
APPENDIX A



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Chairwoman Marilyn Showalter
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr., SW
Olympia, Washington 98504-7250

Re: Docket No. UT-990146 - Chapter 480-120 WAC, Telecommunications - Operations:
Customer Information

Dear Chairwoman Showalter:

Qwest Corporation ("Qwest") respectfully submits these supplemental comments on the proposed Customer Information rules in Docket No. UT-990146, Chapter 480-120 WAC, Telecommunications - Operations. These comments specifically address Qwest's legal concerns with these proposed rules. Qwest is interested in working with the WUTC to promulgate CPNI rules that fairly balance privacy and other legitimate interests, are lawful and that promote the public interest.

Introduction

Qwest has always treated customer information confidentially. It did so before there were Customer Proprietary Network Information ("CPNI") rules promulgated by the Federal Communications Commission ("FCC") with respect to Open Network Architecture ("ONA"), which dealt with CPNI in the context of customer premises equipment ("CPE") and enhanced services. It did so before the passage of 47 U.S.C §222 in 1996 and before the adoption of FCC rules post-§222 enactment. It did so before there were comparable CPNI rules promulgated by the Washington Utilities and Transportation Commission ("WUTC") in 1999. And it continues to do so.

Qwest uses CPNI, within the confines of all applicable laws, to promote and improve its business relationship with customers and has done so for many years without any demonstrations of abuse. Qwest's responsible use of CPNI creates advantages through productivity gains and operational efficiencies that ultimately benefit its customers. CPNI use allows more meaningful conversations with customers about their service needs and interests, and these operational efficiencies facilitate lower prices for products and services.

It is logical that, since Qwest provides telecommunications services, the customer information it collects would include the telecommunications services customers purchase and how they use those services. That does not, however, mean that the information in Qwest's possession is any more "sensitive" than other information collected and used by other businesses – in fact, often it is not. Indeed, the use of most of this information, does not raise significant privacy issues for the vast majority of our customer base. Qwest has long known this, and this fact has been confirmed by statistically valid survey results.

Any communication of CPNI within Qwest's businesses would be speech, protected by the United States Constitution. Using CPNI to effectively communicate with customers would also be protected speech that promotes the interests of customers. Using CPNI in discussions with customers allows Qwest to communicate with willing listeners in ways that reduce unwanted commercial contacts, focus on products and services that customers would most likely be interested in, and work to the benefit of both Qwest and the customer.

Nonetheless, on January 28, 2002, following considerable discussion with the WUTC and the Washington Attorney General, Qwest announced that it re-evaluated plans to share CPNI within the Qwest corporate enterprise, as Qwest had proposed in a December, 2001 bill insert. Qwest made this decision because it has invested too much to improve service and our customer's perceptions about the value we provide, to allow any misunderstandings about its proposed CPNI use to overshadow or overwhelm those efforts. Qwest determined that the best course of action was to give the FCC a chance to conclude its ongoing deliberations about CPNI rules for carriers.

The WUTC has now proposed new and far reaching CPNI rules that depart significantly from FCC's rules and the WUTC's existing rules. The WUTC's current rules reflect in large part the FCC's rules. Whether or not state rules are legally preempted by the federal rules, this consistency is good for carriers and customers alike. While the WUTC's rules require modification in some particulars to be "current" with FCC CPNI regulation, those changes are modest. There is no need for a radical change in approach to intrastate regulation of CPNI. No large carrier in Washington is pressing to share CPNI through an opt-out mechanism at this time. And, the WUTC has the commitment of Qwest that it won't proceed along these lines until the FCC rulemaking is concluded. Qwest continues to believe that the WUTC should wait for the FCC to act to avoid any conflict between FCC and state rules and further customer confusion.

Moreover, governmental regulation of CPNI is, at a minimum, a challenging endeavor. As discussed more fully below, before the government can act to protect a non-constitutional "concern" over a constitutional right, it must prove certain elements. The federal government was not able to meet this burden of proof. The information collected to date in Washington is not likely to produce a record that would justify, in the view of the courts, provisions that are equally or more restrictive of speech than the FCC's invalidated provisions.

The following outlines Qwest's position on the constitutionality of opt-in CPNI approval requirements proposed by the WUTC in its pending rules. It also addresses the FCC's already-articulated position that the federal CPNI approval model preempts any conflicting state regulations. The proposed WUTC CPNI rules run afoul of both. In outlining Qwest's legal position, it is important that the WUTC and our customers understand that Qwest takes seriously its obligations regarding privacy policies and procedures. It is important that everyone understand that it is Qwest's policy not to sell or disclose private customer account information to any other company or individual, except people authorized to offer or help customers get Qwest services and to collect bills; as required by law, to prevent the unlawful use of services; or if the company sells that part of its business. This is Qwest's policy even if the law permits greater "rights" to use CPNI. Qwest acts in a manner we hope builds consumer confidence, not one that compromises it.

