Decision No. C01-1138

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 01R-385T

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IN THE MATTER OF PROPOSED RULES REGARDING THE COLORADO NO-CALL LIST.

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**DECISION ADOPTING RULES**

Mailed Date: November 13, 2001
Adopted Date: October 29, 2001

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## I. BY THE COMMISSION

**Statement**

1. Decision No. C01-865 (Mailed Date of August 24, 2001) opened this docket by issuing a Notice of Proposed Rulemaking ("Notice") regarding the Colorado No-Call List Act[1] ("Act"). The Notice sought to implement the provisions of § 6-1-905(3)(b) of the Act. That section directs the Commission to adopt rules that establish requirements for the Designated Agent[2] in its administration of the No-Call List program.

2. The Notice requested written and oral comment from interested persons on the proposed rules. A number of parties submitted written initial and reply comments in accordance with the Notice including: the Colorado Office of

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[1] Sections 6-1-901, *et seq.*, C.R.S.

[2] The Designated Agent is the party with whom the Commission will contract for creation and administration of the No-Call List. *See* § 6-1-903(5), C.R.S.

Consumer Counsel (OCC); WorldCom, Inc., AT&T Communications of the Mountain States, Inc., Sprint Communications LLP, the Colorado Retail Council, Colorado Cable, the Telecommunications Association, and Household International, Inc., jointly; WorldCom, Inc., AT&T Communications of the Mountain States, Inc., and Sprint Communications LLP jointly (Joint Commenters); WorldCom, Inc. individually; the Bighorn Center for Public Policy[3] (Bighorn); the Direct Marketing Association (DMA); Verizon Wireless; Senator Joan Fitz-Gerald; Senator Ken Chlouber; Mr. Jere Paulmeno; Dr. Susan Boyson; American Association of Retired Persons (AARP); Qwest Corporation (Qwest); the Colorado Telecommunications Association (CTA); and the Consumer Protection Section of the Colorado Attorney General's Office (Attorney General).

3. In accordance with the Notice, we conducted a rulemaking hearing on October 1, 2001 to receive oral comments on the proposed rules. A number of interested persons appeared at the hearing and commented on the proposed rules.

4. Now being duly advised in the matter, we adopt, subject to requests for reconsideration, the rules appended to this order as Attachment A.

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[3] Bighorn is a private, non-profit public policy organization. Bighorn actively participated in the legislative efforts leading to passage of the Act, and as explained *infra*, started its own No-Call List before passage of the Act.

## II. DISCUSSION

A. The purpose of the rules is to implement the No-Call List Act. The Act is intended to balance the privacy interests of residential telephone subscribers and the commercial interests of telephone solicitors. *See* § 6-1-902, C.R.S. Specifically, the Act permits residential subscribers to notify telephone solicitors of their objection to receiving solicitations by telephone or fax. Residential subscribers will give such notice of their objection to receiving telephone solicitations by placing their telephone numbers and zip codes on the Colorado No-Call List. According to the Act, telephone solicitors must remove from their calling lists the numbers of residential subscribers who have given notice of an objection to receiving telephone solicitations. The Designated Agent, guided by Commission rules, is responsible for the development and maintenance of the Colorado No-Call List.

B. The oral and written comments submitted in this proceeding raised a number of issues. We now address those issues.

### A. Complaint System

1. The Notice, pages 4-5, requested comment about proposed Rule 4.13. That rule instructs the Designated Agent to maintain an automated, web-based complaint system to permit residential telephone subscribers to report violations of the

Act over the Internet. Specifically, the Notice pointed out that the rule does not contemplate an alternate complaint mechanism to accommodate consumer complaints, such as a toll-free telephone number. We requested comment whether it is technically and economically feasible to require the Designated Agent to maintain an additional complaint mechanism.

2. A number of commenters, including AARP, the OCC, and the Attorney General, urged the Commission to require an additional complaint system. We agree with those comments and revise the proposed rules accordingly. Initially, we note that § 6-1-905(3)(b)(VIII) only requires that the Designated Agent maintain an on-line complaint system. However, we conclude that this provision of the Act sets forth the minimum requirement only. The language of § 6-1-905(3)(b)(VIII) does not limit the complaint process exclusively to an Internet system. Nothing in the Act indicates that the Commission is legally prohibited from requiring the Designated Agent to maintain an additional complaint mechanism.

3. The commenters point out the importance of maintaining an alternative to the Internet complaint system. Many residential telephone subscribers do not have computers. Therefore, the lack of an additional complaint mechanism will likely be an impediment to enforcement of the Act. The Attorney General, one of the agencies responsible for prosecuting

violations of the Act, noted that the availability of an alternative complaint system will encourage full participation in the No-Call program by consumers, and will promote its effective enforcement.

4. The Colorado No-Call program will be funded entirely from registration fees paid by telephone solicitors. *See* § 6-1-905(3)(b)(II), C.R.S. Consequently, when we issued the Notice, we were concerned about the economic feasibility of requiring the Designated Agent to maintain an additional complaint mechanism. Even though we specifically requested comment from interested persons regarding the economic feasibility of requiring an additional complaint system, no one suggested that such a requirement would be infeasible given the funding source for the program. For these reasons, we modify the proposed rules to require the Designated Agent to establish and maintain an additional complaint mechanism, so long at is economically feasible.

