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BEFORE THE ARIZONA CORPORATION

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AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF) DOCKET NO. RT-00000J-02-0066
DISSEMINATION OF INDIVIDUAL)
CUSTOMER PROPRIETARY) AT&T'S COMMENTS ON STAFF'S
NETWORK INFORMATION BY) FIRST DRAFT - PROPOSED
TELECOMMUNICATIONS) CPNI RULES
CARRIERS)

AT&T Communications of the Mountain States, Inc and TCG Phoenix
(collectively, "AT&T") hereby provide their comments on the Arizona Corporation
Commission Staff's First Draft - Proposed CPNI Rules.

I. INTRODUCTION

On April 2, 2004, the Staff distributed proposed Customer Proprietary Network
Information ("CPNI") rules for comment. Staff distributed 3 different sets of proposed
rules. Generally, the first set provides for opt-in with verification, the second set
provides for opt-out and opt-in with verification (and is based in part on rules adopted by
the Washington Utilities and Transportation Commission), and the third set also provides

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for opt-out and opt-in with verification.¹ Staff seeks comments on all three sets of proposed rules.

AT&T has reviewed Staff's proposed rules. All three proposals suffer from the same infirmity – they are not narrowly tailored and impermissibly infringe on telecommunications carriers' First Amendment rights.

II. COMMENTS

The Commission and Staff are starting from a clean slate. There is no evidentiary record to support Staff's proposals. This is not a case of the Commission adopting rules that it believes are in the public interest based on comments received from interested parties. A federal appellate court has held that CPNI is "commercial speech" for the purposes of the First Amendment. *U S WEST v. FCC*, 182 F. 3rd 1224,1233 (10th Cir. 1999). Accordingly, the burden is on the Staff to demonstrate that its proposed rules pass constitutional muster. This burden is on the Staff, even if no telecommunications carriers file comments in opposition to Staff's proposed rules. The Staff "must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment or misappropriation of sensitive personal information for the purposes of another's identity." *Id.*, at 1235. As the Court noted, "[a] general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under *Central Hudson* for it is not based on an identified harm." *Id.*

¹ The 3 sets of proposed rules are identified by Staff as Draft CPNI rules (TSA Opt-in), Exhibit 1; Draft CPNI Rules (Call Detail Version), Exhibit 2; and Draft CPNI Rules (FCC Plus Verification), Exhibit 3, respectively.

In addition, from a business perspective, the proposed rules are so burdensome that the cost of compliance in Arizona effectively prohibits carriers from making use of CPNI in Arizona at all. This is not only unwarranted but forecloses use of CPNI to the consumers' benefit. Carriers do not use CPNI to harm customers; they believe the use of CPNI will benefit not only the carrier but the consumer as well. Staff's proposals focus so hard on removing what it believes to be the perceived harms that they deny consumers the benefits of the use and disclosure of CPNI.

A. First Amendment – Free Speech

The controlling case in determining whether government restrictions on commercial speech violate the First Amendment is *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). The Tenth Circuit Court of Appeals relied on *Central Hudson* when it overturned the Federal Communications Commission's ("FCC") initial CPNI opt-in rules. *U S WEST v. FCC*, 182 F.3d 1224 (10th Cir. 1999). The District Court also relied on *Central Hudson* and *U S WEST* when it found the CPNI rules adopted by the Washington Utilities and Transportation Commission to be unconstitutional. *Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003). A summary of *Central Hudson*, *U S WEST* and *Verizon* will put the subsequent review of Staff's CPNI proposals in the proper context.

1. Central Hudson

In *Central Hudson*, the U.S. Supreme Court reviewed a challenge to a restriction on promotional advertising instituted by the New York Public Service Commission. The

Court summarized the analysis that has developed when reviewing restrictions on commercial speech.

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson at 566. Although the Court found a substantial state interest and a direct connection between the restriction on advertising and the state interest, the Court found that the state commission had not demonstrated that a more narrowly tailored restriction on promotional advertising would be ineffective in protecting the substantial state interest.

2. U S WEST

In its initial order implementing Section 222 of the Telecommunications Act of 1996, the FCC adopted opt-in CPNI rules that, among other things, required a carrier seeking to use CPNI outside the customer's existing service relationship to obtain express permission from the customer to do so.² U S WEST, Inc appealed the FCC's rules. The Tenth Circuit Court of Appeals overturned the FCC's rules on First Amendment grounds.

² *Implementation of the Telecommunications Act of 1996: Telecommunications Carrier's Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket Nos. 96-115 and 96-149, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) ("CPNI Order").

The Tenth Circuit Court first determined that commercial speech was involved. The Court noted that “[t]he parties did not dispute that the commercial speech based on CPNI is truthful and nonmisleading.” *U S WEST* at 1233.