WUTC Recent History Regarding CPNI Rules

In Docket No. 971514, filed February 5, 1999 and effective March 8, 1999, the WUTC adopted its existing CPNI rules - WAC 480-120-151 Telecommunications Carriers' Use of Customer Proprietary Network Information, WAC 480-120-152 - Notice and Approval Required for Use of Customer Proprietary Network Information, WAC 480-120-153 Safeguards Required for Use of Customer Proprietary Network Information and WAC 480-120-154 Definitions. At the time these rules were adopted, they were intended to be consistent with existing FCC CPNI rules. For the most part, that objective has been realized. The deviations are largely the result of actions taken by the FCC in its *CPNI Reconsideration Order* that are not reflected in the existing rules and would require amendments to incorporate.

On December 23, 1999 the Commission issued its Notice of Opportunity to File Written Comments in Docket Nos. UT-990146, UT-991922 and UT-991301. Qwest (then U S WEST) filed comments on February 4, 2000 that included the following remarks on WAC 480-120-151 and WAC 480-120-152:

[Qwest] suggests waiting to implement these rules as edited until the FCC completes its CPNI rulemaking process. It is highly likely that the FCC will complete its rulemaking process soon and remove the need for these rules at the state level. Returning to these rules after completion of the FCC's process would be consistent with the Governor's mandate to simplify, remove duplication, coordinate among agencies and jurisdictions and limit imposition of rules where possible.

If these rules are adopted, [Qwest] proposes including a disclaimer allowing use of CPNI where authorized by the FCC, Congress or state law and to prevent fraud and abuse. This would again promote consistency and coordination of the law.

On May 2, 2001 the Commission issued another Notice of Opportunity to File Comments in Docket No. UT-990146 and attached the April 30, 2001 revised draft consumer rules. Proposed changes to WAC 480-120-151 and WAC 480-120-152 were not included in the draft rules.

On August 24, 2001 the Commission issued another Notice of Opportunity to File Comments in Docket No. UT-990146 and attached the August 23, 2001 revised draft consumer rules. Proposed changes to WAC 480-120-151 and WAC 480-120-152 were again not included in the draft rules.

On February 14, 2002 the WUTC issued a Notice of Proposed Rulemaking and Oral Comment Opportunity, as well as a final request for Small Business Economic Impact Statement ("SBEIS") information. This is the first time the WUTC proposed changes to existing WAC CPNI rules and introduced several new CPNI requirements and related definitions.

Constitutional Arguments

First Amendment Issues

Only an opt-out CPNI approval process accommodates federal constitutional considerations, customer privacy interests and legitimate commerce. Only an opt-out process allows for maximum information flow – a flow that allows for increased productivity, operational efficiencies and unburdened communications between Qwest and interested and willing listeners.

This position is supported by the Tenth Circuit Court of Appeals.¹ While the WUTC may not be directly controlled by the judicial precedent established by that Court, Qwest is confident that the Ninth Circuit would follow the Tenth Circuit's lead, since both Circuits are required to follow Supreme Court precedent as established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564-65 (1980) ("*Central Hudson*").

Specifically, the Tenth Circuit held that the opt-in CPNI regulations adopted by the Federal Communications Commission "violate[d] the First Amendment" to the United States Constitution.² Accordingly, the Court "vacate[d]" those regulations.³ The Tenth Circuit's decision makes clear that the government's discretion in regulating the communication of factual and truthful information between a speaker and a willing listener is subject to significant federal constitutional restraints. Under that decision, such communication cannot be burdened by government mandates that suppress communication and commerce and that are supported by no meaningful evidence.

¹ *US WEST, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 2215 (June 5, 2000) ("*US WEST v. FCC*").

² *US WEST v. FCC*, 182 F.3d at 1228, 1239.

³ *Id.* at 1240.

The Tenth Circuit's opinion (a) emphasized the "important civil liberties"⁴ that were "abridge[d]" or "restrict[ed]"⁵ by the mandatory opt-in process, (b) expressed serious "doubts" whether either of the "government interests" proffered by the FCC were "substantial,"⁶ and (c) concluded in all events that the regulations were not "narrowly tailored" to minimize the burden on protected speech.⁷ The type of CPNI approval process sustainable under the Constitution is not a close question. The First Amendment interests at issue with respect to Qwest's CPNI use dictate that the "burden" of overcoming inertia be placed not on truthful speakers and interested listeners, but on those unquantified members of the intended audience who prefer not to receive communications based on information provided to, or generated by, their chosen carriers.