5. The revenues available for the No-Call program and the costs of an alternative complaint system are now unknown. Therefore, we also include a waiver provision in Rule 4.13. The Designated Agent may petition the Commission for waiver of the requirement for an additional complaint mechanism. Such a waiver will be granted only if the Designated Agent is

able to prove that it is technically or economically infeasible to maintain an additional mechanism given available revenues.

**B. Information Collected from Complainants**

1. The Attorney General, DMA, the Joint Commenters, the Colorado Retail Council, Colorado Cable, the Telecommunications Association, and Household International Inc. all suggested that the rules should require certain information from complainants. DMA argued that certain information is needed to assist businesses in promptly investigating alleged violations. A complainant's number and zip code would not be sufficient. The Joint Commenters, the Colorado Retail Council, Colorado Cable, the Telecommunications Association, and Household International, Inc. added that the rule should specify the information to be provided in order to create a uniform and useful form for reporting complaints. The Attorney General commented that certain information would be needed in order to validate complaints and to pursue enforcement actions. The Attorney General further suggested that requiring this information would enable it to prioritize enforcement efforts.

2. The Commission agrees with these comments. The information provided by complainants should be adequate to allow for effective enforcement of the Act. Without sufficient information, the Attorney General may be hindered in its efforts to prosecute violations. We also agree that the specified

information from complainants will assist telemarketers in responding to complaints.

3. Therefore, by Rule 4.13,the Designated Agent will require complainants to provide the following information:

- Complainant’s name;
- Complainant’s address;
- Complainant’s telephone number;
- The date and time of the call;
- The name of the telemarketer; and
- The product or service being sold.

The complaint mechanisms maintained by the Designated Agent may provide for additional information requested by the Attorney General upon approval of the Commission. Collection of this information is intended to assist in enforcement of the Act. A complainant's failure to provide all of the listed information shall not preclude the Designated Agent from reporting the complaint to the appropriate enforcement agencies.

### C. Requiring Local Exchange Carriers ("LEC") to Assist in Updating the No-Call List

1. Proposed Rule 5.1 requires LECs, each calendar quarter, to provide electronically to the Designated Agent a list of changed, transferred, and disconnected telephone numbers of residential subscribers. The purpose of the proposed rule is

to allow the Designated Agent to update the No-Call List on a timely basis. A number of parties oppose this rule.

2. First, Qwest and CTA argue that the Commission has no authority to require LECs to assist the Designated Agent in updating the No-Call List. According to these parties, the Act places the responsibility for updating the list solely on the Designated Agent and the residential subscriber, and the Commission's authority to implement the No-Call program is limited by the specific provisions of the Act. Because the Legislature did not intend to impose any reporting obligation on LECs, the Commission has no such authority. We disagree.

3. Section 6-1-905(6), C.R.S, provides that: "Beginning not later than July 1, 2002, the designated agent shall update the data-base, on an ongoing basis, with information provided by residential subscribers *and local exchange providers*." (Emphasis added.) This language authorizes us to require LECs to assist the Designated Agent in maintaining the No-Call List. Reliance on LECs to update the No-Call List is reasonable. Maintaining records of changed, transferred, or disconnected numbers is an essential part of telephone numbering administration, a traditional, telephone public utility function. Even without a No-Call program, LECs must maintain such information as part of their local exchange business. For example, disconnected telephone numbers must be

tracked on a timely basis to make these numbers available to new subscribers.

4. Qwest, CTA, and the Joint Commenters also argue that providing electronic lists of changed, transferred, or disconnected numbers to the Designated Agent will be burdensome and expensive for the LECs. These parties contend that Proposed Rule 5.1 improperly shifts costs associated with the No-Call program to the LECs themselves. If the Commission imposes such a reporting obligation on the LECs, the parties contend, the LECs should be reimbursed by the Designated Agent for these costs.

5. We respond: As noted above, maintaining records of changed, transferred, or disconnected telephone numbers is a necessary part of operating as a LEC. Without specific explanation as to how Proposed Rule 5.1 will result in significant *new* costs to the LECs, we are skeptical of these claims. The parties assertions of excessive burden and expense were vague and unexplained. In any event, if the LECs do incur significant new expenses to comply with Rule 5.1, they can request reimbursement for these expenses from the Commission.[4]

[4] The Commission could authorize reimbursement to the LECs from two funding sources: First, it may be feasible to pay these expenses from the registration fees collected from telephone solicitors by the Designated Agent. Second, because maintenance of records relating to telephone subscribers is a public utility function, the Commission could approve a properly supported rate adjustment for the LECs.

For these reasons, we find it reasonable to require LECs to assist the Designated Agent in maintaining the No-Call List.

**D. Verification of New Numbers Placed on the No-Call List**

1. Proposed Rule 4.16 would require the Designated Agent to verify, through electronic means or by phone, that new numbers on the No-Call List were "*bona fide*." This would require confirmation that a person placing a number on the list has authorization to place that number on the list. The Attorney General, the OCC, Bighorn, and AARP all oppose verification of new numbers on an ongoing basis. They argue that this requirement will slow down the process, and be costly to the Designated Agent. They also contend that verification is not required by the Act. Bighorn asserts that no other state with a no-call list requires verification. Moreover, the parties observe, it would be ironic to force the Designated Agent to make unsolicited calls for purposes of verification to residential subscribers who have just indicated their preference not to receive such calls.

2. We agree with this reasoning, and will not require verification on an ongoing basis. We note that § 6-1-905(7) prohibits anyone from placing another person's telephone number on the official No-Call List without authorization. Violations of this provision are subject to prosecution and penalties. We conclude that verification on an

ongoing basis is unnecessary. Consequently, Proposed Rule 4.16 is not adopted.

