

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information And Other Customer Information	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149
	)	
2000 Biennial Regulatory Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	)	CC Docket No. 00-257
	)	

**VERIZON'S REPLY COMMENTS TO PETITIONS FOR  
RECONSIDERATION OF THIRD REPORT AND ORDER**

Michael E. Glover  
Edward Shakin  
Of Counsel

Ann H. Rakestraw  
  
1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201  
(703) 351-3174

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**VERIZON'S REPLY COMMENTS TO PETITIONS FOR RECONSIDERATION OF THIRD REPORT AND ORDER<sup>1</sup>**

**Introduction**

Commenters from all segments of the industry supported Verizon's and AT&T Wireless' petitions for reconsideration requesting the Commission declare that inconsistent state CPNI regulations are preempted. These commenters recognize that it is impossible to separate the interstate and intrastate portions of CPNI, and thus deciding preemption only on a case-by-case basis would undermine the Congressional goals of establishing a uniform national CPNI policy, and would violate carriers' First Amendment rights.

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<sup>1</sup> See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Third Report and Order and Third Further Notice of Proposed Rulemaking*, 17 FCC Rcd 14860 (2002) ("Third CPNI Order").

The handful of commenters opposing the petitions raise theoretical arguments that states might be able to develop First Amendment records different than that gathered by the Commission. But the record established by the Commission makes clear that significant new restrictions would violate carriers' First Amendment rights. Moreover, the current "case-by-case" approach allows states to implement regulations that effectively supersede *federal* CPNI policy, and is already creating serious, real burdens to carriers, and violating their First Amendment rights. The Commission should grant the petitions filed by Verizon and by AT&T Wireless.

**I. Commenters From All Industry Segments Support the Petitions, and Reaffirm that a "Case-By-Case" Approach to Preemption Will Impose Significant Burdens and Infringe Carriers' First Amendment Rights**

Wireless carriers, local exchange carriers (CLECs and ILECs), and long distance carriers have all filed comments encouraging the Commission to grant Verizon's and AT&T Wireless' petitions.<sup>2</sup> Indeed, as several commenters pointed out, the Commission itself has previously made a convincing case for a strong preemption policy:

In the Commission's own words, state rules that impose more restrictive CPNI regulations "conflict with Congress' goal to promote competition through the use or dissemination of CPNI or other customer information," upset the balance between carriers' First Amendment rights and consumers' privacy interests, "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."<sup>3</sup>

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<sup>2</sup> See, e.g., AT&T Comments (filed Dec. 20, 2002); Cellular Telecommunications & Internet Association Comments (filed Dec. 26, 2002) ("CTIA Comments"); IDT Corporation Comments (filed Nov. 19, 2002); SBC Communications Comments (filed Dec. 27, 2002); Sprint Comments (filed Dec. 27, 2002); United States Telecom Association Comments (filed Dec. 23, 2002) ("USTA Comments"); WorldCom Comments (filed Dec. 27, 2002).

<sup>3</sup> CTIA Comments, at 7 (citing *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, ¶ 18 (1998) ("Second CPNI Order")).

The Third CPNI Order does not articulate a reasoned basis for its “abrupt departure from this position,” AT&T Comments, at 7, nor could it. The interstate and intrastate portions of CPNI are intertwined. Because it “would not be economically or operationally feasible for” carriers to revamp their entire marketing efforts to accommodate 50 different CPNI regulations,<sup>4</sup> carriers would have to comply with the most stringent – *i.e.*, state – CPNI requirements. *See* Verizon Petition, at 5-12; Breen Decl., ¶¶ 6, 8, 13-15. Thus, the effect of deciding preemption only on a case-by-case basis would be to allow state regulations to trump federal law. *Id.* This would undermine the Congressional goals of establishing a uniform, national CPNI policy and violate carriers’ First Amendment rights. Verizon Petition, at 11-23.

