BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Rulemaking – Chapter 480-120 Telecommunications Operations	)	DOCKET NO. UT-990146
	)	SUPPLEMENTAL COMMENTS OF SPRINT ADDRESSING PROPOSED CPNI REGULATIONS

. . . . . .

COMMENTS OF SPRINT

Sprint Communications Company L.P. and United Telephone Company of the Northwest, d/b/a Sprint (collectively herein "Sprint or the "Company") submit these supplemental written comments in advance of the March 27 Open Public meeting in the hope that they can be considered before the proposed Telecommunications Operations rules are advanced to the final, CR-102 stage. Sprint understands and respects the confidentiality of our customer's proprietary network information (CPNI) and the rights of our customer under federal law to limit the company's ability to use, disclose, or permit access to such information. Additionally, Sprint has no desire to share such information with other companies unless directed to do so by our customers. Sprint's intention is to use information it has about its customers in the manner any good business would: To better understand our customers' needs. Equipped with such knowledge, the Company can develop and market services specifically suited to meet customer needs and market to those who are most likely to benefit from or have an interest in an offering.

Sprint appreciates the public policy concerns that the Commission must weigh in balancing the need for consumers to preserve their privacy against the Company's need to access proprietary information for business development. Unfortunately, the current set of draft rules

would impermissibly restrict Sprint's right to engage in commercial speech with its customers. Additionally, the rules are inconsistent with Federal Law, which will result in confusion for consumers trying to understand their rights, and confusion for the companies attempting to implement CPNI use in Washington. The need to modify existing systems and procedures to address these unique state requirements will be costly to companies and, ultimately, to Washington ratepayers.

I. Inconsistencies between FCC rules and State Rules should be Corrected in Favor the Federal Law.

Sprint notes that there are a number of inconsistencies between the WUTC rules and the current FCC rules. Whether or not these inconsistencies represent conflicts with the FCC's rule for purposes of preemption, they will create confusion for companies subject to the rule and are likely to lead to customer confusion regarding customers' rights and permissible carrier use of CPNI.

Many carriers operating within the state provide service in multiple states and provide interstate services. As the jurisdictional nature of service offerings blur, as is the trend with data and bundled services, it will be increasingly difficult for companies to determine how different sets of rules will apply.

The FCC has determined that it will exercise its preemption authority on a case-by-case basis where conflicts occur, stating that, "Exercising this authority is consistent with what Congress envisioned to *ensure a uniform national CPNI policy, and is necessary to reduce confusion and controversy for customers and carriers regarding carrier use of CPNI.*"[1]

[1] Clarification Order and Second Further Notice of Proposed Rulemaking, FCC 01-247, CC Docket 96-115, 96-149 released September 7, 2001, at p.7, ¶13 ("Clarification Order"). See also Order on Reconsideration and Petitions for Forbearance, FCC 99-223CC Docket No. 96-115, 96-149 released September 3, 1999 p. 61, ¶112 ("Reconsideration Order").

(emphasis provided). For these reasons and those set forth below, Sprint urges the Commission to follow the FCC's approach.

The FCC has analyzed the issue over many years and is, therefore, in the best position to articulate rules that fairly balance rights and interests of all parties involved. Moreover, the FCC is currently soliciting feedback from stakeholders, including state commissions, in an effort to further refine the rules, if necessary, in order to fairly balance the interest of consumer privacy with carriers' right to commercial speech. Surely one set of national rules is the best way to achieve this objective.

The primary differences between the proposed State rules and the FCC rules that Sprint hopes can be aligned are enumerated below:

1. Definitional changes. The WUTC would distinguish DSL as a separate category of service for purposes of determining related/unrelated services, whereas the FCC does not.
2. The WUTC would not permit the carrier to use, disclose, or permit access to a customer's call detail unless the customer expressly agrees, or "opts in." Current FCC rules permit the use of call detail unless the customer has opted out, provided customers have been notified of their opt-out rights.
3. The WUTC would require an opt-in approach in order for the carrier to use private account information to sell unrelated services. The FCC currently permits companies to use all CPNI to market unrelated services under an opt-out approach.
4. The WUTC would require more mechanisms for opt-out, including an option on every payment coupon. In contrast, the FCC leaves the mechanism up to the carrier as long as the carrier provides reasonable and convenient means to opt-out, *see Clarification Order at p. 6,* ¶9, and requires only one-time notice.