### E. Requiring the Designated Agent to Accept the Bighorn No-Call List

1. Prior to passage of the Act, Bighorn designed a website allowing Colorado residents to place their telephone numbers on an unofficial no-call list (the Bighorn list). Proposed Rule 4.4.1 directs the Designated Agent to accept the Bighorn list for use in initiating the official Colorado No-Call List if Bighorn makes its database available to the Designated Agent on or before June 1, 2002. The proposed rule requires that the Designated Agent affirmatively verify numbers on the Bighorn list prior to placing those numbers on the official No-Call List.

2. We first address whether the Commission has the legal authority to accept the Bighorn list as part of the official No-Call List. A number of parties (*i.e.*, DMA, WorldCom, the Joint Commenters, the Colorado Retail Council, Colorado Cable and Telecommunications Association, and Household International, Inc.) contend that this action would violate the Act. Essentially, these parties rely on § 6-1-905(3)(b)(III), which provides:

> . . . . The method by which each residential subscriber may give notice to the designated agent of his or her objection to receiving such solicitations, or may revoke such notice, shall be *exclusively* by

> entering the area code, phone number, and zip code of the subscriber directly into the database via the designated state internet web site or by using a touch-tone phone to enter the area code, phone number, and zip code of the subscriber via a designated statewide, toll-free telephone number maintained by the designated agent as a part of the Colorado no-call list.

(Emphasis added.) According to these parties, the statute's use of the word "exclusively" means that only residential subscribers themselves can place their own numbers on the No-Call List. This, they argue, legally precludes use of the Bighorn list in establishing the No-Call List. We disagree.

3. Bighorn pointed out that its list does comply with the informational requirements of § 6-1-905(3)(b)(III); its list contains subscriber area codes, telephone numbers, and zip codes only.

4. The Designated Agent's verification of that information – subscribers' numbers will not appear on the official No-Call List unless they respond affirmatively to the Designated Agent's inquiry – complies with § 6-1-905(3)(b)(III). Subscribers will, in effect, have placed the required information on the No-Call List.

5. We also note that § 6-1-905(3)(b)(VII) (Commission shall specify the methods by which additions, deletions, changes, and modifications shall be made to the No-Call List), and § 6-1-905(3)(b)(X) (Commission shall specify

other matters relating to the No-Call List as it deems necessary or desirable) give the Commission discretion in implementing the No-Call program. For the reasons discussed below, we conclude that accepting the Bighorn list at the start-up of the "official list" is a reasonable exercise of discretion, especially with the verification process adopted in the rules.

6. We further note that the opponents acceptance of the Bighorn list essentially argue this: There is only one exclusive way for residential subscribers to get their telephone numbers on the official No-Call List. The *residential subscribers themselves* must directly enter their numbers on the official list. However, that position is inconsistent with other provisions of the Act. Specifically, § 6-1-905(3)(c) requires the Designated Agent to accept that portion of a national no-call database relating to Colorado if an appropriate federal agency establishes a national list. This would be an instance of the Designated Agent accepting numbers into the Colorado No-Call List without residential subscribers themselves entering their numbers directly into the official list. In addition it is implicit in § 6-1-905(7) (person cannot enter the telephone number of another person on the Colorado No-Call List without authorization of the person to whom the number is assigned) that residential subscribers themselves need not enter their numbers into the Colorado No-Call List, so long as the

person entering the number into the list has authorization to do so. Accepting the Bighorn list with verification is consistent with the intent of § 6-1-905(7). For all these reasons, we conclude that we have the discretion to direct the Designated Agent to accept the Bighorn list with verification.

7. Several parties, including the Attorney General, AARP, OCC, and Bighorn, support transfer of the Bighorn list to the official Colorado No-Call List at start-up. According to these parties, the purpose of the Act is to provide a method by which residential telephone subscribers in Colorado can choose whether to receive calls from telemarketers; those who have signed up on the Bighorn list have already made that choice. These subscribers have the legitimate expectation that, with the passage of the legislation, the Bighorn list will simply be grandfathered into the official Colorado No-Call List. Finally, since the data for each subscriber included in the Bighorn list is identical to that required by the Act, these parties observe that such grandfathering will be a straightforward, easily executed process.

8. The opponents of grandfathering the Bighorn list (DMA, WorldCom, AT&T, Sprint, Colorado Cable, the Telecommunications Association, Household International, and the Colorado Retail Council), on the other hand, contend that the Bighorn list is a private list, that it was not mandated by any

law or regulation, and that, while the subscribers on the list wished to support passage of the Act, they may not necessarily have wished to be on the official No-Call List. Moreover, these parties observe that the Bighorn list was begun in 1999. Therefore, some of the information contained on the list is stale, numbers may have been placed on the list by unauthorized persons, and some numbers may represent subscribers who no longer wish to preclude telemarketers from calling. In short, these parties believe that the proper way to implement the official No-Call List is to start over and require all interested subscribers to register directly on the new, official list. The Bighorn list should not be grandfathered into the official list.

9. If the Commission decides to transfer the Bighorn list, another issue arises: whether to require the Designated Agent to verify that the numbers on the list are assigned to subscribers who still wish to be included in the official No-Call List. The proponents of transferring the Bighorn list, in general, see no reason for verification. They believe that the original intent of these subscribers is clear, and that verification will be inconvenient for the subscribers, costly for the Designated Agent, and not required by the Act. If the Commission decides to require verification, the proponents propose using an "opt out" verification process. That is, the

entire Bighorn list would be accepted by the Designated Agent; then, individual numbers would be deleted later if individual subscribers affirmatively request removal. The list would also be "scrubbed" to remove disconnected or reassigned numbers.