The Court next reviewed whether there was a substantial state interest. The FCC had advanced two state interests – privacy and competition. The Court stated that “the government bears the responsibility of building a record adequate to clearly articulate and justify the state interest.” *Id.* at 1234. Merely asserting a broad interest in privacy is not enough. *Id.* “In sum, privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it.” *Id.*, at 1235. The government must also “show that the dissemination of the information desired to be kept private would inflict specific harm on individuals...” *Id.* “A general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under *Central Hudson* for it is not based on an identified harm.” *Id.* The Court never found a substantial state interest; instead, it proceeded with its analysis assuming such an interest existed for purposes of the *Central Hudson* analysis.³ *Id.*, at 1236.

The Court subsequently reviewed whether the restrictions on CPNI directly and materially advanced the government’s interests. After noting that the harms must be real and the restrictions must materially alleviate those harms, the Court found that the FCC presented no evidence that the harm to either privacy or competition was real and that the

³ The Court noted that although the FCC never articulated it directly, the Court inferred from the FCC’s statements that disclosure of CPNI might prove embarrassing. The Court had “some doubts” whether this rises to a substantial state interest. *Id.*

FCC relied on speculation.⁴ Once again, the Court made no affirmative finding that the regulations directly and materially advanced a substantial state interest.

The Court, assuming for the sake of argument that the FCC provided a substantial state interest and that the regulations directly and materially advanced that interest, reviewed the FCC's rules to determine whether they were narrowly tailored. The Court concluded the regulations were not narrowly tailored.

Even assuming that telecommunications customer value the privacy of CPNI, the FCC record does not adequately show that an opt-out strategy would not sufficiently protect customer privacy. The respondents merely speculate that there are a substantial number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given such notice and the opportunity to do so. Such speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires.

Id., at 1239. Having determined that the rules were not narrowly tailored, the FCC's opt-in rules were overturned.

3. Verizon Northwest, Inc.

On November 7, 2002, the Washington Utilities and Transportation Commission ("WUTC") adopted new rules on the use and disclosure of CPNI. The rules subsequently were declared unconstitutional. *Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003).

The WUTC divided CPNI into two categories: call detail and "private account information."⁵ The rules required the use of opt-in before using call detail for any

⁴ "This burden is not satisfied by mere speculation or conjecture." *U S WEST* at 1237, quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1990).

⁵ See *Verizon* at 1189. Staff's second proposal defines call detail. The definition is essentially the same as the definition adopted by the WUTC. "Private account information" is information that identifies the customer but is not call detail.

purpose other than billing. Verizon alleged that the rules were preempted by federal law and violated the First Amendment. Verizon sought a permanent injunction⁶ and each party filed for summary judgment. Verizon's motion for a permanent injunction and summary judgment was granted.

The District Court determined that the rules impacted protected speech. *Verizon* at 1191. The Court subsequently analyzed the regulations under the *Central Hudson* test. *Id.* The Court found, based on the record, "that there was a substantial state interest in ensuring that consumers be given an opportunity to approve uses of CPNI." *Id.*

The Court, however, found that the rules did not directly and materially advance the state interest for two reasons. One the rules excluded wireless carriers.

Under the WUTC's rules, consumers face different rules regarding the use of CPNI if they use wireless and interstate telecommunications services in addition to the intrastate services to which the WUTC's rules apply. Furthermore, the exclusion of wireless services from the regulations leaves a large segment of services free from the protections offered by the WUTC's restrictions. The WUTC, therefore, fails to establish that its rules are part of a substantial effort to advance a valid state interest.

Id. at 1193. Two, the rules were complicated and confusing.

In the present case, it defies credulity that consumers will understand the complicated regulatory framework sufficiently to effectively implement their preferences. Simply put, the state's interest will not be advanced given the confusion over the regulations. For these reasons, the court finds that the WUTC's rules fail to advance the state's interest in a direct and material way.

Id.

⁶ A preliminary injunction had been granted by the District Court on February 10, 2003.

Although the rules failed the second prong of the *Central Hudson* test, the Court reviewed whether the rules were narrowly tailored and concluded they were not. The District Court's analysis is relevant to the Arizona CPNI rulemaking process.

The WUTC contends, however, that opt-in is the only approach that will protect CPNI. The WUTC points to evidence in the record derived from the Qwest experience with opt-out to demonstrate that opt-out approaches are fundamentally flawed. . . .

The evidence upon which the WUTC relies, however, does not invalidate opt-out approaches. Rather, it is evident that the *presentation* and *form* of opt-out notices is what determines whether an opt-out campaign enables consumers to express their privacy preferences. The FCC recognized this very fact when it devoted a substantial portion of its 2002 Order to dictating the form, content, and frequency of opt-out notices. . . .

In the present case, there is no evidence that the WUTC considered similar requirements. Instead, it appears as though the WUTC was motivated by consumer complaints regarding the implementation of Qwest's opt-out campaign. Undoubtedly, the Qwest experience did not go well. That experience, however, does not support the proposition that *all* opt-out presentations are flawed. In fact, Verizon's recent experience implementing opt-out in accordance with the FCC rules in Washington stands in stark contrast to Qwest's. Verizon sent out opt-out notices to approximately 700,000 subscribers; 7.5 percent successfully opted out and fewer than 45 subscribers lodged any complaint. Verizon's experience strongly suggests that properly controlled opt-out campaigns can protect consumers from the unauthorized use of CPNI without impacting speech to the extent that the current rules do. That experience, along with the FCC's, demonstrates that regulations that address the form, content, and timing of opt-out notices, when coupled with a campaign to inform consumers of their rights, can ensure that consumers are able to properly express their privacy preferences.