The judicial framework of the Tenth Circuit opinion is compelling and consistent with First Amendment jurisprudence and the expert opinions of scholars of both speech and economics. The Tenth Circuit makes clear that, crafting a narrowly-tailored opt-in requirement poses formidable legal challenges for the WUTC.⁸

Fifth Amendment Issues

Attempts to shift the fundamental property "ownership" of CPNI from carriers to individuals, such that an individual would lay claim to "control" of CPNI over and above that enjoyed by a carrier would also run afoul of the Fifth Amendment to the federal constitution.⁹ See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (holding that the Takings Clause protects stored data and that the government's use of private proprietary research data constituted a compensable taking). Similarly, an appropriation of a carrier's proprietary commercial business information pertaining to its transactions with its customers amounts to a taking. As one scholar has concluded in the context of customer information, "[a] legislative, regulatory, or even judicial determination that denies processors the right to use their data could very likely constitute a taking and require compensation. . . . [F]or the billions of data files currently processed and used by U.S. individuals and institutions, a dramatic alteration on user rights makes a compelling case for the existence of a taking." Fred H. Cate, *PRIVACY IN THE INFORMATION AGE*, p. 74, Brookings Institute 1997.

⁴ *Id.* at 1228.

⁵ *Id.* at 1232.

⁶ *Id.* at 1235 (doubts regarding privacy interests), 1236-37 (skepticism about competitive interests).

⁷ *Id.* at 1238-39.

⁸ Attached to this filing, to detail Qwest's position in more than summary form, are a variety of documents, ranging from Qwest's filings before the FCC in 1996 to its briefs before the Tenth Circuit in 1998. Those filings are incorporated herein by this reference.

⁹ One of the WUTC's proposed rules, *i.e.*, that defining the term "proprietary" as equivalent in all cases to "ownership," raises concerns in this area. [Proposed 480-120-021, definition of "Proprietary"]

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In terms of traditional notions of "ownership," CPNI belongs to a carrier, not to the customer.¹⁰ That CPNI pertains to the purchasing characteristics of customers does not give them a property interest in it. Even personal data like telephone numbers, addresses, social security numbers, and medical history — let alone records of purchases and economic transactions — are almost always owned by someone else: the Post Office, the government, a bank, or a physician or hospital.¹¹ "A data processor exercises property rights in his data because of his investment in collecting and aggregating them with other useful data. It is the often substantial investment that is necessary to make data accessible and useful, as well as the data's content, that the law protects." Cate, *PRIVACY IN THE INFORMATION AGE*, *supra*, at 74. As one noted scholar has observed, "the expand[ing] protection for commercial information reflects a growing awareness that the legal system's recognition of the property status of such information promotes socially useful behavior" and therefore encourages reliance by data processors. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 469 (1991).

Finally, it must be remembered that "the relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary." *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31 (1926). "Customers pay for service, not for the property used to render it....By paying bills for service, they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company." *Id.*; see also *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 22 n.1 (1986) (Marshall, J., concurring in the judgment); *Simpson v. Shepard*, 230 U.S. 352, 454 (1913) (a utility's "property is held in private ownership"). In conclusion, crafting an opt-in requirement that does not compromise the Fifth Amendment poses formidable legal challenges for the WUTC.

Facts About Customers and Their Privacy Responses

Attached with this filing for inclusion in the record, Qwest submits a statistically valid survey conducted by one of the premiere privacy experts in the United States, Dr. Alan Westin.¹² As a preliminary matter, it should be understood that Dr. Westin has parsed the population as

¹⁰ If a third party were to break into a carrier's computers and steal CPNI, it would be the carrier (and not individual subscribers) who would have a cause of action for conversion.

¹¹ The Supreme Court has held that individuals have no reasonable expectation of privacy in the telephone numbers dialed from their phones, see *Smith v. Maryland*, 442 U.S. 735 (1979), or even with respect to checks and deposit slips used in banking. *United States v. Miller*, 425 U.S. 435, 443 (1976); see also *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 69-70, 73-76 (1974) (upholding numerous banking transaction record keeping and reporting requirements).

¹² *Public Attitudes Toward Local Telephone Company Use of CPNI: Report of a National Opinion Survey Conducted November 14-17, 1996*, by Opinion Research Corporation, Princeton, N.J. and Prof. Alan F. Westin, Columbia University, Sponsored by Pacific Telesis Group.

comprised of "privacy unconcerneds" (about 16%), "privacy fundamentalists" (about 24%) and a constituent of "privacy pragmatists" (approximately 60%). See Letter from Privacy & Legislative Associates (Dr. Alan Westin and Robert Belair), to the FCC, dated January 23, 1997, at 2, note 2 ("Privacy & Legislative Associates Letter"), Attachment 7. ("Privacy pragmatists' tend to generally favor the benefits extended to them by the free flow of information, but are swift to react when they think that information policies or uses are unfair.")

