell then services during the call.

4. Is a one-time notice of a customer’s right to “opt-out” sufficient? Or should a telephone company also provide an “opt-out” opportunity on an annual basis?

A company permitted to use "opt out" should provide at least annual notices to customers. At a minimum, all new customers post-notice should receive conspicuously titled notice information at the time the obtain service so that they can make an informed decision. As noted above, having check boxes on the returnable portion of the customer's bill would serve the same function on a monthly basis, at little additional cost to the company.

5. Should a telephone company using the “opt-out” method give a customer a chance to “opt-out” at the time the customer orders service?

Yes. The carrier should be required to notice the customer at the same time, and by the same method, as the request for service is received. I.e. if a customer calls the carrier to initiate service part of the salesperson's script should include oral notice of the carrier's CPNI policy and offer an opportunity to orally opt-out at that time.

6. What is your preference for giving approval for use of your customer information, including who calls you and who you call: “Opt-in” or “opt-out?”

The Washington state Attorney General believes the "opt-in" regime is best suited to protecting Washington consumer's expectation of privacy.

7. If your information is used without your approval, what harm will this cause you? Will it endanger you? Will it cost you money? Will it potentially cause embarrassment? Is there any other specific harm that might occur?

Please see the attached comments filed by 39 state Attorneys General with the FCC.