Indeed, as comments by the Washington Utilities and Transportation Commission (“WUTC”) make clear, states are *already* adopting CPNI regimes that conflict directly with the Commission’s approach and that unlawfully restrict the marketing of both intrastate and interstate services. As the WUTC frankly admits, it adopted regulations, effective January 1, 2003, which purport to apply “greater protection (opt-in rather than opt-out)” to certain types of CPNI, “*even when that information is used by the telecommunications company and its affiliates.*”<sup>5</sup> The WUTC’s new rules reject the “total service approach” which has been part of this Commission’s regulation of CPNI from the outset.<sup>6</sup> Instead, as to a new category of CPNI denominated “call detail” (itself

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<sup>4</sup> *People of the State of California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994); *see also* Declaration of Maura Breen, ¶¶ 15-18 (“Breen Decl.”) (attached as Appendix E to Verizon Petition).

<sup>5</sup> *See* WUTC Comments, at 2-3 (filed Dec. 23, 2002) (emphasis supplied).

<sup>6</sup> The Commission has consistently found that “a large percentage of telecommunications customers . . . expect that carriers will use CPNI to market their own telecommunications services and products, as well as those of their affiliates,” *Third CPNI*

contrary to the unitary definition of CPNI contained in Section 222), carriers must obtain opt-in approval even for in-bucket marketing to existing customers. Thus, in situations where this Commission has found that no express customer approval is required *at all*, the WUTC has applied a stringent opt-in regime.<sup>7</sup>

The WUTC argues that the fact Verizon has filed a legal challenge to its rules in federal District Court “shows that it is unnecessary for the Commission to presumptively preempt state telephone customer privacy protections,” WUTC Comments, at 8-9. However, the case actually demonstrates the *opposite*. While Verizon believes that the District Court will overturn the WUTC rules, the fact is that Verizon’s First Amendment rights (and those of other carriers) are being, and will continue to be, violated until the WUTC rules are enjoined or significantly modified.<sup>8</sup> Moreover, this battle – and its incumbent expenses and First Amendment burdens – very well could be played out repeatedly if more states follow the WUTC’s lead and adopt their own inconsistent and unconstitutional CPNI regulations. Obviously, district courts could reach disparate

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*Order*, ¶ 36, and that “through subscription to the carrier’s service, [the customer] has implicitly approved the carrier’s use of CPNI within that existing relationship,” *Second CPNI Order*, ¶¶ 23-24. Thus, it has found no privacy interest requiring any customer approval mechanism for in-bucket marketing. The new WUTC rules expressly reject the Commission’s repeated findings on that point.

<sup>7</sup> The WUTC’s new rules also reject the Commission’s judgment regarding the sharing of CPNI with agents, independent contractors and joint venture partners in favor of an opt-in regime for any entity outside the “corporate family” as redefined by the WUTC rules. *See* WUTC Order, App. C (attached as an exhibit to WUTC Comments).

<sup>8</sup> The WUTC is correct that the District Court on December 20, 2002 stated that it would not grant a temporary restraining order or preliminary injunction until the WUTC was able to depose the Verizon witness who filed a declaration in support of Verizon’s complaint. WUTC Comments, at 8. However, the court made it clear that it was denying preliminary relief only for the short period of time necessary to conduct very limited discovery on the preliminary injunction. Verizon anticipates that this discovery and further briefing will be concluded within the month of January.

results on these issues, leading to a further patchwork of regulation and frustrating the congressional goal of uniform, national CPNI regulation under the terms of Section 222.

## **II. The Commission Should Reject Opponents' Abstract Arguments About "State Sovereignty" and Theoretical Speculation That States Could Amass Different First Amendment Records than the Commission**

The commenters that oppose Verizon's and AT&T Wireless' petitions offer essentially two arguments: (1) as a matter of "state sovereignty," the Commission should allow states the "flexibility" to adopt "consumer protection" laws regarding CPNI, even if those laws conflict with federal CPNI policy; and (2) it is theoretically possible that states will be able to demonstrate a better First Amendment record than the Commission.<sup>9</sup> Neither of these arguments is convincing, and neither provides a justification for a "case-by-case" approach to preemption.

