REPLY COMMENTS OF QWEST CORPORATION
IN DOCKET NO. UT-990146
PROPOSED RULES WAC 480-120-201 TO 209 & 211 TO 216
CUSTOMER INFORMATION
June 19, 2002

Pursuant to the Washington Utilities and Transportation Commission's ("Commission") request for reply comments in Docket No. UT-990146, Qwest Corporation ("Qwest") respectfully submits these Reply Comments.

I. INTRODUCTION AND SUMMARY

As Qwest demonstrated in its prior comments, the Tenth Circuit's action in *U S WEST v. FCC*[1] significantly limits the Commission's discretion in promulgating customer Proprietary Network Information ("CPNI") approval processes and imposes material constitutional restraints on the Commission's revisitation of its CPNI rules in Docket No. UT-990146. When tested against those constraints, only a governmentally-mandated opt-out CPNI approval process can be sustained. Telecommunications providers should have primary responsibility for establishing and implementing CPNI approval processes, guided by market forces, with government enforcement mechanisms available as an additional safeguard. Alternatively, if the Commission is nevertheless inclined to adopt revised and specific regulations governing CPNI approvals, only an opt-out CPNI approval process accommodates constitutional considerations, customer privacy interests and legitimate commerce. The Commission should align its regulatory action with this advocacy, since it is the only course of action calculated to be sustained as constitutionally permissible.

Other commentors -- the Electronic Privacy Information Center ("EPIC"), Low Income Telecommunications Program ("LITE"), Senior Services, Public Counsel and the American Civil Liberties Union of Washington ("ACLU")- - argue for an opt-in approval requirement for all CPNI.[2] However, none of these commentors support their position with relevant legal precedent or empirical evidence. Rather, each purports to support its argument with conjecture and analogies to inappropriate facts or situations. These comments fail to provide the evidentiary support necessary to justify an opt-in CPNI approval mechanism under the requirements of *Central Hudson*[3] and the Tenth Circuit's analysis.

Qwest comments below, are specific to EPICs advocacy since they are largely the only party that attempts to provide a legal basis in support of their comments. EPIC, somewhat reconstituted from the *Amici Curiae* group of parties that filed an unsuccessful

[1] *U S WEST, Inc. v. FCC*, 182 F.3d 1224, 1240 (10 th Cir. 1999), *cert. denied*, 120 S.Ct. 2215 (June 5, 2000) *("U S WEST v. FCC")*.

[2] EPIC argues for an opt-in approval requirement throughout its comments. However at page 1, EPIC states that "an opt-out approach should be used for all these forms of customer information…".

[3] *Central Hudson Gas & Electric Corp. v. Public Service Commissio*n, 447 U.S. 557 (1980) ("*Central Hudso*n"). As outlined by the Tenth Circuit, "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.'" *U S WEST v. FCC*, 182 F.3d at 1233 (referencing *Central Hudso*n, 447 U.S. at 564-65).

petition for reconsideration before the Tenth Circuit,[4] presses arguments similar to those rejected by that Court. Accordingly, any decision that relies upon these unsubstantiated arguments will be rejected -- again -- on appeal. EPIC here tries to revive its case that an opt-out CPNI approval requirement fails to protect some general government interest in privacy. EPIC fails to supply any of the evidence or analysis that was missing from its predecessor's prior claims before the Court. Specifically, EPIC fails to explain the specific nature and importance of the governmental interest in protecting consumer privacy with respect to CPNI. EPIC fails to provide any relevant facts or data to show how an opt-out CPNI approval mechanism would compromise any legitimate governmental interest associated with a carrier-customer relationship or the interests of the parties to the telecommunications service relationship. Indeed, EPIC provides only the most superficial legal analysis on the subject of informational privacy, citing to cases where the facts and the law are inapposite to the current situation. All told, EPIC's advocacy that the Commission impose an opt-in CPNI approval mechanism essentially invites the Commission to abrogate the law and constitutional protections afforded speakers and audiences under the First Amendment. The Commission should decline the invitation.