5. The WUTC would require Carriers to give written confirmation on opt-ins whereas the FCC does not.
6. The WUTC would require Carriers to send written confirmation on every change of opt-in, and opt-out whereas the FCC does not.
7. The WUTC would require that a compliance certificate be filed with the annual report. The FCC permits the company to retain this on-site. The WUTC requires an officer of the company to certify compliance, whereas the FCC requires the officer to indicate whether or not company is in compliance.

A. Sprint Recommends that the Definitions in the Draft Rules be Revised so that they are Consistent with the Federal Law.

Sprint recommends that the definition of "Category of Service" found in WAC 480-120-021 match the FCC's definition in §64.2005(a). The FCC delineates categories between local, interexchange, and CMRS, whereas the WUTC treats digital subscriber line service as a separate category and also includes the PIC freeze as part of the local service.

Sprint likewise recommends that the definition of CPNI match the definition in the Telecommunications Act §222(h)(1) and FCC rules §64.2003(c). The difference between the WUTC draft and the Act is that the WUTC has inserted, "including call detail, requested by an applicant or" and "which includes information obtained by the company for the provision of telecommunication service; and . . ." Sprint's primary reason for recommending these changes is to maintain consistency between the FCC and State rules to minimize customer and company confusion, as well as the administrative costs and difficulties attendant with implementing different rules for different jurisdictions.

B. Sprint Recommends that the Commission Revise Call Detail Rules

In WAC 480-120-205(1), the Commission would forbid a company from using call detail information to provide or market service offerings, unless the customer gives explicit opt-in approval under WAC 480-120-202. Sprint believes that this prohibition would make it unduly burdensome for a company to develop, market, and provide services to meet its customers specific needs. In short, it would create obstacles for the company in conducting its fundamental business that would not be imposed on other industries and would stifle the growth the telecommunications market in Washington.

Sprint has no interest in analyzing call detail to gain personal information about its customers. The way in which the Company would use call detail would NOT result in a report that would, for instance, show that John is calling Sally 20 times a day and talking for only a minute at a time. Rather, the Company would tailor plans to suit customer's use of the network. For instance, some customers may benefit or have an interest in obtaining a block of time toll calling plan, of which they would not otherwise be aware,[2] that encompasses certain adjacent geographic areas. Such plans have been developed in the past where there is considerable demand for an EAS offering, but little or no justification for instituting a new mandatory EAS route based on public interest criteria. The raw data from the switch indicating a call pattern may "detail" who made the call, to whom, and when. The ultimate report used for marketing purposes would NOT contain such information; however, it would generate a sales lead list comprised of individual customer names who are likely to benefit or have an interest in the offering based on the data modeling results.

[2] Realistically, customers do not have the time nor the inclination to count their minutes and comb the Sprint web page, or the myriad of other telecommunication provider web pages, to find the best value. And customers that do not have computers or access to the internet, would be even less likely to find the

Without access to call detail, the company will be unable to craft plans to meet its customer's specific needs. Marketing plans would have to be prepared based on limited data or on other less accurate market research, such as polls or focus groups, or mere guesswork. Additionally, it would be difficult to target-market such options without access to call detail. Mass marketing is less cost-effective than a targeted approach, and could be vastly more intrusive to the overall customer base than it would be to the relatively few individuals who would stand to benefit from such a plan but do not wish to hear the offering.

Unfortunately, geographic, or business/residence segregation cannot effectively target customers for plans that are based on usage patterns, as we have seen with EAS studies in the past. For instance, we cannot assume that most customers in exchange A will make more calls to exchange B than to exchange C or exchange D. Indeed it is difficult to modify the draft rule to envision all the ways that data segmentation might be permitted without foreclosing linkages that have not yet been established between customers' use of existing services and new ones that might complement or replace those services. For the foregoing reasons, Sprint recommends that WAC 480-120-202 should be eliminated in its entirety.

C. Sprint Recommends that the Commission Mirror the FCC's Rules treatment of Services for which Customer Approval is Not Required.

WAC 480-120-205 is also problematic in that it does not match the requirement in the federal rules concerning when a carrier may use CPNI – which in the case of Washington, would be limited to private account information excluding call detail – without customer approval. While WAC 480-120-205(1) comports with 47 C.F.R. § 64.2005(c)(3), it omits verbiage contained in 47 C.F.R. § 62.2005(b)(1) and (c)(1), which state that a wireline carrier may use, disclose or permit access to CPNI derived from its provision of local exchange service or

---

communications plan that truly met their needs. CPNI based marketing is a service to the customer and a

interexchange service, without customer approval, for the provision of CPE and call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, protocol conversions, and inside wiring installation, maintenance, and repair services.