10. WorldCom, an opponent of transferring the Bighorn list, argues that if a transfer does take place, verification is required to ensure reliability of the list. Furthermore, WorldCom argues that verification should not be allowed to continue until September 30, 2002, as provided for in Proposed Rule 4.4.1, but should be completed by July 1, 2002. Otherwise, some subscribers may still not be verified by the time the official No-Call List begins operation, and may erroneously believe that they are part of the list. This would result in confusion and mistaken complaints.

11. In a related matter, DMA and the Colorado Retail Council argue that, if the Bighorn list is transferred to the official No-Call List, the Commission should also include all other existing no-call lists related to Colorado. The OCC responds by indicating that, while it has no conceptual problem with accepting other lists, it foresees some administrative problems in doing so. It believes that the Bighorn list has a different status because it has been considered to be the precursor of the official No-Call List by the general public.

12. We will direct the Designated Agent to accept the Bighorn list at the start-up of the No-Call program. We find that the residential subscribers who placed their numbers on the Bighorn list have indicated their interest in being on a no-call list. We conclude, however, that the Designated Agent must verify each number from the Bighorn list before it is transferred to the official No-Call List. By this verification the designated agent will avoid transferring stale numbers, numbers that someone other than the subscriber placed on the Bighorn list, or numbers that are assigned to subscribers who now do not wish to be included on the No-Call List. Verification causes the residential subscriber to, in effect, place their information on the official No-Call List.

13. During the verification process, the Designated Agent must make clear that, until the subscriber whose number is on the Bighorn list, affirmatively responds to the Designated Agent's verification query, the subscriber will not be a part of the official No-Call List, since each subscriber must volunteer to enter their number to the list. Finally, the Commission rejects the suggestion that other no-call lists be transferred to the official list. No evidence was offered concerning what other lists exist, how they were developed, or what subscriber information they contain. Without such information, no reason exists to include such lists.

**F. Limiting Telephone Solicitation by LECs**

1. The Notice, page 3, requested comment on the Commission's authority to impose limitations on telephone solicitations by LECs to their local exchange customers. In particular, the Notice pointed out that the Act, § 6-1-903(10), defines "telephone solicitation" to exclude calls by a person that has an "established business relationship" with the residential subscriber. Section 6-1-903(7) defines "established business relationship," in part, as a relationship formed: "through a *voluntary*, two-way communication between a seller or telephone solicitor and a residential subscriber. . . ." (Emphasis added.) In the Notice, we observed that LECs were, until recently, regulated monopolies. Residential subscribers, as such, had little or no choice for local exchange providers.

2. The Telecommunications Act of 1996 and Colorado law, §§ 40-15-501, *et seq.*, C.R.S., opened the local exchange market to competition. In the Notice, we reasoned that the No-Call List "existing business relationship" definition might jeopardize parity between incumbent LECs[5] and newly entering competitive local exchange carriers (CLECs). The no-call list might also, we feared, create entry barriers for CLECs.

[5] An incumbent LEC is a LEC that was providing local telephone service as of February 8, 1996, the date of enactment of the Telecommunications Act of 1996.

3. Given these circumstances, we requested comment on whether we could impose limitations on telephone solicitations by LECs by defining "established business relationship" to exclude LECs' relationship with their local exchange customers. Most of the commenters, including Qwest, the Joint Commenters, CTA, and the OCC, argue that the Commission lacks the authority to limit telephone solicitations by LECs. For example, the commenters suggest that the Act does not give the Commission authority further to define "voluntary" in § 6-1-903(7). The commenters argue that the Attorney General and the courts are the entities responsible for enforcing the Act. Because telephone solicitation is not a public utility activity, they suggest the Commission has no extra-statutory authority to limit such activity on the part of LECs. We note that even the Attorney General opposes such a rule. *See* page 10 of comments.

4. The comments persuade us that we should not attempt to limit telephone solicitation by LECs to their customers. We agree that nothing in the Act indicates an intent to impose special telemarketing restrictions on LECs. Given that this is a consumer protection statute, we do not possess the near-plenary latitude granted to us under the public utility statutes.

5. We reach this legal conclusion with hesitation, however. The parity and entry-barrier issues remain manifest. As a matter of competition policy, it should not stand that incumbent LECs have asymmetric telemarketing access to persons on the no-call list.

### G. Allowing Wireless Telephone Subscribers to Place Their Numbers on the No-Call List

1. The rules attached to the Notice (Rules 2.7 and 2.8), in effect, would permit subscribers of wireless telephone service to place their numbers on the No-Call List. However, the Notice specifically requested comment on our authority to adopt this rule.

2. Some of the comments supported inclusion of wireless service in the No-Call program. For example, Bighorn and the Attorney General argue that many residential consumers now use wireless service as an alternative to traditional wireline local exchange service. These commenters claim that unwanted telephone solicitations to a wireless number are at least as intrusive as such calls to a wireline number. They argue that inclusion of wireless service in the No-Call program would be consistent with the spirit and the policy of the Act: to protect the privacy interests of residential telephone users.