Polling a statistically valid sample of the privacy "universe" demonstrated the following:

- ◆ Despite a generalized concern over privacy issues, large majorities of the public believe it is acceptable for businesses, and in particular local telephone companies, to communicate with their own customers to offer them additional services,¹³ especially if those not wishing such communications are provided with an opt-out opportunity.¹⁴
- ◆ In particular, a large public majority believes that it is acceptable for local telephone companies to communicate with their customers using CPNI data.¹⁵ "Majorities in favor of local telephone company use of customer information for marketing were registered for all the demographic subgroups that make up the general public: young, middle-aged, and older persons; lowest to highest incomes; black, white, and Hispanic; male and female; lowest to highest education; conservative, moderate, and liberal political philosophy; urban, suburban, and rural community dwellers; and by Northeast, North Central, South, and West regions."¹⁶ The availability of an opt out procedure brings initial approvals of local telephone company use of CPNI from the two-out-of-three respondent level up to the 80% range of public approval.¹⁷
- ◆ Individuals understand "notice and opt out" procedures, and many have used them in one context or another.¹⁸

¹³ *Id.* Questions 7 (businesses generally), 9 (local telephone companies); Analysis at Item 7.

¹⁴ *Id.* Questions 8 (businesses generally), 12 (local telephone companies); Analysis at Item 8.

¹⁵ *Id.* Questions 10-11.

¹⁶ *Id.*, Analysis at Item 10, p. 9.

¹⁷ *Id.* Questions 11-12; Analysis at Items 8-10, pp. 8-10.

¹⁸ *Id.* Question 5 (familiarity with notice-and-opt-out), 6 (actual use of notice-and-opt-out); Analysis at 9-10 ("The CPNI survey found the respondents who have used opt outs in other business settings are willing to change their position from initial disapproval to positive views of customer-records-based communications by local telephone companies when" follow-up questions are asked).

- ◆ Hispanics, African-Americans, women, young adults (18-24 years of age), persons who have used an opt-out previously, and persons who order many additional telephone services, all have a higher-than-average level of interest in receiving information about new services from telecommunications carriers.¹⁹

Because an opt-in policy essentially dams the flow of information until permission is granted, it operates to suppress consumer benefits both indirectly and directly. Indirectly, an opt-in policy can adversely affect the design and development of products as well as direct communications with individuals. Without CPNI, a carrier must communicate with a customer as if the carrier is a stranger to the customer (e.g., engage in "broadcast speech" rather than targeted speech). This creates not only potential ill will but is inefficient for the carrier (increasing its costs) and the customer (either causing an unwarranted contact or taking too long once the communication is initiated). For the vast majority of customers there would be no benefits associated with an opt-in policy.

At the March 14, 2002 workshop, the WUTC staff stated that complaints collected from individuals about Qwest's (or carriers') use of CPNI was posted at the WUTC's web site. A review of the information posted indicates that only 404 comments were filed *via* electronic mail. There are currently over 3 million access lines in the state of Washington. Despite a generalized concern over privacy issues, the large majority of the Washington public made no comment to the WUTC on this matter. Qwest believes customers' silence on this matter is due in large part to customer's determinations that Qwest utilizes CPNI in a responsible manner.

The "Costs" of Privacy Protection

The Tenth Circuit cited to Professor Cate in support of the proposition that privacy interests must always be balanced against other interests, including free speech rights, because privacy protection "imposes real costs on society." 182 F. 3d at 1234-35 and note 7. Among the costs are the "withholding of relevant true information" and the "interfer[ence] with the collection, organization, and storage of information which can assist businesses in making rapid, informed decisions and efficiently marketing their products or services. In this sense, privacy [protection] may lead to reduced productivity and higher prices for . . . products or services." *Id.*, citing to Professor Cate's Privacy in the Information Age, pp. 28-30.

Over time, Professor Cate has held fast to his position that interference with or burdens on the use of customer information create inefficiencies, reduced productivity and higher prices generally for products and services. Professor Cate (in another context) and other commentators have observed that such information constitutes part of this nation's "essential infrastructure," the benefits of which are "so numerous and diverse that they impact virtually every facet of American life." Fred H. Cate & Richard J. Varn, The Public Record: Information Privacy and

¹⁹ *Id.* Questions 9-11; Analysis at 9.