The FCC chose to include these services because they found that customers expect their telecommunications providers to market CPE and information services to them.[3] Specifically, it reasoned that no evidence has been produced that shows that allowing wireline carriers to market CPE to their customers, using CPNI without customer consent, violates customers' expectations.[4] The FCC was also "convinced that such usage by carriers would be beneficial to customers as new and advanced products develop."[5] Again, for the sake of consistency, and because the FCC has already developed an extensive record and analyzed the consumer issues, WAC 480-120-205 and 206 should be replaced with FCC rules §64.2005.

D. Notification Requirements that May Not Be Accurate

For the same reasons, WAC 480-120-207 should be replaced with FCC rules §64.2007. If the Commission decides against adopting the FCC rules, then certain changes should be made to WAC 480-120-207 at a minimum. WAC 480-120-207(5)(a) is over-inclusive because it requires all carriers to inform customers that they "will" disclose subscriber list information to telemarketers, even if they do not.

The rule states, "The notice must inform customers that the name, address, and telephone number, if published in the telephone directory, are not private information and will not be

---

way of limiting the volume of marketing the Company must conduct.

[3] Reconsideration Order, at ¶¶ 38-46. The information services for which carriers may use CPNI without customer approval for marketing purposes are call answering, voice mail or messaging, voice storage and retrieval services, and fax storage and retrieval services, and protocol conversions. The FCC did not include Internet access services.

[4] Id. at ¶44

[5] Id.

withheld from telemarketers if the customer opts-out." Although Sprint may disclose such information to its own telemarketers, it withholds such information from outside telemarketers for all customers. Sprint, therefore, should not be required to provide a notice that informs its customers that the Company will not withhold private information from any telemarketers. Moreover, some companies may not share directory listing information with their own telemarketers. The rule should read, "If the company provides the name, address, and telephone number to telemarketers, the notice must inform customers that the name, address, and telephone number, if published in the telephone directory, are not private information and ~~will~~ may not be withheld from telemarketers if the customer opts-out."

WAC 480-120-209 (3)(k) should read, "A company may state in the notice that the customer's approval to use, disclose, or permit access to private account information may enhance the company's ability to offer products and services tailored to the customer's needs~~, if the statement is accurate~~." There is no need for a prohibition against lying in this particular rule.

E. Sprint Recommends that the Commission Revise Notification, Re-notification and Mechanisms Required in the Draft Rules

WAC 480-120-208 through 480-120-211 outline the mechanisms for opting-out of use, disclosure, and access to private customer account information and notification requirements for opt-in and opt-out. While Sprint would be agreeable to provide most of the communication options listed in WAC 480-120-208 to its customers on a voluntary basis, it asserts that the rules are generally overly prescriptive and should comport with the FCC requirements found in §64.2007 to avoid customer confusion and minimize costs.

Two years ago, Sprint provided notification to its customers of the CPNI issue. Since then, all new customers and customers subscribing to new services have been notified of their CPNI options. Sprint's notice clearly explained what information constitutes CPNI and

expressed our desire and commitment to keep such information confidential. Sprint assured customers that we would not release their CPNI to other companies unless the customer requested in writing that we do so. The notice told customers how to prevent the company from using CPNI by calling a toll-free number and assured customers that opting-out would in no way affect their current services. The notice was comprehensible and not misleading. It was clearly legible, used sufficiently large type, and was not buried in other written material, but was instead sent as a separate postcard. Sprint made no attempt to persuade customers to freeze third party access to CPNI, nor did Sprint impose a deadline for action by the customer. Since the initial notification, Sprint has notified its new customers and any customers subscribing to new services of their CPNI rights. The notification is part of the customer fulfillment package that is sent to customers confirming the new services to which they have subscribed. Sprint has always waited 60 days to hear from the customer before beginning to use CPNI for the customer. According to Sprint's policy, a customer can opt-out at anytime, without restriction.