II. OPT-IN CPNI APPROVAL PROCESSES WILL NOT WITHSTAND CONSTITUTIONAL SCRUTINY AND SHOULD NO LONGER BE PURSUED

A. EPIC Fails To Offer Any Serious Legal Or Empirical Evidence To Support An Opt-In Process.

EPIC's advocacy fails because it ignores the directive of the Tenth Circuit that "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. Moreover, privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered proper balancing of the benefits and harms of privacy."[5] Contrary to the Court's clear directive, EPIC fails to identify any specific privacy harm associated with the use of CPNI within the carrier-customer relationship, or even within the context of reasonable third-party releases. And, EPIC makes no attempt to balance any "privacy harms" against the burden imposed on speakers and interested audiences, not to mention legitimate commercial activity *(e.g.*, efficiency, productivity, financial stability).[6]

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[4] In its filing before the Court, EPIC professed to represent "15 consumer and privacy organizations." Significantly, this commenting body no longer enjoys the support of the "22 Law Professors and Privacy Scholars" who were represented by its predecessor's filing. *See* Motion of the Electronic Privacy Information Center, *et al.*, filed Oct. 22, 1999, Case No. 98-9518 (10 th Cir.) and Brief of the Electronic Privacy Information Center, *et al.*, filed Oct. 22, 1999 in the same case.

[5] *U S WEST v. FCC,* 182 F.3d at 1234-35 (footnote omitted).

[6] *Compare id.* at n. 7 ("privacy interferes 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 may lead to reduced productivity and higher prices for those products or services").

1. EPIC's Legal Citations are not Relevant or Controlling

EPIC attempts to fashion its putative government interest as one imbued with constitutional significance,[7] despite the Tenth Circuit's conclusion that the matter of CPNI use and sharing does not itself implicate a federal constitutional right to privacy since there is no claim that the government is violating any person's privacy.[8] At this time in American jurisprudence, there is no constitutional right to "informational privacy" as between private parties. There may be statutory rights, or common law rights, but there is no constitutional government obligation (or right) to protect private parties within a relationship from each other or to regulate the way in which information generated within that relationship is used.

The cases EPIC cites fail to support its position. Specifically, the cases do not involve parties within relationships using information within that relationship to advance the informational and pecuniary interests of both parties. Rather, some cited cases involve holders of information who are met with demands from unaffiliated entities to release the information when the holder of the information has no interest in doing so, *e.g., Lanphere & Urbaniak v. Colorado*[9] and *Department of Defense v. Federal Relations Auth.*[10] These cases do not address the rights of a willing carrier/speaker or an interested customer/ audience or the matter of information generated within a relationship being used within that relationship. Failing even to address the facts of the instant case, these cases clearly do not support imposing a high barrier *(i.e*., opt-in approval) to speech within the context of the existing relationship.

The case of *Edenfield v. Fan*e,[11] while containing the language quoted favorably by EPIC,[12] resulted in judicial action at odds with EPIC's advocacy. In *Edenfiel*d, the Court invalidated a ban on in-person solicitation by certified public accountants, even though other communication vehicles *(e.g*., mailings or advertisements) existed and remained permissible. The case supports more the position of Qwest and commentors supporting opt-out CPNI approval mechanisms[13] than a party urging an opt-in model.

EPIC also argues that "Congress recognized the importance of a citizen's privacy interest by enacting statutes preventing disclosure of precisely the same information [as

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[7] EPIC at 2 ("The constitutional right of privacy protects two distinct interests: 'one is the individual interest in avoiding disclosure of personal matters, and the other is the interest in independence in making certain kinds of important decisions,'" referencing *Whalen v. Roe,* 429 U.S. 589 (1997)).

[8] *U S WEST v. FCC,* 182 F.3d at 1234 n.6 ("Here, the question is solely whether privacy can constitute a substantial state interest under *Central Hudso*n, not whether the FCC regulations impinge upon an individual's right to privacy under the Constitution."). *Compare Whalen v. Roe, see* note 16, *supr*a, articulating the elements of a constitutional claim. *And compare Sheets v. Salt Lake Count*y, 45 F.3d 1383 (10 th Cir. 1995) (cited by EPIC at 2 n.2), which also involved a claim against the state under 42 U.S.C. § 1983.