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Access – A New Framework for Finding the Balance 10 (1999), available at <http://www.cspra.org/csprasite/pdfs/thepublicrecord.pdf>. In an information economy or information society, damming the flow of information seriously impedes the functioning and progress of an information economy. For example, Federal Reserve Board Chairman Alan Greenspan has explained that “information on the characteristics of consumers . . . has enabled producers and marketers to fine tune production schedules to the ever greater demands of our consuming public for diversity and individuality of products and services” and is “essential to the functioning of an advanced information based economy such as ours.” Quoted in Fred II. Catc, *Principles of Internet Privacy*, 32 Conn. L. Rev. 877, 883 (2000).

Shifting from theory to facts, Attachment 9 (a document from Qwest to the FCC outlining Qwest's attempts to secure affirmative CPNI opt-in approvals) demonstrates that the costs associated with attempts to secure affirmative approvals are beyond any rational benefits and would therefore effectively halt the proper use of CPNI. Each attempt to obtain CPNI approval continues to escalate the “cost per consent obtained.” As an absolute matter, it is impossible – regardless of the amount of money spent – to spend enough to secure affirmative approvals from a large enough base of customers to warrant the expense. Moreover, the kinds of responses realized by Qwest in its trial indicate no strong customer position on the matter of CPNI approval. Rather, the results indicate that the subject matter is not very interesting to most customers, most likely because it does not represent a matter of serious concern to them. *See US WEST v FCC*, 182 F.3d at 1239 (results may “reflect that a substantial number of individuals are ambivalent or disinterested in the privacy of their CPNI”).²⁰ In essence, Qwest's trial proves what the FCC has long held is likely behavior by mass market customers faced with requests for affirmative approval – inertia will overtake action. *See Qwest's Opening Brief*, in the FCC CPNI Proceeding, June 11, 1996, at Appendix A (here provided as Attachment 3).

Additionally, Qwest here provides a recent report entitled “The Hidden Costs of Privacy: The Potential Economic Impact of ‘Opt-In’ Data Privacy Laws in California,” by Peter A. Johnson and Robin Varghese, January 2002 (Attachment 13). While this report was confined to only certain businesses and a single state, it is indicative of the kinds of cost burdens (particularly those associated with inefficiencies) that would be realized in other contexts.

The costs associated with the WUTC proposed rules clearly outweigh any benefit. Neither the rules nor the costs associated with their implementation have been found to be warranted or necessary.

Constitutional Standard for Governmental Action Restricting CPNI Use by Carriers

²⁰ *See Attachment 10*, p. 2, where Qwest advised the FCC that the percentage results associated with the CPNI affirmative approval trial conducted by Qwest indicated a general lack of interest in the subject matter rather than a response on a matter of grave concern to individuals.

Before the government can act in a manner that impedes commercial speech, it must comply with the requirements articulated by the United States Supreme Court in *Central Hudson*. So long as the speech is truthful, the government may restrict the speech only if it proves (1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest."

Because it was designed to protect legitimate first amendment interests, the *Central Hudson* standard is quite rigorous. In the case of assertions of "privacy protection," the difficulty of achieving the standard is even more appropriate given the existence of a clearly articulated federal constitutional right and the vagaries associated with the claims of "privacy rights" or the need for "privacy protections." For the most part, the government is unable to identify with clarity either the source of the privacy "right" it claims exists or how the regulation it proposes to adopt advances that interest in a balanced and narrow manner. Indeed, it was on that basis that the Tenth Circuit invalidated the FCC's rule mandating use of an opt-in process.

Professor Cate concludes that the First Amendment's protection of speech -- a specific, articulated, constitutional protection -- will almost always be upheld over attempts to protect privacy, especially where the privacy to be protected is not well articulated or well grounded in law and extends beyond the physical invasion of persons or homes. He states, "Just as the First Amendment protects the privacy of every person to think and to express thoughts freely, it also fundamentally blocks the power of the government to restrict expression, even in order to protect the privacy of other individuals. As a result, the First Amendment . . . restrains the power of the government to control expression or to facilitate its control by private parties in an effort to protect privacy." Cate, *PRIVACY IN THE INFORMATION AGE*, at 55.

Substantial State Interest?

It is unclear what "substantial state interest" the WUTC believes it is advancing under the context of its proposed rules. "Privacy" is too broad a phrase to meaningfully articulate the interest for purposes of judicial review; even "who you call" is not private with respect to the network provider that transmits the call and the information that results in a future bill. As the Tenth Circuit Court of Appeals stated, "[t]he breadth of the concept of privacy requires [courts] to pay particular attention to attempts by the government to assert privacy as a substantial state interest." *US WEST v. FCC*, 182 F.3d at 1234.