The result of this communication effort is that to date, approximately 28,000 households, or 5.6 percent of the households Sprint serves in Washington have "opted-out." Obviously, customers have been informed of their choices and have exercised their choice. Not a single customer has complained about the mechanisms Sprint has used, or the opt-out approach. To our knowledge, our customers have not experienced any difficulty in choosing to opt-out, nor have there been any allegations of misuse of CPNI. In light of these facts, we urge the Commission to consider what the 10th Circuit Court of Appeals characterized as "an obvious and substantially less restrictive alternative, an opt-out strategy"[6] in tailoring its CPNI regulations, before determining that an opt-out strategy would not sufficiently protect customer privacy.

[6] *U S West v. FCC, 182 F.3d 1224, 1238 (1999).*

Moreover, it should be unnecessary for Sprint to re-notice its customers for opt-out, particularly since its notice met the WUTC rules in place at the time and the FCC is not requiring re-notice. Specifically, the FCC said that carriers are not required to provide a new opt-out notification as long as the opt-out notice used 1) satisfies the requirements set forth in 47 C.F.R. § 64.2007(f); 2) provided a reasonable and convenient means of opting out, and 3) the carrier provided a safe-harbor of 30 days after sending notice before assuming that those customers who did not reply were consenting to the company using CPNI. Sprint asserts that it has fully met these requirements. Moreover, re-notice is likely to generate customer confusion. If the FCC makes changes to its notice requirement as a result of its current proceeding, Sprint customers in Washington could well end up receiving three different notices with three different messages.

The mechanism proposed in WAC 480-120-208(1)(d) by which the company would print a box or blank on every payment coupon is a particularly onerous requirement. Such a collection mechanism would be extremely labor intensive, costly, inefficient, and subject to human error. Every single customer payment coupon would have to be sorted manually in every billing cycle to determine if a box or blank was marked. Those that were marked would have to be manually entered into a database. Additionally, any option on the coupon payment for "opting-out" would be meaningless to customers without some verbiage about CPNI and the opt-out rights. Essentially, then, this mechanism would entail ongoing notification, which would be infeasible on a payment coupon. For instance, WAC 480-120-207(3) requires that notices never be included with bills that contain a bill stuffer. Therefore, bill stuffers could not ever be sent, because every bill would include CPNI notification. Additionally, the twelve-point font requirements and amount of information required for CPNI notification would exceed the payment coupon space.

Sprint urges the Commission to adopt the FCC's approach in requiring a one-time notification.[7] If the Commission does not adopt the FCC rules but elects to create its own rule, then the burden could be reduced significantly by making (c) and (d) alternatives, rather than making both options mandatory, as discussed at the March 21st workshop. Subsection (c) pertains to marking a box or blank on the notice and returning it to a stated address.

Sprint urges the Commission to eliminate the confirmation requirements found in WAC 480-120-207(5)(i), 480-120-209(3)(n), and 480-120-211. Companies do not generally provide written confirmation every time there is activity on the customer's account, such as when the customer supplies a medical certificate, is now Lifeline eligible, etc. If the customer is concerned that the company records may be incorrect, they may always call and seek confirmation. If there had been much demand for confirmation, Sprint might find it economic or be able to justify the expense of written confirmation in order to increase customer satisfaction; however, Sprint has had no such evidence. Sprint has no interest in withholding such information, it merely wants to keep its operating costs to a minimum so that it can continue to provide affordable rates, make the best use of its resources, and remain a viable business. Sprint is particularly concerned about any increased costs during this economic recession. Sprint would be able to provide an automatic confirmation by electronic means, and may be able to provide an indicator on its billing statements, but asserts that the separate mailing requirement is an excessive cost imposition that will ultimately be borne by all consumers.

F. Exception for Written Approval

If the WUTC adopts an opt-in approach, then line WAC 480-120-209(4) should be modified to read:

[7] §64.2007(f)

(4) Opt-in approval by the customer must be in writing or in electronic form, except when approval is given verbally during an in-bound call pursuant to WAC 480-120-204.

G. Compliance Statement

WAC 480-120-213 (3) should be modified so that it is consistent with the requirements in 47 C.F.R. § 64.2009(e) concerning compliance. If the Commission does not elect to adopt the FCC rule in its entirety, then the WAC could be modified to read:

> (3) An officer of the company must certify to the commission on an annual basis that the company has or has not established operating procedures that are adequate to ensure ~~in~~ compliance with the rules concerning private account information. A statement explaining how the company's operating procedure is or is not in compliance with the commission rules on this topic ~~rules~~ must accompany the certificate.