[9] 21 F.3d 1508 (10 th Cir. 1994), cited in *U S WEST v. FC*C, *id.* at 1235 (supporting the Court's decision to assume a substantial government interest).

[10] 510 U.S. 487 (1994), cited by EPIC at 3 n.4. While the case does contain dicta about information and an individual's expectation of privacy, it was within a context of information being legally wrested from a holder not desiring to release it. That is certainly not the case here.

[11] 507 U.S. 761 (1993).

[12] EPIC at 2 n.2.

[13] Sprint, Verizon and Allegiance support opt-out CPNI approval mechanisms.

CPNI] to the public at large."[14] This assertion is incorrect on at least three counts. First, the information associated with EPIC's cited legislative enactments does not involve information "precisely" like CPNI. While cable viewing records and video rental records might be similar in sensitivity to CPNI to some persons, other information -- such as credit (financial) and medical information -- is generally considered more sensitive than CPNI, as witnessed by representations of other administrative agencies and expert opinions.[15] Second, EPIC's citation to the Cable Act and Video Privacy Act as supportive of its position is misplaced. The Cable Act allows internal use of customer information for purposes of providing cable and cable-like services;[16] and the Video Privacy Act allows use of viewing information internally within a business operation and release of "category" information externally if the vendor posts a notice and allows individuals to opt-out.[17]

Tellingly, the statutes referenced by EPIC have not been subject to constitutional challenge and represent -- at least on their face -- not unreasonable accommodations of First Amendment rights. Moreover, more recent legislative proposals and deliberations continue to support opt-out approval mechanisms as representing the appropriate balance between commercial productivity and efficiency and privacy.[18]

2. EPIC Provides No Facts of Privacy Invasion

EPIC cites to publications addressing Americans concerns about privacy in the context of on-line activities.[19] Such "evidence" of privacy angst, particularly in a wholly different context than that at issue here, is clearly not sufficient to sustain an opt-in CPNI approval mandate. As the Tenth Circuit stated, the government cannot satisfy the *Central*

[14] EPIC at 2 n. 2.

[15] In response to the Federal Communications Commission's ("FCC") Second Further Notice of Proposed Rulemaking in *CC Docket Nos. 96-115 and 96-149*, (*FCC 01-247, rel. Sep. 7, 2001*) numerous parties argued that CPNI does not rise to the level of "sensitive" information in the way that financial or health information does. *See, e.g*., ALLTEL at 4-6; AWS at 4; Cingular at 4-6; DMA at 4-6; Nextel at 2, 6-8; Sprint at 6 and n.1; Vartec at 3. *And see* U.S. Department of Commerce, National Telecommunication and Information Administration, "Privacy and the NII: Safeguarding Telecommunications-Related Personal Information," (October, 1995), at 25 n.98; Letter from Gina Harrison, Director, Pacific Telesis, to William F. Caton, Acting Secretary, Federal Communications Commission, dated Jan. 24, 1997, transmitting a letter from Privacy & Legislative Associates, Alan Westin and Bob Belair, to A. Richard Metzger, Jr., Deputy Chief, Common Carrier Bureau, Federal Communications Commission, dated Jan. 23, 1997, at 2-8 ("Westin Jan., 1997 Letter").

[16] 47 U.S.C. § 551. *And see FCC Comments*, BellSouth response to the Federal Communications Commission's ("FCC") Second Further Notice of Proposed Rulemaking in *CC Docket Nos. 96-115 and 96-149*, (*FCC 01-247, rel. Sep. 7, 2001*) at 6-7; DMA *Id.* at 3-4; Verizon *Id.* at 3 (arguing that the Cable Act presents an appropriate opt-out model for the Commission to consider). *See also* U S WEST, Inc.'s Opening Comments, CC Docket No. 96-115, filed June 11, 1996 at 7-10 ("1996 U S WEST Comments") (presenting a "schematic of the salient provisions of the two Acts" (47 U.S.C. § 551 and § 222), indicating that an opt-out approach would be quite appropriate under Section 222 given the similar legislative structure and language of the provisions).

[17] 18 U.S.C. § 2710(b)(2)(D)(ii).

[18] *See* Tommy G. Thompson, Secretary of Health and Human Services, et al., Petitioners v. Western States Medical Center et al. No. 01-344, Supreme Court of the United States.