3. Other comments by the OCC[6] and Qwest suggests that the Commission lacks the statutory authority to include wireless in the No-Call program. They point out that the Act is limited to "residential subscribers." Section 9-1-903(9) defines "residential subscriber" as a person "who has subscribed to residential telephone service with a local exchange provider, as defined in section 40-15-102(18) C.R.S." A "local exchange provider," in turn, is a person providing the telecommunications service consisting of "a local dial tone line and local usage necessary to place or receive a call within an exchange area...." *See* § 40-15-102(3), C.R.S.

4. We agree with the statutory interpretation by the OCC and Qwest. The No-Call program is limited to wireline local exchange service, and does not include wireless service. The proposed rules are modified consistent with this discussion.

### H. Requiring LECs to Include a Market Message Regarding the No-Call List on Customer Bills

1. Proposed Rule 5.2 would require LECs to notify their residential subscribers, by a market message, of subscribers' rights to enter their telephone numbers on the No-Call List. The OCC, Bighorn, and the Attorney General supported

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[6] The OCC agrees that it would be consistent with the public interest and the underlying intent of the Act to allow wireless subscribers to place their numbers on the No-Call List. However, the OCC also agrees with Qwest that the Act does not appear to allow this. The OCC concludes that the Legislature itself must revise the Act to address wireless service.

the rule. The commenting telephone companies--Qwest, CTA, and the Joint Commenters--oppose the proposal.

2. The telephone companies again argue that the Act is a consumer protection measure, not a public utility statute. Because the No-Call program does not concern the rates, terms, or conditions of public utility service, the Commission's authority is limited by the specific provisions of the Act. Nothing in the Act indicates an intent that LECs specifically and uniquely should be burdened with educating consumers about the No-Call List. Therefore, the companies argue, the Commission lacks the authority to adopt Proposed Rule 5.2.

3. We agree that the Commission has no authority to impose consumer education obligations on the LECs with respect to the No-Call List. As a consumer protection measure, the No-Call program is not directly related to public utility service.[7] Therefore, no basis exists to impose special obligations for consumer education regarding the list on LECs. We do not adopt Proposed Rule 5.2.

## I. Expanding the Time for Telemarketers to Update Their No-Call Lists

1. The Joint Commenters, the Colorado Retail

[7] One exception was discussed above. Specifically, the LECs do engage in telephone numbering administration as part of their local exchange business and are uniquely positioned to assist the Designated Agent in updating the No-Call List.

Council, Colorado Cable, the Telecommunications Association, and Household International, Inc. object to Proposed Rule 4.10, which specifies that the Designated Agent will update the No-Call List by the 10th day of each calendar quarter. The Joint Commenters, *et al.*, point out that § 6-1-904(4) requires telemarketers to update their No-Call lists no later than 30 days after the beginning of every calendar quarter. That statute, the Joint Commenters, *et al.*, argue, gives telemarketers a full 30 days after the beginning of each calendar quarter to update their lists. The Joint Commenters, *et al.* contend that Proposed Rule 4.10 may leave insufficient time for telemarketers to update their no-call lists. In light of the provisions of § 6-1-904(4), the Joint Commenters, *et al.*, argue, the Commission has no authority to shorten the 30-day period provided for in the Act. Their solution is to change Proposed Rule 4.10 to require that the Designated Agent update the No-Call List by the 10th day before the end of the calendar quarter.

2. The Commission disagrees with this analysis. Section 6-1-904(4) does not guarantee to telemarketers a 30-day period after the Designated Agent has updated the official No-Call List to update their lists. The statute simply requires that telemarketers update their lists *no later than* 30 days after the beginning of each calendar quarter. In this

electronic age, we find it implausible that telemarketers will require 30 days to update their No-Call lists; no evidence was offered to support this claim. Consequently, Proposed Rule 4.10 remains unchanged.

**J. Payment of Registration Fees**

1. Referring to Proposed Rule 4.2, the Joint Commenters, the Colorado Retail Council, Colorado Cable, the Telecommunications Association, and Household International, Inc. argue that telemarketers should be given options for paying the annual registration fee other than by credit card, because of the possible expense associated with this method. They propose adding payment options including check, money order, and cash.

2. Proposed Rule 4.2 reflects the language found in the Act, specifically § 6-1-905(3)(b)(II). The statute sets a minimum standard only. Given this interpretation, we agree that telemarketers should have more than the credit card payment option. Proposed Rule 4.2 is amended to include the options of payment by check, money order, or credit card.

**K. Effective Dates for the No-Call List**

1. Qwest argues that the Commission should set specific dates for subscribers to begin signing on to the Colorado No-Call List, and for the Designated Agent to begin to fully implement the program. Adoption of specific dates will

enable telemarketers to accurately plan for compliance with the No-Call requirements.

2. We deny this request and will leave Proposed Rule 4 unchanged. By specifying that subscribers should be able to begin to place numbers on the list *no later than* June 1 and that the Designated Agent must begin full implementation of the program *no later than* July 1, we allow for the possibility that the process will proceed more quickly than can be known with certainty at this point.

**L. FAX Solicitations**

1. DMA points out that some telemarketers rely solely on solicitation by fax. These telemarketers should, DMA suggests, be able to obtain a No-Call List consisting solely of fax numbers. It recommends that the rules be changed to reflect this suggestion. We reject this request.

2. We are unaware of any way in which the Designated Agent could differentiate between voice and fax numbers without that information being provided by subscribers themselves. Because the statute does not contemplate the provision of such information, it is not feasible to require the Designated Agent to produce a fax-only list. Consequently, we deny DMA's request.