The Tenth Circuit was critical of the government's failure to demonstrate a substantial state interest in protecting persons from the disclosure of sensitive and potentially embarrassing information. It stated:

In the context of a speech restriction imposed to protect privacy by keeping certain information confidential, the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on

individuals, such as undue embarrassment or ridicule, intimidation or harassment or misappropriation of sensitive personal information for the purposes of assuming another's identity. *Id.* at 1235.

The Court then noted that neither Congress nor the FCC explicitly identified "what 'privacy' harm § 222 seeks to protect against. Noting that the FCC spent some text discussing call detail, the Court stated that "[t]he government never states it directly, but we infer from this thin justification that disclosure of CPNI information could prove embarrassing to some and that the government seeks to combat this potential harm." *Id.*

The Court then stated quite clearly, "We have some doubts about whether this interest, as presented, rises to the level of 'substantial.' We would prefer to see a more empirical explanation and justification for the government's interest." In this regard, blanket prohibitions or restrictions are much less likely to be found consistent with the First Amendment than those that are tailored to particular types or uses of information.

Legislative action by the Washington State legislature provides guidance on the issue of privacy protection. In RCW 42.17.255, the statute uses terms such as "right to privacy," "right of privacy," "privacy, or "personal privacy." As the Court in *City of Tacoma v. Tacoma News, Inc.*, 827 P.2d 1094 (1992) stated, privacy invasions or violations occur "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." (This is essentially a legislative adoption of the Restatement (Second) of Torts (1997) § 652D, referenced by the Court. 827 P.2d at 1097.) While the context of the statute is different from that involving telecommunications carriers and their customers, the case strongly suggests that (a) a harm from a disclosure must be provable and must not be "moderately" or "somewhat" offensive – it must be highly offensive; and (b) disclosures of information within a corporate organization or between that organization and businesses with whom it has close, contractual relationships does not involve release to the public. Taking direction from the state legislature on the policy of Washington state on information uses and disclosures, Qwest's CPNI uses are appropriate and raise no public interest harms.

Direct and Material Advancement of State Interest

Even if the WUTC were to be able to articulate a substantial state interest, it must consider how its proposed rules would directly and materially advance that interest. Again, based on the Tenth Circuit's prior analysis they would not. When legitimate First Amendment interests are involved, the WUTC cannot speculate about possible harms that might occur through sharing CPNI within a corporate enterprise, or promulgate overbroad regulations in order to control the most possible venal use of information imaginable. Nor can it assume with no proof or proof to the contrary that releases by a carrier to third parties would in all cases be harmful to individuals. Some transfers (where agents perform activity on behalf of carriers and there are restrictions on the use to which CPNI can be put) are simply routine and raise no privacy concern. For these

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reasons, the WUTC can only regulate against demonstrable harms associated with CPNI sharing and disclosures and, in some contexts, proving any harm at all poses a difficult challenge.

The Tenth Circuit found that an opt-in CPNI approval regime failed this element of *Central Hudson* because "[w]hile protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract, [it had] no indication of how it may occur in reality with respect to CPNI." 182 F.3d at 1237. In addition, there is no basis to assume that all of the information that would be covered by the proposed rules is in fact "sensitive" and "potentially embarrassing."

Less Restrictive Regulation than Opt-In

Even if harm could be proven from CPNI sharing or disclosures, in order for a WUTC CPNI regulation – such as an opt-in mandate -- to be upheld against a federal constitutional challenge, the WUTC would have to prove that it was regulating the use of CPNI in a manner no more restrictive than necessary to achieve its objective of protecting against the demonstrated harm. An opt-in requirement would fail that test without doubt as to intra-corporate use and most likely with respect to third party disclosures if the regulation did not accommodate disclosures for unextraordinary purposes (such as providing CPNI to agents or providing it along with a sale of a part of the business).

Assuming that the government could prove that there were a substantial state interest as it describes, the question would be whether an opt-out policy is sufficient to represent a customer's approval to use CPNI and to protect the state's demonstrated interest. The answer is a resounding "yes." As the Tenth Circuit noted, it is speculative (and Qwest argues counterintuitive) that persons who care a great deal about privacy generally or about privacy and CPNI in particular would fail to act to protect their own interests. 182 F.3d at 1239 (the FCC simply "speculate[s] that there are a substantial number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given notice and the opportunity to do so. Such speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires"). A governmental regime established based on an assumption that such persons would fail to act is based on a paternalism the Supreme Court has rejected as inappropriate. See *44 Liquormart v. Rhode Island*, 116 S. Ct. 1495, 1507 (1996) (principal opinion); *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 769 (1976).