[19] EPIC at 7 and n.23, referencing a supporting document that appears to involve primarily online activities or cyberspace. Their relevance to the instant case is not sufficient to support an affirmative CPNI approval process.

Hudson test "by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served."[20] For EPIC to provide the Commission with the requisite foundation to successfully defend an opt-in CPNI approval regime, it must correlate a specific privacy interest with a narrowly-tailored government protection. It fails to do so.

EPIC's attempt to prove that CPNI is seriously sensitive information that can support a substantial governmental interest[21] fails because it ignores several pertinent considerations. It fails to analyze how its position squares with the fact that Americans are not a monolithic block when it comes to matters of privacy and information use.[22] Furthermore, it ignores the fact that, although the Tenth Circuit acknowledged that some CPNI might be deemed sensitive,[23] it nevertheless expressed considerable skepticism about the strength of the government's interest.[24] Finally, EPIC's argument fails to address existing record evidence that shows that individuals do understand opt-out approval models, have used them,[25] and are irritated -- not pleasantly engaged -- by opt-in CPNI requirements.[26]

EPIC argues that an opt-out CPNI approval mechanism cannot protect customers' privacy in a CPNI context "because it is not calculated to reasonably inform consumers about their privacy options."[27] It continues that an opt-out process would put "the burden on the customer to pay for and return their opt out notice."[28] What EPIC continues to ignore is that an opt-in requirement burdens the First Amendment rights of speakers and interested listeners. If the concept of "informed consent," as articulated by EPIC, were sufficient to override constitutional considerations, the FCC's original *CPNI Order* would not have been vacated. If the Tenth Circuit's opinion means anything, it is that the burden of expressing a preference with respect to the use of CPNI be placed on individuals who may have a strong position on the matter, rather than on individuals who have no position or not a strong position adverse to such use.

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[20] *U S WEST v. FCC,* 182 F.3d at 1235.

[21] EPIC at 2-3 n.5 and accompanying text (citing to a case involving the Fourth Amendment constitutional right to privacy, *Smith v. Maryland*, 442 U.S. 735, 748 (1979) (Stewart, J., dissenting)).

[22] *See* Westin Jan., 1997 Letter at n.2 ("Approximately 16 percent of the public are 'privacy unconcerned' and, for them, there is very little in the way of personal information which they deem to be 'sensitive.' Another approximately 24 percent of the public can be classified as 'privacy fundamentalists' and, for them, almost any personal information is deemed to be quite sensitive. The majority of the American public, approximately 60 percent, can be usefully categorized as 'privacy pragmatists.' For them, the sensitivity of personal information will vary . . . as will their tolerance for the disclosure and use of . . . information.").

[23] *U S WEST v. FCC,* 182 F.3d at 1229 ("sensitive nature of some CPNI, such as when, where, and to whom a customer places calls").

[24] *Id.* at 1234-35.

[25] S*ee* Westin Survey at page 9 ("Analysis of the people who have used opt outs indicates that they are at the highest levels of privacy concern").

[26] In response to the Federal Communications Commission's ("FCC") Second Further Notice of Proposed Rulemaking in *CC Docket Nos. 96-115 and 96-149*, (*FCC 01-247, rel. Sep. 7, 2001*) CenturyTel at 6 (noting that in its experience customers become vexed when asked by the carrier if CPNI can be used for purposes of discussion about other services), 11-12. *Compare* Verizon *Id.* at 4 and n.5 (citing to Supplemental Comments of Bell Atlantic, CC Docket No. 90-623 at Att. 2, filed May 5, 1994, attached to Reply Comments of Bell Atlantic, CC Docket No. 96-115, filed June 26, 1996).

[27] EPIC at 5.

[28] *Id.*

In all events, EPIC's claims that an opt-out process cannot satisfy the "approval" requirement of Section 222[29] is entirely hypothetical and speculative. The Tenth Circuit, of course, has held that speculation cannot form the basis for a government regulation impinging on lawful speech.[30] EPIC makes no attempt to demonstrate how its advocacy would survive the judicial directive. Indeed, EPIC's claims are not merely unsupported, but are refuted by the fact that there is a range of approaches to the "opt-out" choice *(e.g.*, telephone calls, electronic messaging) that can satisfy the approval requirements,[31] particularly when that requirement is construed -- as it must be -- in a manner consistent with the Constitution.