### M. Specification of Annual Registration Fees

Bighorn commented that Proposed Rule 3.2 fails to specify the registration fees to be paid by telemarketers. Bighorn suggests that the rule specify the registration fees and the method by which the annual registration fees will be determined. We deny this request. The Act requires that the registration fees and structure be calculated annually. Specifying these matters in the rules would be unnecessarily burdensome and inefficient. In particular, the Commission would be required to engage in rulemaking each year to change the fees. Instead, we will specify annually by formal order the registration fees to be paid by telemarketers. This is consistent with our practice in setting annual surcharges for the Colorado High Cost Support Mechanism. That practice has worked well for the High Cost Fund and should work well here.

## III. CONCLUSION

For the reasons discussed above, we adopt the rules appended to this order.

## IV. ORDER

### A. The Commission Orders That:

1. The rules appended to this decision as Attachment A are adopted. This order adopting the attached rules shall become final 20 days following the mailed date of this decision

in the absence of the filing of any applications for rehearing, reargument, or reconsideration. In the event any application for rehearing, reargument, or reconsideration to this decision is timely filed, this order of adoption shall become final upon a Commission ruling on any such application, in the absence of further order of the Commission.

2. Within 20 days of final Commission action on the attached Rules, the adopted Rules shall be filed with the Secretary of State for publication in the next issue of the Colorado Register along with the opinion of the Attorney General regarding the legality of the Rules.

3. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this decision.

4. This Order is effective immediately upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING October 29, 2001.**

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

POLLY PAGE

JIM DYER

Commissioners

ATTEST: A TRUE COPY

Bruce N. Smith
Director

CHAIRMAN RAYMOND L. GIFFORD
CONCURRING, IN PART,
DISSENTING, IN PART.

## V. SUPPLEMENTAL OPINION BY COMMISSIONER JIM DYER

A. In this supplemental opinion, I note that it is highly plausible, and in fact the most reasonable interpretation of the statute, that the Legislature's use of "exclusively" is intended simply to limit the information the Designated Agent could collect from residential subscribers. That is, § 6-1-905(3)(b)(III) can be interpreted reasonably to mean that the only information residential subscribers shall be required to enter into the database is their area code, telephone number, and zip code. Bighorn's and the OCC's post-hearing comments point out that this interpretation of § 6-1-905(3)(b)(III) is

consistent with the Legislative history of the Act. The Legislature considered whether residential subscribers, when placing their numbers on the list, should be required to give their names and addresses in addition to the other information. Parties who opposed requiring this additional information prevailed: residential subscribers need only provide their area code, telephone number, and zip code. Section § 6-1-905(3)(b)(III) reflects that Legislative determination.

B. I flatly reject any notion that my decision in this matter represents "capitulation in the face of purported political pressure for a piffle." First, there was no "political pressure" purported or otherwise. Second, were there such misguided pressure I would not "capitulate."

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JIM DYER

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Commissioner

## VI. CHAIRMAN RAYMOND L. GIFFORD CONCURRING, IN PART, AND DISSENTING, IN PART

A. The Commission majority deliberately misconstrues the language of § 6-1-905(3)(b)(III) C.R.S., to achieve a piffling political end. Because the legislature expressly limited our

discretion on how names can be added to the Colorado no-call list, I dissent from the majority's decision to add the Bighorn no-call database to the Colorado no-call list.

B. The issue here is whether the Commission has the authority by rule to make the Bighorn list part of the Colorado no-call database. To be able to add the Bighorn list, the legislature needs to have conferred policy discretion to make such an addition to the Colorado no-call list. It is evident, and my colleagues even seemed to agree at the public deliberations,[8] that the legislature has conferred no such discretion. To the contrary, the statute gives us no such latitude to make wholesale additions to the Colorado no-call list database.

C. This dissent is in three parts. First, I offer the only valid construction of § 6-1-905(3)(b)(III), C.R.S. Second, I discuss the proffered rationales for taking the Bighorn list. Third, I offer some comments about the Commission majority's publicly-stated reasons for accepting the Bighorn list.

**D. Proper Construction of § 6-1-905(3)(b)(III), C.R.S.**

1. The state Administrative Procedure Act, §§ 24-4-101, *et seq.*, confers a great deal of latitude to agencies

[8] I base this assertion on my colleagues' statements at the Commission Deliberation Meeting on October 29, 2001, and not on the passable, if unconvincing, *post hoc* legal rationale contained in the majority order and concurrence.

engaged in rulemaking. Rules adopted by an agency are presumed to be valid. *Regular Route Common Carrier Conference v. Public Utils. Comm'n*, 761 P.2d 737, 743 (Colo. 1988). Any challenging party has the burden to establish invalidity of the rule by demonstrating that the agency violated constitutional or statutory law, exceeded its authority, or lacked a basis in the record for the rule. *Id.*, § 24-4-106(7), C.R.S. By authorizing addition of the Bighorn list, the Commission has exceeded its statutory authority and thus committed reversible error.

2. Statutory construction is not any sort of special legal necromancy. It only becomes so when results-oriented bodies seek to torture language to reach a pre-desired policy outcome. Proper statutory construction is straightforward application of the rules of grammar we learned in grade school.