As Century Telephone pointed out, and the FCC agreed, a company should not be required to certify to a statement if it is not true.[8] Additionally, the officer will not have personal knowledge that every employee in the company has always abided by the rule, but can attest to whether the company has established operating procedures adequate to ensure compliance.

[8] Reconsideration Order at ¶ 128.

II. The "Opt-in" Requirements in the Draft Rules Violate Sprint's Constitutionally Protected Right to engage in Commercial Speech

The draft rules that the Commission has proposed in the instant proceeding address telecommunications carriers' use of Customer Proprietary Network Information ("CPNI"). Sprint is particularly concerned about proposed sections WAC 480-120-202, -203, and -204 (the "Draft Rules"), because those sections restrict Sprint's First Amendment right of free speech. Specifically, the Draft Rules restrict Sprint from exercising its right to engage in commercial speech with its customers by requiring it to seek out and obtain explicit approval, or "opt-in," from a customer before the Company may use CPNI to market new services to the customer. *See Draft Rules, Section 480-120-203 through -205*. In addition, the Draft Rules prohibit Sprint from offering service enhancements to a customer based on "call detail" information recorded by the Company, without explicit prior customer approval. *See Draft Rules, Section 480-120-202*.

The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech."[9] The Supreme Court applied the First Amendment only to non-commercial types of speech, e.g. political speech, until the 1970's, when the Court afforded commercial speech First Amendment protection, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976)("Virginia Pharmacy Board")*.

The Court invalidated a Virginia statute, in *Virginia Pharmacy Board*, that restricted the advertisement of prescription drug prices. Four years later, relying on *Virginia Pharmacy Board*, the Court affirmed that the First Amendment protects commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric, 447 U.S. 557, 561, 100 S. Ct. 2343, 2349, 65 L. Ed. 2d 341, 348 (1980)("Central*

[9] The Amendment applies to the States under the Due Process Clause of the Fourteenth Amendment. *See Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 855, n. 1, 73 L. Ed. 2d*

Hudson"). The Court determined that the First Amendment applies to commercial speech because commercial expression "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id*.

A. Analysis under Central Hudson's 4-prong test shows that the Draft Rules violate the First Amendment.

Regulations of commercial speech are reviewed under the 4-prong *Central Hudson* test. In *Central Hudson*, the Supreme Court applied the 4-prong test to invalidate a regulation, promulgated by the Public Service Commission of New York, that restricted advertising of prices for electric services. The first prong is "whether the expression is protected by the First Amendment." *Central Hudson, 447 U.S. at 566, 100 S. Ct. at 2351, 65 L. Ed. 2d at 350*. The next question is whether the asserted governmental interest in restricting the speech is substantial. *Id*. If the answers to both questions are affirmative, it must be determined whether the restriction directly advances the governmental interest. *Id*. In other words, as the Court stated, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson, 447 U.S. at 564, 100 S. Ct. at 2351, 65 L. Ed. 2d at 349*. Last, a restriction on protected commercial speech cannot be sustained if it is "more extensive than is necessary to serve that interest." *Central Hudson, 447 U.S. at 566, 100 S. Ct. at 2351, 65 L. Ed. 2d at 350*. The Court explained in developing this prong that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Central Hudson, 447 U.S. at 564, 100 S. Ct. at 2351, 65 L. Ed. 2d at 349*.

435, 102 S. Ct. 2799 (1982); Grosjean v. American Press Co., 297 U.S. 233, 244, 80 L. Ed. 660, 56 S. Ct. 444 (1936); Gitlow v. New York, 268 U.S. 652, 666, 69 L. Ed. 1138, 45 S. Ct. 625 (1925).

1. The Draft Rules restrict targeted marketing that is commercial speech protected by the First Amendment.

So long as the commercial speech is truthful and non-misleading, it is protected by the First Amendment. *Central Hudson, 447 U.S. at 566, 100 S. Ct. at 2351, 65 L. Ed. 2d at 350*. A restriction on the ability of a speaker to engage in commercial speech invokes the First Amendment, regardless of the extent of the restriction. The 10th Circuit Court of Appeals explained, "a restriction on speech tailored to a particular audience, 'targeted speech,' cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, 'broadcast speech.'" The court concluded, "[t]herefore, the existence of alternative channels of communication, such as broadcast speech, does not eliminate the fact that the CPNI regulations restrict speech." *U S West v. FCC, 182 F.3d at 1232, citing Florida Bar v. Went For It, Inc., 515 U.S. 618, 132 L. Ed. 2d 541, 115 S. Ct. 2371 (1995)*.[10]

The Draft Rules, like the FCC's opt-in requirement, restrict CPNI use. Sprint's constitutionally protected right to engage in targeted marketing depends entirely on its ability to use CPNI. As a result, the restrictions in the Draft Rules on Sprint's ability to use CPNI will have a direct and proportionate restrictive effect on Sprint's ability to conduct targeted marketing. Therefore, a restriction on CPNI use is a restriction on targeted marketing.