### **A. Preempting Inconsistent State CPNI Regulations Does Not Impair "State Sovereignty"**

Some commenters argue that preemption would impair "state sovereignty" and "states' longstanding ability to protect consumers through enactment of substantive standards and by enforcement of existing state laws." National Association of Attorneys General Comments, at 1-2. This argument grossly overstates the effect of a preemption policy, and is misplaced.

Despite opponents' characterizations, the petitions do not request the Commission to preempt "any conceivable state approach that differs in any way from the FCC's rules, no matter what its basis." NASUCA Comments, at 2 (filed Dec. 24, 2002). Rather, they ask the Commission to preempt regulations that are *inconsistent with* federal CPNI regulations. Verizon Petition, at 1; AT&T Wireless Petition, at 1. Preemption where state regulation conflicts with or

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<sup>9</sup> See, e.g., National Association of Attorneys General Comments, at 2 (filed Dec. 23, 2002).

frustrates the goals of federal regulation is a well-established doctrine with both the courts and the Commission. There can be no serious argument about the Commission's authority to exercise such preemption. The Commission has routinely preempted state regulations in areas where it would be impossible to separate the interstate and intrastate portions of telecommunications, and courts have consistently upheld this preemption authority. *See Verizon Petition*, at 7-8. And although one commenter claims that "regulation of telecommunications is the shared responsibility of federal and state government," that comment is based on pre-1996 Act law. *See NASUCA Comments*, at 3. As the Supreme Court recently stated, there is no question whether the federal government "has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has."<sup>10</sup>

Indeed, the existing order already states that the Commission will review and preempt state regulations "on a case-by-case basis" to the extent they "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." Third CPNI Order, ¶¶ 69, 74. The real question is whether the Commission should continue with its current approach of declining to presume that "more restrictive" state CPNI requirements are in fact preempted. *Id.*, ¶ 70.

The difference between existing Commission preemption policy and the prior policy sought in the petitions is the *timing* of the preemption decision, and the presumption that applies to conflicting state laws. However, the impact of that difference is enormous. By stating an intention to address inconsistent state regulations only on a "case-by-case-basis," the

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<sup>10</sup> *AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366, 378 n.6 (1999). Section 222, governing CPNI, was enacted by the 1996 Act. *See* Second CPNI Order, ¶¶ 1-2.

Commission has emboldened some states to attempt to thwart national CPNI policy, through adoption of inherently conflicting regulations. *See, e.g.*, WUTC Order, App. C. And, because intrastate and interstate CPNI is intertwined, more stringent state regulations will effectively trump federal policy, all at the expense of carriers' First Amendment rights. Verizon Petition, at 5-23; AT&T Comments, at 2-12; CTIA Comments, at 6-9; IDT Comments, at 2. Indeed, the WUTC nowhere disputes (or even addresses) the argument that its more stringent CPNI rules will apply to interstate and jurisdictionally mixed services because carriers cannot administer a "dual regime" of customer consent. *See, e.g.*, Breen Decl., ¶¶ 14-18.<sup>11</sup> Thus, the Commission's current preemption policy invites a patchwork of inconsistent regulations (which ultimately must be overturned by the courts and/or the Commission), and results in wasteful litigation, unnecessary costs, and infringement of carriers' First Amendment speech. Verizon Petition, at 5-23. There simply is no reasoned basis to allow such an inefficient and unconstitutional approach to preemption.

Some states have argued that they may be able to adopt CPNI regulations that do "not necessarily" conflict with federal CPNI goals. *See, e.g.*, Arizona Corporation Commission Comments, at 4. While that is undoubtedly true as a theoretical matter, the question of which way the Commission's presumption should operate must be resolved in light of the First

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<sup>11</sup> In fact, the WUTC practically concedes this point in its own order adopting its new more stringent CPNI rules. On their face, the rules apply to CPNI associated with both intrastate and interstate services. *See, e.g.*, WAC 480-120-201 (defining "call detail"), in WUTC Order, App. C. Moreover, in response to comments expressing concern that consumer confusion would result from receiving *both* the FCC-mandated CPNI notices and the substantially different WUTC notice, the WUTC responded: "If companies send two different notices to customers under the opt-out mechanism, no doubt confusion will result. *Confusion can be avoided if companies send to customers only the correct notice based on these rules. To the extent our rules are more protective of sensitive call detail information than the FCC rules, companies will be required to send opt-in notices.*" WUTC Order, App. A, at p. 6 (emphasis added). Thus, the WUTC acknowledges that its more restrictive regime will trump the Commission's rules in Washington State.