3. Section 6-1-905(3)(b)(III) commands the Commission to:

> Specify that the method by which each residential subscriber may give notice to the designated agent of his or her objection to receiving such solicitations, or may revoke such notice, shall be exclusively by entering the area code, phone number, and zip code of the subscriber directly into the database via the designated state internet web site or by using a touch-tone phone to enter the area code, phone number, and zip code of the subscriber via a designated statewide, toll-free telephone number maintained by the designated agent as a part of the Colorado no-call list;

4. The grammar of the statute is subtle, but it ultimately is not that hard. The legislature tells us to: "specify that the method" to sign-up for the no-call list "shall be exclusively by entering the area code, phone number, and zip code of the subscriber directly into the database via the designated state internet web site or by using a touch-tone phone. . . ." Thus, our rulemaking obligation is explicit and clear: we are to specify that the *exclusive* method to sign-up for the no-call list is either: by entering area code, phone number and zip code directly into the designated state internet web site or by using a touch tone phone.

5. The parts of speech and syntax of this provision are dispositive. "[E]xclusively" is the adverbial form of "exclusive," meaning "[n]ot allowing something else; incompatible;" "[n]ot accompanied by others; single or sole; or "[c]omplete; undivided." American Heritage Dictionary (4th ed. 2000). As an adverb, "exclusively" modifies the imperative verb construct, "shall be." There then follows three prepositional phrases: 1) "by entering…," 2) "into the database…," 3) "via the designated state internet web site…." These prepositional phrases all refer back to the verb "shall be," and thus the adverb "exclusively." The only reasonable reading of this provision would have "exclusively" apply to all three

prepositional phrases.[9] The syntax is crucial. "Exclusively" right next to "shall be" makes it modify each and every prepositional phrase. This means that the exclusive means to allow names in the no-call list is through entry into the database via the state designated web site. There is no wiggle room to take the Bighorn list, no matter how popular that might be.

6. Commentators, even the Bighorn Center, agree that the Bighorn list is not, nor has it ever been, the state designated web site. Indeed, the state designated web site does not come into being until we designate it so. "Shall be," the operative verb construct in the sentence, is prospective language. *See* 1A C. Sands, *Sutherland Statutory Construction* 693 (4th ed. 1985) ("It is obvious that the word 'shall,' in itself, cannot 'include' the past."). Moreover, statutes are presumed to be prospective. *See* § 2-4-202, C.R.S. The Bighorn list is already-existing and does not fit within the statutory command that the method of adding names to a list shall be ***exclusively*** by entering the relevant data into the database via the state designated web site.

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[9] "bring together the words and groups of words that are related in thought and keep apart those that are not so related.... Modifiers should come, if possible, next to the word they modify. If several expressions modify the same word, they should be so arranged that no wrong relation is suggested." William Strunk, Jr. and E.B. White, *The Elements of Style,* 28-29 (3d ed. 1979).

7. A close reading of the statute compels me to conclude that its plain, reasonably understood meaning allows additions into the database only through the state designated web site. There is no ambiguity in the provision. There is no invitation from the legislature to exercise discretion. Rather, there is a clear command that we make rules delimiting the method for entering names into the Colorado no-call list.

### E. Majority's Basis for Adding Bighorn List to Colorado No-Call Database

1. The majority's desire to tease adequate authority from the statute to add the Bighorn list is unconvincing. Before we declare a statute "ambiguous," it must indeed be so. As my construction of the statute demonstrates, there is no ambiguity in this statute.

2. Furthermore, the majority's rationale proves my point, not theirs.

3. First, the majority claims that the Bighorn list complies with the informational requirements of § 6-1-905(3)(b)(III). This is true, but utterly beside the point. Complying with part of a statute betrays the fact that the Bighorn list does not comply with the whole of the statute's requirements. This is akin to the Commission finding a utility's proposed rate as "just, but not reasonable," but endorsing the rate because it complied with part of the

statutory requirement. Picking and choosing what statutory requirements we will follow is not an option.

4. Next, the majority cites § 6-1-905(3)(c) as providing an alternative way to add a specific list to the Colorado no-call list. That provision authorizes the addition of a single, national federal database Notably, this specific authorization allows the addition of a specific list that is not the Bighorn list. If anything, it shows the legislature was cognizant of other lists and chose only to allow this specific list to be added wholesale to the Colorado no-call list database.

5. Furthermore, § 6-1-905(3)(c), C.R.S., can be read entirely in harmony with § 6-1-905(3)(b)(III). There are two ways the legislature has allowed for additions to the Colorado no-call list: first, through entering information into the database via the state designated web site; second, by wholesale adoption of a federal list. These are two, specific, exclusive ways to be added to the Colorado no-call list. How this authorizes us to add the Bighorn list to the no-call database is beyond me. It makes no sense to say that because the legislature authorized addition of the federal list in 905(3)(c), in addition to the method specified in § 6-1-905(3)(b)(III), that it therefore follows that we can take any list we want to.

6. The final refuge of those advocating addition of the Bighorn list is the more general provisions of §§ 6-1-905(3)(b)(VII), 6-1-905(3)(b)(X). The OCC and Bighorn Center direct us to these provisions and the majority embraces them as its last line of defense. This ignores the canon of statutory construction enshrined in § 2-4-205, C.R.S., that a specific provision prevails over a general provision.[10] Thus, here, the specific, exclusive method of adding names to the database in § 6-1-905(3)(b)(III), C.R.S., triumphs over the more general provisions in §§ 6-1-905(3)(b)(VII) and (X). Of course, this has to be so. If the general provision is allowed to swallow the specific provision--as advocated by the majority, the OCC and Bighorn--then there was never any need for the specific provision to be in the statute.

