Law Office of
Richard A. Finnigan
2405 Evergreen Park Drive SW
Kathy McCrary Suite B-1
Paralegal Olympia, Washington 98502
(360) 956-7001
Fax (360) 753-6862

March 27, 2002

Carole Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive SW
PO Box 47250
Olympia, WA 98504-7250

Re: Docket No. UT-990146 – Customer Information Rules

Dear Ms. Washburn:

These comments are filed on behalf of the Washington Independent Telephone Association (WITA). These comments are in an attempt to address some questions and concerns related to the proposed rules dealing with customer proprietary network information (CPNI).

In considering these rules, the Commission must balance the competing important concepts of free speech and privacy. Early on, WITA suggested that the Commission adopt a "opt-in" approach where a company proposed to use call detail information for marketing purposes or where a company proposed to sell CPNI to an unaffiliated third party. WITA proposed that the Commission adopt an "opt-out" approach for other uses of CPNI. Even in this approach, WITA is not sure that the opt-in approach for these purposes would withstand First Amendment scrutiny. However, it seems that where call detail information is used directly to market services to customers, there may be a heightened sense of privacy for specific call detail information that warrants the opt-in approach. WITA is concerned that a broader opt-in approach will not withstand First Amendment scrutiny.

In these comments, WITA will address many of the things discussed in the workshops of March 14 and March 22, 2002. In addressing those items, WITA does not mean to repeat its arguments, but to follow through on questions and concerns raised by the Commissioners in those workshops. WITA appreciates the Commissioners' attendance at those workshops.

WITA will also identify some items that, due to a lack of time, were not able to be raised in the workshops.

Definitions

The Commission proposes adopting a definition for "private account information." The question that must be asked is why inject a new term into the rules in addition to the general accepted definition CPNI? This new term raises questions. It suggests that this information is owned by the customer. There has never been a determination that CPNI is owned by the customer.

The definition of "telecommunication service" should be amended as follows: "' telecommunication service' means any one of the category of services that are offered by companies …."

There was a great deal of discussion in the workshops about the category of service. WITA believes that adding a new category of service for data services will bring the Commission's rules into direct conflict with the rules adopted by the FCC. This may well mean that a company can not comply with the FCC rules and also comply with the Commission's rules at the same time. This is not a mere extension of regulatory control which is consistent with the FCC rules. Instead, creation of a new category raises inconsistencies between the FCC and the Commission's rules that will be hard to reconcile. In addition, given the direction of the FCC on broadband services, it may be outside the purview of this Commission to create that category. The FCC appears to be headed down a road which will define data services as either information services or telecommunication services that are interstate in nature.

Draft WAC 480-120-202

As stated earlier, WITA does not have strenuous objection to using an opt-in approach for use of customer call detail information for marketing purposes. However, WITA's overriding concern is that the companies be able to continue to provide good, quality service to customers and deal with customers in a normal working environment. To this end, there is some confusion raised by the phraseology in proposed WAC 480-120-202(2)(a). WITA notes that the Commission is proposing a definition of the word "provision" as meaning

supplying telecommunication service to a customer. Given the term "provision" is the Commission's proposed definition in WAC 480-120-021, then why does the Commission then use the words "initiate, render, bill and collect" in this draft rule? The better phraseology, relying on the Commissions proposed definition, would be to word WAC 480-120-202(2)(a) as: "The provision of telecommunications services the customer has purchased or requested."

In addition, WITA suggests that proposed WAC 480-120-202(c) be amended to include complaints communicated to the company, as well as the Commission.

Finally, WITA suggests that a subsection (d) be added to deal with the divulgence of call detail under legal compulsion. Perhaps the following language would suffice:

> (d) Provide call detail in response to governmental rule, regulation or order, administrative or judicial subpoena or other demand of apparently lawful authority.

At the March 14, 2002 workshop, there was also a concern about use of data in the aggregate form. It would be helpful in any Commission order adopting new CPNI rules to include a paragraph that specifically clarifies that companies may use call detail information which is aggregated for such purposes as determining community of interest for EAS or even for marketing purposes, so long as the company is not using specific customer detail to market to a specific customer without the opt-in approval.

Another issue that was raised at the March 14 workshop was the need to use call detail information in generally accepted industry record exchanges for any number of purposes. Again, either specific a exception should be included in WAC 480-120-202 or clarifying language should be included in the Commission order adopting the rule.

<u>Draft WAC 180-120-205</u>

Based upon the discussion at the March 14, 2002 workshop, Commission staff clarified that use of the word "specifically" in subsection (1) was not meant to be limiting. Perhaps the word "specifically" should be eliminated and the words "for example" should be used instead.

Proposed WAC 480-120-205(1) begins with the exception, "Unless the customer directs otherwise." It is not clear what this means. This exception also begins subsection (2). If this is meant to refer to the opt-out provisions

under proposed WAC 480-120-207, then the cross-reference should be made. As currently stated, the language is ambiguous. In addition, given the language in subsection (3), this exception is unnecessary and redundant.