Amendment rights involved. A presumption against state CPNI rules will work no harm to core constitutional rights, and if litigation is needed to demonstrate that a state rule is in fact *consistent* with the Commission's rules, both the carriers' First Amendment rights and consumer welfare (as established by the federal rules) will be protected in the meantime. Exactly the opposite is the case under the current preemption policy. The Commission's presumption must be in favor of federal consistency and First Amendment rights, not abstract "state sovereignty" concerns. Indeed, despite commenters' claims, there are no "state sovereignty" claims at issue. As discussed above, CPNI indisputably involves interstate commerce, and thus is an area in which Congress can legislate. Because Congress has legislated in this area, and has set a uniform, *national* CPNI policy, state sovereignty issues are not implicated. *See AT&T Corp. v. Iowa Utils. Board*, 525 U.S. at 387 n.6.

**B. States Cannot Be Allowed to Thwart the First Amendment Decisions of the Commission and the Tenth Circuit**

Opponents of the PFRs also theorize that states may be able to establish a First Amendment record that is different than the one amassed by the Commission, and that would justify an opt-in approach to consent. *See, e.g.,* NASUCA Comments, at 8. However, especially given the extensive record developed by the Commission in the course of its several CPNI proceedings, "although it is certainly possible that one or more of the 50 states might develop a *different* record, it is unlikely that they will develop a *better* record – one that is more comprehensive than the Commission's record." AT&T Comments, at 8. The Commission received comments from every corner of the industry, but ultimately concluded that it could not, consistent with the First Amendment, adopt an opt-in regime for intra-company

communications.<sup>12</sup> As Chairman Powell explained, “despite the laudable efforts of the parties to generate such an empirical record, not to mention our own efforts, no more persuasive evidence emerged that would satisfy the high constitutional bar set by the court.”<sup>13</sup> The Commission should not continue a policy that permits the states to infringe carriers’ First Amendment rights when the Commission has already conducted a full evidentiary inquiry.

Indeed, the WUTC Comments demonstrate that states are *not* developing more detailed records in support of their regulations, but are simply trying to revisit and second-guess the First Amendment balance already struck by the Commission and by the Tenth Circuit in *US West v. FCC*, 182 F.3d 1224 (10<sup>th</sup> Cir. 1999). In its Order in support of the new WUTC regulations, the WUTC proffers only a few sentences from “consumer” comments as evidence that customers do not expect their CPNI to be disclosed,<sup>14</sup> with “no attempt at explanation or context.” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 819 (2000). Even aside from the fact that the WUTC cannot explain the import of these consumer comments and even aside from the fact that customer expectations are not a limiting factor in their service providers’ First Amendment rights, the WUTC’s reliance on a limited, self-selected, and statistically insignificant sample of comments to justify the curtailment of carriers’ First Amendment rights is precisely the danger that the Constitution is designed to prevent. *See* AT&T Comments, at 12 (“Because the whole point of a constitution is to place certain principles beyond the reach of majority preferences, the Washington UTC’s analysis is wholly inadequate” (citation and

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<sup>12</sup> The Commission concluded that, “[i]n formulating the required approval mechanism . . . [opt-out], we carefully balance[d] carriers’ First Amendment rights and consumers’ privacy interests so as to permit carriers flexibility in their communications with their customers while providing the level of protection to consumers’ privacy interests that Congress envisioned under Section 222.” *See* Third CPNI Order, ¶ 1.

<sup>13</sup> Third CPNI Order, Separate Statement of Chairman Michael K. Powell.