Other of EPIC's listed infirmities with an opt-out CPNI approval process are similarly speculative and -- even if proven -- are clearly insubstantial from the perspective of governmental interests and privacy protection. Its concerns, for example, that notices may get lost under a pile of other less important mail (including other notices), may not be paid attention to by consumers or may be written in unintelligible language,[32] are rank speculation, at least with respect to CPNI and any future carrier notices. If EPIC or a consumer finds fault with a specific carrier notice, either can file a complaint with the Commission. The fact that this less restrictive alternative is available defeats all of EPIC's "list of horribles" associated with an opt-out CPNI approval process.

Moreover, even if EPIC's observations were not entirely speculative, they would not support the arguments it advances. The government cannot depress the communication of lawful speech to potentially interested persons in order to protect uneducated, inattentive adults. The notion that government must intervene to protect customers whom it believes are incapable of responding to an opt-out notice sent to them by first-class mail reflects the kind of paternalistic attitude that the Supreme Court has repeatedly rejected as justification for restrictions on commercial speech.[33] The Constitution requires that the burden of overcoming inertia be placed on those who wish to restrict the dissemination of information, not on speakers or interested audiences.[34]

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[29] EPIC at 8.

[30] *U S WEST v. FCC,* 182 F.3d at 1237.

[31] *See FCC Second Further Notice of Proposed Rulemaking in CC Docket Nos. 96-115 and 96-149*, (*FCC 01-247, rel. Sep. 7, 2001*) *at ¶ 9.*

[32] EPIC at 5.

[33] *See 44 Liquourmart v. Rhode Islan*d, 116 S.Ct. 1495, 1507 (1996) (principal opinion); *Edenfield v. Fan*e, 507 U.S. at 767; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 769 (1976). *See also* AT&T at 7, filed in response to the Federal Communications Commission's ("FCC") Second Further Notice of Proposed Rulemaking in *CC Docket Nos. 96-115 and 96-149*, (*FCC 01-247, rel. Sep. 7, 2001*) (noting that the Supreme Court has refused to find that consumers interested in a subject matter "would fail to protect themselves"); Nextel *Id.* at 5 ("The arguments of opt-in advocates rest on the paternalistic and unsupported assumption that consumers are either too uninformed or too disengaged to act to control the use and disclosure of . . . CPNI.").

[34] *See U S WEST v. FCC,* 182 F.3d at 1239 (asserting that it is speculative to assume such individuals will not act). *And see* AT&T at 6, filed in response to the Federal Communications Commission's ("FCC") Second Further Notice of Proposed Rulemaking in *CC Docket Nos. 96-115 and 96-149*, (*FCC 01-247, rel. Sep. 7, 2001*) ("[a]s for those customers who decline to opt out, there is no reason to believe that they place a high value on keeping their CPNI private"); Nextel *Id.* at 3 ("there is no evidence that a customer opposed to a carrier's use or disclosure of his or her CPNI outside the customer's existing . . . relationship with that carrier would not opt-out from such use and disclosure"). *See also* note 37 *supra.*

III. CONCLUSION

For all of the reasons set forth above, the Commission should reject continued requests, that it infringe protected speech by mandating an opt-in requirement. The Commission can avoid continued and unsettling controversy over the proper format and scope of CPNI approvals by deferring to the Congressional directive of Section 222. A CPNI approval model imposing directly on carriers the responsibility for compliance with Section 222, as disciplined by market forces, promotes the deregulatory emphasis of the Telecommunications Act. Yet, it allows for Commission enforcement actions in cases of carrier misfeasance to ensure compliance and protection of the public interest. Should the Commission determine that reliance on market forces and regulatory enforcement capabilities is insufficient for proper administration of Section 222 and that more formal regulations are required, those regulations must conform to constitutional imperatives.

The only assured CPNI approval process to measure up to this standard is an opt-out one. Such approach fairly balances governmental, privacy and commercial interests in a manner consistent with the constitution and sound public policy.