The way in which Sprint conducts targeted marketing ensures (1) that customers are advised on new service offerings that might better suit their needs (2) that customers receive the best value; (3) that CPNI is used for limited purposes; and (4) that CPNI remains confidential

[10] Summarizing the facts in *Went For It*, the court states "a lawyer referral service and an individual lawyer challenged a Florida Bar rule that prohibited attorneys from using direct mail advertisements to solicit wrongful death and personal injury clients within thirty days of the accident or disaster causing death or injury. Despite the fact that the attorney could indiscriminately mail solicitations for his services, the [Supreme Court] found that the targeted speech constituted commercial speech and that the restriction on the targeted speech implicated the First Amendment." *See Went for It, 515 U.S. at 620-21*.

and unavailable for use except by and between the customer and the Company. Therefore, the targeted marketing that the Draft Rules restrict is expression related to the economic interests[11] of the speaker and its audience, and clearly implicates the First Amendment. Moreover, there is nothing unlawful or misleading about Sprint's collection or use of CPNI, or in the Company's targeted marketing campaigns that are based on CPNI. Therefore, Sprint's targeted marketing is protected by the First Amendment.

2. The Commission's interest in protecting customer's privacy is not sufficiently well defined to determine whether it is substantial for purposes of review under the First Amendment.

The Commission has not sufficiently defined the specific interest in mandating an opt-in approach to CPNI. Based on rulemaking workshop discussions, it appears that the Commission's primary interest is in maintaining the privacy of CPNI.[12] Specifically, the Commission's interest appears to be that CPNI, and especially call detail, could somehow become public information.

Sprint is concerned that the Commission's interest is not sufficiently definite to justify a restriction of Sprint's constitutionally protected right to engage in commercial speech, because,

[11] In fact, targeted marketing is related to more than just the economic interests of the customer, and it does more than just propose a commercial transaction. Targeted marketing is the only means by which the Company can ensure that it is providing customers with the highest *quality* of service that the Company offers for customers' specific needs. Because targeted marketing does more than merely propose a commercial transaction, it is arguable that restrictions of such speech are subject to a more rigorous standard of review. Sprint reserves those arguments for future comments, should the Commission decide to adopt the Draft Rules for the purposes of CR-102. For the purposes of these comments, Sprint assumes without admitting that the speech is purely commercial.

[12] The 10th circuit court aptly notes that the privacy interest asserted with regard to CPNI, "is distinct and different from the more limited notion of a constitutional right to privacy which is addressed in cases such as *Griswold v. Connecticut, 381 U.S. 479, 484-86, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965),* and *Roe v. Wade, 410 U.S. 113, 152-56, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973)* (stating that the constitutional right to privacy covers only personal rights deemed "fundamental" or "implicit in the concept of ordered liberty" (internal quotation marks and citations omitted))." *U S West v. FCC, 182 F.3d at 1234*. The limited question in the case First Amendment review of restrictions on CPNI use, "is solely whether privacy can constitute a substantial state interest under Central Hudson, not whether the FCC regulations impinge upon an individual's right to privacy under the Constitution." *Id*.

"the government cannot satisfy the second prong of the Central Hudson test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served." *US West v. FCC, 182 F.3d at 1235*. Considering indefiniteness of the interest apparently asserted by the Commission, and because of the limited nature of the privacy interest that the government can assert as a justification for restricting speech, it is unlikely that the Draft Rules would survive under this prong of *Central Hudson*.