7. The concurring opinion takes a different tack. It mangles the grammar of the statute to justify its conclusion. The concurrence pays no attention to the syntax of the clause, claiming that "exclusively" modifies only the information that needs to be entered into the database. This is impossible. For the concurrence's construction to hold, "exclusively" would have to be inside the prepositional phrase "by entering the

[10] This is, of course, the well-known canon of construction: *generalia specialibus non derogant*. *See* Decision No. R00-1057 at p. 47 fn. 26 (Gifford, dissenting).

area code, phone number and zip code. . . .” Instead, “exclusively” is placed right next to the verb “shall be,” causing it to modify *each* prepositional phrase. The concurrence’s construction would be right if the statute read: shall be by ***exclusively*** entering the area code, phone number and zip code. . . .” Since the statute does not follow that word order, the concurrence’s construction cannot be right.

8. The majority’s legal position is untenable. Its construction of the statute, in the end, amounts to a generalized gloss on the supposed ends that the no-call list seeks to achieve. This is not legal analysis, but wishful thinking. The legislature passed an unambiguous, specific statute. Our job is to implement its clear command.

**F. Other Illegitimate Reasons For Accepting Bighorn List**

1. I must not let pass certain comments made purporting to justify our acceptance of the Bighorn list.

2. One Commissioner seized on supposed ambiguity in the legislature’s intent when passing the No-Call List Act. The legislature’s alleged intent is irrelevant to our deliberation.

3. The legislature’s job is not to create legislative history, not to formulate legislative intent, and not to rely on the executive and judicial branches to create laws. The laws are the final work product of the legislature and represent the full effort of their work; everything else is

mere background. The text of the statute is the legislative history. The text is fully reflective of all that went into creating the law. The consideration of legislative history is not only unnecessary, as the text of the statute reflects all of the legislature's intent (although not necessarily all of the legislators' intent), but also misleading, because individual aspects of the legislative history do not necessarily reflect the final compromise reached by the legislature.

4. Even if the use of legislative history in statutory interpretation was theoretically acceptable, the practical problems with incorporating it argue against its inclusion. Legislative history is prone to manipulation both in the interpretation and creation phases. The process of formulating and passing a statute is complex, requiring that statements of legislative history be understood in the context of this process. Fundamentally, this context involves arriving only at an end-product, or a statute, meaning that legislators may simply ignore or not take the time to understand the legislative history as it takes place. In addition, individual statements, taken outside of the necessary context, may suggest different interpretations than intended when considered within the full context of the process. Finally, the situation lends itself to the fabrication of legislative history by those that seek to benefit from its later misuse.

5. This record demonstrates the plasticity of legislative history. In this record, we have letters from two state senators telling us the legislature's "intent" as to the meaning of "existing business relationship" in § 6-1-903(7)(a), C.R.S. These letters respectively urge us to adopt a specific construction of "existing business relationship" based on the legislative history – but they claim the legislative history compels completely opposite conclusions![11]

6. Because legislative history is so unreliable and so frequently misused, I urge my colleagues categorically to reject its use as an interpretive guide.

7. A second rationale offered by the majority is that Commission decisions are only partly legal, but also involve a great deal of "politics." I might prefer a less derisive term such as "informed judgment," but it all depends on the statute you are construing. Here, the statute is explicit, clear, and limiting. Thus, we have no discretion to engage in politics, or make an informed judgment as to the statute's meaning. We must simply reject the Bighorn list because it falls beyond the purview of our statutory authority.

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[11] *See* Letter from State Senator Ken Chlouber to Raymond Gifford, dated September 25, 2001 (arguing legislature intended existing business relationship not to mean regulated utilities should be treated differently than other businesses); Letter from State Senator Joan Fitz-Gerald to Bruce Smith, dated September 10, 2001 (arguing legislative intent for established business relationship did not include regulated LECs within definition). Both letters entered of record in Docket No. 01R-385T.

8. This Commission is bound to follow the law as written by the legislature. Sometimes those laws are ambiguous and we are given latitude to interpret them. In other instances, the law contains open-ended provisions where the legislature, in effect, invites us to fill-in the policy direction. For instance, the Public Utilities Law contains numerous open-ended provisions, such as "just and reasonable," "public convenience and necessity," and "public interest." *See, for instance,* §§ 40-3-101, *et seq.;* 40-4-101, *et seq.*; 40-5-101, *et seq.,* C.R.S. In these types of statutes, I agree that the Commission has room to apply its own, informed policy preference. Contrast those provisions with the no-call statute, however, and it is clear that we have no such similar discretion. With the No-Call List Act, the legislature has given us a clear command that the method for adding a name to a no call list shall be exclusively by entering the information into the database via the state designated web site or by touch-tone phone. There is no room to add the Bighorn list in that language.

9. Finally, the majority's construction represents a capitulation in the face of purported political pressure for a piffle. Were the Commission faithful to the language of the Act, the default rule would make interested persons have to sign-up for the no-call list by re-entering their number and zip

code into the database via the state designated web site. Under the majority's rule, an interested person will have to sign-up for the no-call list by reconfirming their interest after receiving a confirmation e-mail or notice from the designated agent. Thus, in both instances, a person wanting to be on the Colorado no-call list has to sign-up again. The Commission sells out its duty to follow the law in exchange for a confirmation e-mail!

F. I urge my colleagues to reconsider their position and follow the plain legal command that the legislature has given us. Our job here at the Commission is to follow the command of the law, not to torture the law to achieve an outcome people might want us to.[12]

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD
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Commissioner

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[12] The Commissioner's Oath is to the laws of the State of Colorado, as written, not to improve them where we think it appropriate.