The tenets of *Central Hudson* make clear that it is the obligation of the government to prove that an opt-out regime would insufficiently protect an asserted privacy interest. It is not the burden on carriers to prove the opposite. Qwest believes the government could not demonstrate that an opt-in requirement was necessary to protect individuals' privacy interests particularly with respect to uses by their supplying carrier and not even with respect to all third party transfers. This is particularly true in light of the fact that additional judicial and regulatory mechanisms are available to protect individuals from a *bona fide* carrier misuse of CPNI along

the lines the questions presupposes. The WUTC has not made the requisite case to have its proposed rules sustained against a federal constitutional challenge.

Call Detail Information Creates No Exception to the Above Standard

The same standards discussed above apply to "call detail" information. Thus, attempts of the WUTC to regulate this "type" of CPNI will be tested against the Tenth Circuit and *Central Hudson* standard.²¹ This is true whether the regulation seeks to preclude the use of 10-digit detail (the number called) as well as attempts to prohibit carriers from using Numbering Plan Area (NPA) codes or central office (NXX) information (NPA-NXX).

The Tenth Circuit stated that "Given the sensitive nature of some CPNI, such as when, where, and to whom a customer places calls," Congress afforded CPNI the highest level of privacy protection under § 222." 182 F.3d at 1228-29. The Court was comparing § 222(c) with other subsections of § 222, such as the provisions dealing with aggregated information. In the former case, for example, customer "approval" was necessary before a carrier could use CPNI; whereas with respect to aggregate information no such "high[] level of privacy protection" was provided for in the statute. Nor was such protection required in the case of subscriber list information ("SLI"). By describing this legislative framework, the Court was not validating a substantial state interest in protecting people from disclosure of such information, particularly *vis-a-vis* their serving carriers that recorded the information.

As stated above, the Tenth Circuit had difficulty with the FCC's proffer of a substantial state interest, even in the context of call detail uses, characterizing its arguments as "thin justifications" addressed to "potential harm[s]". *Id.* at 1235. It later went on to say that an opt-in CPNI approval regime failed this element of *Central Hudson* because "[w]hile protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract, [it had] no indication of how it may occur in reality with respect to CPNI." *Id.* at 1237.

Document Productions

Included with this cover letter, Qwest submits documents identified on the enclosed "Attachment Index." Qwest's expectation is that these Attachments will be included in the record in this proceeding and should operate to (a) provide factual support for Qwest's arguments; (b) provide expert opinion supportive of Qwest's arguments; and (c) provide the WUTC with prior advocacy positions of Qwest, the FCC and others regarding this important matter.

²¹ Carriers, of course, are free to volunteer restrictions on their own conduct or use of CPNI. And, they can be challenged if they do not comport their behavior to their representation. The Commission's informal and formal complaint rules provide a forum for customer grievances against carriers, creating another "less restrictive" alternative to protect customer privacy "concerns."

Federal Preemption

At the previous workshop there appeared to be some confusion with respect to Qwest's use of the term "conflict" when comparing the WUTC's proposed rules with those of the FCC. WUTC participants asserted that the only cause for concern with respect to "different" federal and state CPNI rules was if there were a "conflict" defined as a situation where it is impossible for Qwest to comply with both rules. The WUTC's position, however, is not the appropriate analysis with respect to preemption and state CPNI rules, as made clear by the language of the FCC itself. The FCC, using the term "conflict," describes a conflict in much broader terms than does the WUTC and indicates clearly that different federal and state CPNI regulatory regimes create a "conflict." It states:

State rules that likely would be vulnerable to preemption would include those permitting greater carrier use of CPNI than section 222 and our implementing regulations announced herein, as well as those state regulations that sought to impose more limitations on carriers' use. This is so because state regulation that would permit more information sharing generally would appear to conflict with important privacy protections advanced by Congress through section 222, whereas state rules that sought to impose more restrictive regulations would seem to conflict with Congress' goal to promote competition through the use or dissemination of CPNI or other customer information. In either regard, the balance would seemingly be upset and such state regulation thus could negate the Commission's lawful authority over interstate communication and stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . . We find, therefore, that the rules we establish to implement section 222 are binding on the states, and that the states may not impose requirements inconsistent with section 222 and our implementing regulations.

CPNI Order, 13 FCC Rcd. 8061, 8077-78 ¶¶ 18, 20. Notably absent from the FCC's discussion of preemption was a reference to a physical inability to comply with both federal and state rules.