3. The Draft Rules do not directly advance the Commission's asserted interest.

The regulation must directly advance the asserted interest. According to the Supreme Court, this prong "concerns the relationship between the *harm* that underlies the State's interest and the means identified by the State to advance that interest." *Lorillard Tobacco Co. v. Massachusetts, 533 U.S. 525, 555, 121 S. Ct. 2404, 2422, 150 L. Ed. 2d. 532, 559 (2001) ("Lorillard Tobacco Co.")(emphasis added)*. The restriction must "directly and materially advance the asserted governmental interest." *Id., citing Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173, 188, 144 L. Ed. 2d 161, 119 S. Ct. 1923 (1999)(internal quotations omitted)*. Clarifying when a restriction directly and materially advances the governmental interest, the Court held that the government's burden, "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id*.

The harms that the Commission and the commentors have raised at the rulemaking workshops and in written comments are not real. Sprint's maintains the confidentiality of CPNI.

In addition, the kind of private information that has drawn the most concern from commentors is simply not retained or used by Sprint in marketing products to customers.[13]

An opt-in requirement will likewise not directly address concerns that the use of CPNI results in unwanted marketing intrusions into the homes of customers. In fact, an opt-in approach will likely increase the volume of mass marketing, both by mail and telephone, by companies. Thus, the Draft Rules would not survive the third prong of *Central Hudson* because they do not do not directly advance the Commission's asserted interest.

4. The Draft Rules are more extensive than necessary to satisfy the Commission's interest in protecting privacy.

The restriction on commercial speech must be no more extensive than necessary to satisfy the government's asserted interest. *See Central Hudson, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341*. In the case of CPNI, an opt-out requirement is clearly less extensive than opt-in, and provides the same degree of privacy protection as opt-in. The evidence in the record demonstrates that customers are capable of and willing to opt-out.

Moreover, the government must "'carefully calculate the costs and benefits associated with the burden on speech imposed' by the regulations." *Lorillard Tobacco Co., 533 U.S. at 561, 121 S. Ct. at 2426, 150 L. Ed. 2d. at 563, citing Cincinnati* v. *Discovery Network, Inc., 507 U.S. 410, 417, 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993)*. The costs in this case fall directly to consumers and, in particular, those who do not have the means to seek out the best value in the telecommunications marketplace:

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A

[13] For instance, Sprint would not retain the names of people its customers call or the relationship of a called party to the customer. Such information is of no value to Sprint.

> disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.

Virginia Pharmacy Board, 425 U.S. 748, 763, 96 S. Ct. 1817, 1826, 48 L. Ed. 2d 346, 359.

The rationale that *Virginia Pharmacy Board* applied to information about prescription drugs also applies to telecommunications services and prices. Obtaining complete and accurate information about prices and services in the expansive and volatile telecommunications market is difficult for even the savviest consumer. Companies frequently change prices, introduce new services and bundles of services, and enter and exit the market.

The way that Sprint uses CPNI ensures that its customers get the best value, tailored to customers' specific communications needs. By marketing services to customers that will benefit from an offering, rather than to all of its customers, Sprint reduces unwanted mass telemarketing and mailing campaigns. This reduces the Company's costs in providing service and allows it to design products to meet the particular needs of our customers. The overall result is higher quality services at lower prices.

III. Conclusion

Sprint shares the Commission's concern for maintaining the confidentiality of customer network information, and has no intention of releasing such information to outside companies without the customer's express consent. Still, while protection of sensitive information is paramount, the Commission will not serve the public interest by placing restrictions on the Company's ability to use such information for internal purposes to develop and market products and services that meet specific customer needs. In Sprint's view, this important public policy issue is best addressed at a national level, with state participation, to ensure rules that are consistent across state borders. A consistent approach will greatly ease the administration and

enforcement of the policy. It will also reduce customer confusion, as well as company and societal costs.

As they currently stand, the Draft Rules restrict targeted marketing that is commercial speech protected by the First Amendment. The Commission's interest in protecting customers' privacy is not sufficiently well defined to determine whether it is substantial for purposes of review under the First Amendment. The Draft Rules do not directly advance the Commission's asserted interest because the harms that the Commission and commentors have raised at rulemaking are not real. The Draft Rules are more extensive than necessary to satisfy the Commission's interest in protecting privacy. Thus, the opt-in requirement in the Draft Rules violates Sprint's right to engage in commercial speech. The Commission, therefore, should adopt an opt-out requirement that mirrors the approach adopted by the FCC.

Respectfully submitted this 26th day of March, 2002, by

/s/ Nancy L. Judy

Nancy L. Judy
State Executive – External Affairs

/s/ William E. Hendricks

William E. Hendricks, Esq.
Regulatory Attorney
WSBA No. 29786