<sup>14</sup> *See* WUTC Order, at 31-32.

quotation marks omitted)). And none of the consumer comments cited by the WUTC support its arbitrary segmentation of CPNI into two distinct categories: “call detail” and other “private account information.” This “paucity of evidence” – in the face of the millions of Washington citizens who have voiced no complaint, as well as the millions of Americans who have benefited from carrier use of their CPNI<sup>15</sup> – cannot support a substantial state interest. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 667 (1994); *see Playboy*, 529 U.S. at 821-22 (“Without some sort of field survey, it is impossible to know how widespread the problem in fact is . . . .”).<sup>16</sup>

The Commission has already undertaken the constitutional analysis necessary to determine the correct approach to carrier use of CPNI and, as one would expect based on the Commission’s searching national review, the WUTC has been unable to produce any new evidence of constitutional consequence. There is no reason to believe other states will fare any better. The Commission should not allow its preemption policy – and infringement of carriers’ First Amendment rights – to be dictated by such a remote contingency.

### **III. There Are No Procedural Problems With Verizon’s Petition**

The WUTC attempts an end-run around Verizon’s Petition, arguing that it does not comply with Commission rules because Verizon failed to inform the Commission of “the

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<sup>15</sup> Third CPNI Order, ¶¶ 35-36.

<sup>16</sup> Many of these consumer communications address disclosure of CPNI to third parties for the marketing of non-communications related services. *See, e.g.*, WUTC Order, at 31-32. Verizon does not engage in such disclosures and they are not implicated by carrier speech regarding CPNI with existing customers. Moreover, the Qwest experience with opt-out, referred to by the WUTC, *see* WUTC Comments, at 4-5, involved an alleged failure to properly administer a customer approval system – a problem that could occur in either an opt-in or opt-out regime and is properly addressed by enforcement of existing notice requirements. *See* 47 C.F.R. § 64.2008.

possibility of differing state regulations” that was “well-known to Verizon during the Commission’s rulemaking proceeding.” WUTC Comments, at 10 (citing 47 C.F.R. § 1.429(b)(2)). What WUTC fails to acknowledge, however, is that Verizon and other commenters in the prior proceedings did *not* have notice that the Commission was considering changing its rule on preemption in the Third CPNI Order. As one commenter noted, “the Commission neither discussed the issue of preemption in its *Clarification Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 16506 (2001), nor asked the parties for comments on whether it should modify its finding barring the states from adopting regulations governing the carriers’ use of CPNI that were inconsistent with the Commission’s regulatory paradigm implementing Section 222.” Sprint Comments, at 3. *See also* CTIA Comments, at 2 (“The Commission’s recent reversal of this presumption [of preemption] comes as a surprise, given that it did not seek comment on the preemption issue, and did not give any indication that it intended to change its preemption policy”) (footnote omitted)).

In other words, although Verizon may have known that certain states were considering CPNI regulations, it believed – as did other carriers – that the Commission’s then-existing preemption policy, and the Third CPNI Order, would preclude the enactment of inconsistent state regulations. Indeed, Verizon expressly requested that the WUTC delay implementation of its CPNI rules until the Commission issued the Third CPNI Order, because “[t]he proposed rules conflict with federal law and FCC rules, and they have serious constitutional defects.”<sup>17</sup> Thus, there simply is no merit to the WUTC’s claim that Verizon “could have presented the information contained in” the Petition and its supporting declaration at an earlier time. WUTC

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<sup>17</sup> *See* Comments of Verizon Northwest Inc. on Moving Proposed CPNI and Credit Rules to the CR-102 Stage, Before the Washington Utilities and Transportation Commission, Docket No. UT-990146, at 1 (filed March 21, 2002).

Comments, at 10. A petition for reconsideration is the proper vehicle to address an issue or decision not addressed in the initial notice of informal rulemaking.

**Conclusion**

The Commission must preempt state CPNI regulations that are inconsistent with federal CPNI rules, for the reasons set forth more fully in the petitions for reconsideration filed by Verizon and by AT&T Wireless. It should therefore adopt a presumption that any State regulations that are more restrictive than the Commission's rules are preempted.

Respectfully submitted,



Ann H. Rakestraw

Michael E. Glover  
Edward Shakin  
Of Counsel

1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201  
(703) 351-3174

January 6, 2003

Counsel for the Verizon telephone companies