Beyond that, even if "impossibility" were the test for preemption applicable here – which it is not – that standard, properly understood, is met here. Any doubt on this score is resolved by the FCC's discussion in its *CPNI Order* of its prior, successful attempt to preempt a state regulation addressed to CPNI:

"In Louisiana Pub. Serv. Comm'n v. FCC, the Supreme Court held that, even where Congress has not provided the Commission with a direct grant of authority over intrastate matters, the Commission may preempt state regulation where such regulation would negate the Commission's exercise of its lawful authority because regulation of the interstate aspects of the matter cannot be severed from regulation of the intrastate aspects. The Court of Appeals for the Ninth Circuit applied this principle, generally referred to as the "impossibility exception," in the specific context of a state CPNI regulation even prior

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to the 1996 Act. In California III, the Ninth Circuit upheld the Commission's preemption of California regulations that required prior customer approval for access to CPNI, under the impossibility exception. We conclude that, in connection with CPNI regulation, the Commission may preempt state regulation of intrastate telecommunications matters where such regulation would negate the Commission's exercise of its lawful authority because regulation of the interstate aspects of the matter cannot be severed from regulation of the intrastate aspects. As several parties observe, where a carrier's operations are regional or national in scope, state CPNI regulations that are inconsistent from state to state may interfere greatly with a carrier's ability to provide service in a cost-effective manner. In addition, as MCI points out, even if a state written approval requirement were limited to the use of CPNI for the marketing of intrastate services, for example, it would disrupt interstate service marketing because it would be impractical to limit marketing to interstate services."

CPNI Order, id. at ¶ 16 (footnotes omitted).

The Commission's proposed rules at WAC 480-120-202, -205, -206, -207, -208 and -209 conflict with the FCC rules and cannot withstand constitutional scrutiny. In addition, Qwest has policy concerns with proposed WAC 480-120-211 - Confirming Change in Approval Status and WAC 480-120-213 - Safeguards Required for Using Private Account Information. Qwest will address these issues along with other proposed rule concerns at the March 27, 2002 open meeting.

Conclusion

Qwest values its customers and respects their judgment with regard to the use of CPNI. Qwest is confident that an opt-out CPNI approval regime would provide customers with ample opportunity to exercise their choice regarding CPNI use. In all events, since Qwest shares customer account information on a very limited basis at this time, there is no need for radical changes to the current WUTC rules nor state regulatory action that materially departs from the federal regulatory regime, even assuming such changes were permissible.

I look forward to our discussion this Friday and appreciate the opportunity to explain Qwest's position on these important issues. If you have further questions, I can be reached at (303) 672-2859.

Sincerely,

Theresa Jensen
for Kathryn Krause

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cc: Commissioner Richard Hemstad
Commissioner Patrick Oshie
Glenn Blackmon

ATTACHMENT INDEX

#	<u>DATE</u>	<u>DOCUMENT IDENTIFICATION</u>
1	Telecommunications of 1996	Section 222, as amended
2	Current	FCC CPNI rules, 47 CFR §§ 64.2001 <i>et seq</i>
3	June 11, 1996	U S WEST Opening Comments, FCC CPNI Rulemaking, CC Docket No. 96-115
4	June 26, 1996	U S WEST Reply Comments, FCC CPNI Rulemaking, CC Docket No. 96-115
5	December 2, 1996	Letter from Kathryn Krause (U S WEST) to FCC (William Kehoe and Karen Brinkmann, including a discussion on the role and scope of "implied consent" in CPNI analyses
6	January 16, 1997	Letter from Pacific Telesis (Gina Harrison) submitting Westin Survey and related materials to FCC (William F. Caton, Secretary)
7	January 24, 1997	Letter from Pacific Telesis (Gina Harrison) to FCC (William Caton) submitting an analysis from Privacy & Legislative Associates on the "sensitivity" of CPNI
8	February 19, 1997	Letter from Elridge Stafford (U S WEST) to FCC (William Caton) submitting slide presentation on "CPNI/SLI Rules That Serve the Public Interest"
9	September 11, 1997	Letter from Elridge Stafford (U S WEST) to FCC (Caton) submitting Letter from Kathryn Krause to FCC which includes results from U S WEST CPNI Affirmative Approval "Trial"
10	December 16, 1997	Letter from Elridge Stafford (U S WEST) to FCC (Salas) attaching Slide Presentation associated with follow up discussion with FCC on CPNI affirmative approval trial
11	August 13, 1998	U S WEST Opening Brief in <i>U S WEST v. FCC</i> , Tenth Circuit Case (No. 98-9518)
12	October 15, 1998	U S WEST Reply Brief in <i>U S WEST v. FCC</i> , Tenth Circuit Case (No. 98-9518)
13	January 24, 2002	"The Hidden Costs of Privacy: The Potential Economic Impact of 'Opt-In' Data Privacy Laws in California" by Peter A. Johnson, PH.D and Robin Varghese, M. Phil.