Draft WAC 480-120-206

WITA does have strong objection to proposed WAC 480-120-206(1). WITA's position is that it is appropriate to market services between categories of service on an opt-out rather than an opt-in basis. To start with WITA's member companies are not in the business of selling CPNI to third parties. Therefore, perhaps an additional section may be needed to describe an opt-in provision for providing CPNI to unrelated third parties.

However, addressing the marketing between categories of service, WITA believes that marketing between categories of service should be allowed on an opt-out basis. Doing so would provide a benefit not just to the companies, but certainly to the customers. For example, WITA's members could market toll services to customers where the toll services would be able to save the customer money. They would avoid calling customers where the service would not be of benefit to the customer and save those customers from irritation of receiving a call that does not help them in any way.

WITA position is that this rule goes too far. The proposed subsection (2) contains a sweeping prohibition that disallows the use of CPNI "for any other purpose not specifically allowed in WAC 480-120-203, 480-120-204 and 480-120-205, unless the customer has given explicit written ("opt-in") approval." The prohibition could well impinge upon a normal working relationship between the company and its customer. WITA suggests that the prohibition be restricted to "any other marketing purpose."

WITA also suggests that the word "specifically" be taken out since this causes some confusion. There are both general and specific allowances contained in the cited regulations. By qualifying what may be used to those that are "specifically" allowed, the Commission would further limit the use of CPNI and the general authorizations contained in the cited regulations could not be relied upon absent an opt-in approval. That would defeat the purpose of the general authorizations contained in the cited regulations. Absent a change to an opt-out mechanism, WITA suggests that subsection (2) be rewritten as follows:

> A company may not use, disclose, or permit access to CPNI for any marketing purpose not allowed on WAC 480-120-

> 203, 480-120-204 and 480-120-205, unless the customer has given explicit written "opt-in" approval.

Draft 480-120-207

There was a great deal of discussion at the workshops about proposed WAC 480-120-207(5)(b), specifically what would constitute the description of "each purpose" for which CPNI may be used. WITA believes that a description of the general purposes for which CPNI be used is the most that can be reasonably expected. It is impossible to detail each specific purpose. In order to balance this general description against with a customer's right to evaluate the use of CPNI, WITA suggests that section 5(b) be written as follows:

> The notice must describe each purpose (e.g., provision of telecommunication services, marketing of telecommunication services, marketing of non-telecommunications services) for which the CPNI may be used and specifically state whether the CPNI will be used to market services to the customer or whether the CPNI will be sold or provided to unrelated third parties.

At the workshop, there was general agreement that the same sort of language that is contained at the end of subsection (5)(b) would be added to (5)(a) so that there is not an inference that the company regularly provides information to tele-marketers.

There was also discussion at the workshop concerning the reference to 12-point type in proposed subsection (5)(f). In checking with some of the WITA's members, for notification purposes, 8-point type which is boldfaced or 10-point type that is not boldfaced would be clearly legible. Certainly, the 24-point type in proposed subsection (6) is not appropriate.

There was also discussion of the use if the word "placed" in subsection (5)(f). Commission staff's comment at the workshop that this was language from the FCC rule. However, under the FCC rule, the CPNI notice can be part of the bill and is not required to be a separate document as contained in the Commission's draft rules. Therefore, the FCC's use of the term "placed so as to be readily apparent to the customer" makes sense. It does not make sense under this proposal.

Draft WAC 480-120-208

There was a great deal of discussion concerning proposed (2)(c) and (d). WITA suggests that these items be deleted. In particular, subsection (d) would cause a great deal of operational problems for companies.

In addition, WITA suggests (e) be rewritten as follows:

> Electronic mail, if the company otherwise regularly receives and sends electronic mail messages to its customers as an established means of communicating simultaneously with multiple customers.

WITA would also ask that subsection (2)(f) be an option not a requirement. While companies have websites, (some of which have been recently established) those websites may not have the capability for use of interactive forms.

Draft WAC 480-120-209

The comments related to section 207 apply generally to section 209 as well.

In addition, WITA asks that the Commission clarify how long a company must maintain records of customer notification and approval a set out in 480-120-209(2). Is it meant that the general record keeping requirements apply?

Based upon comments at the workshop, the Commission was going to clarify that "writing" as used in the CPNI rules includes e-mail.

Draft WAC 480-120-213

At the workshop, WITA raised the question whether the Commission could apply the new reporting requirements to companies that have fewer than 2-percent of the access lines in the state.

Draft WAC 480-120-216

WITA suggests the words "uses or" and "use or" be deleted from this proposed rule. The line number must be used in many ways in providing services to the customer. For example, it must be transmitted for billing purposes. It must be transmitted as part of the SS7 network information. WITA's understanding is that it is the "provision" of subscriber list information

that is the concern, not the company's use of that information for normal operating purposes. In addition, WITA has suggested that the term directory publishing be defined consistent with the FCC's definition in 47 CFR 64.2337(b).

Sincerely,

RICHARD A. FINNIGAN

RAF/sle

cc: Terrence Stapleton