Id., at 1194-1195 (emphasis in original; citations and footnotes omitted).

The Court concluded that the rules failed the *Central Hudson* test and were contrary to the First Amendment. The Court granted Verizon's motion for summary judgment and permanently enjoined the WUTC from enforcing the rules. *Id.*, at 1195.

4. Arizona Constitution

Article I, Section 8 of the Arizona Constitution states that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” There is some question whether the Arizona Constitution even applies. Use of CPNI arguably does not disturb a person's private affairs (the information is lawfully in the possession of the carrier), nor is the customer's home being invaded. There have been previous statements by Staff that suggest that the Arizona constitutional right to privacy is broad enough to permit infringement on the First Amendment rights of carriers to use and disclose lawfully collected information. However, the Arizona Constitution makes it quite clear that the Constitution of the United States is the supreme law of the land. A.R.S. Const. Art. 2, § 3. Therefore, to the extent a state law or rule violates the U.S. Constitution, the state cannot rely on an Arizona constitutional article to justify it. Stated another way, if the rules violate the First Amendment, the Arizona Constitution's right to privacy cannot legally support the rules.

5. Conclusion

The Commission must be mindful of *Central Hudson*, *U S WEST* and *Verizon* when adopting rules for the use and disclosure of CPNI. Because First Amendment issues are involved, the burden is on the Commission and Staff, not the

telecommunications carriers. The Commission must compile a record that complies with the *Central Hudson* test.⁷

B. Staff's CPNI Proposals

In response to the Tenth Circuit Court of Appeals decision, the FCC reviewed its CPNI rules, specifically with respect to the use and disclosure of CPNI. Generally, the FCC reaffirmed the “total service approach.”⁸ The “total service approach” defines the scope of the services under Section 221(c)(1) and “defines what the carriers may do without the approval of the customer.” *Id.*⁹ Carriers that do not intend to use CPNI outside the “total service approach” need not receive customer approval or provide any customer notice. *Id.*, ¶¶ 83 and 91; 47 C.F.R. § 64.2005(a).

Having adopted a “total service approach,” the FCC set out specific circumstances opt-out would be permissible, and opt-in would be required, for obtaining customer approval to use, disclose or access CPNI. A carrier may use an opt-out approach to disclose CPNI to an affiliate that provides communications-related services. *Id.*, ¶¶ 33-44.¹⁰ A carrier may also disclose CPNI to a joint venture partner, agent, or independent contractor using opt-out for the marketing of communications-related services if the

⁷ The Commission must demonstrate a substantial state interest. The rules must directly advance that interest. Finally, the rules may not be more intrusive than necessary to protect the state interest.

⁸ *Implementation of the Telecommunications Act of 1996: Telecommunications Carrier's Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Third Report and Order and Third Further Notice of Proposed Rulemaking, FCC 02-214 (rel. July 25, 2002) (“*Third Report and Order*”), ¶ 83. The “total service approach” allows a carrier to use CPNI without customer approval to market with respect to existing services. For example, if a customer purchases local and long distance service, the carrier can use CPNI without customer approval to market services related to local and long distance service. It may not use CPNI without the customers approval to market wireless service. *CPNI Order*, ¶¶ 24, 30; *Third Report and Order*, ¶¶ 83-84.

⁹ Section 221(c)(1) specifically permits the use of CPNI without the approval of the customer under certain circumstances: 1) in the provision of the telecommunications service from which such information is derived, or 2) in the provision of services necessary to, or used in, the provision of such telecommunications services including the publishing of directories.

¹⁰ If the carrier and the affiliate are both providing communications services to the customer, no customer approval is required. 47 C.F.R. § 47.2005(a)(1).

carrier obtains a confidential agreement from the partner, agent or independent contractor. *Id.*, ¶¶ 45-47. To disclose CPNI to a third-party or an affiliate that does not provide communications-related services, a carrier must obtain customer approval by use of an opt-in process. *Id.*, ¶¶ 50-52.¹¹

As the Court noted, simply showing that customers feel strongly about their privacy rights or may be embarrassed by disclosure of CPNI is insufficient to meet the *Central Hudson* test.

All of Staff's proposals incorporate a significant number of provisions that are inconsistent with the FCC's CPNI rules, go well beyond the requirements of the FCC's rules and are not narrowly tailored. Staff's proposals are overly burdensome and add significant costs for any carrier seeking to use CPNI and implicitly fail to recognize the consumer benefits. Accordingly, Staff's rules also do not reflect a "careful calculation of the costs and benefits" and are not narrowly tailored.¹²

1. Staff Proposal No. 1 TSA Opt-In

a. R14-2-xx02 Definitions

This section defines "Opt-Out approval" and "subscriber list information"; however, the terms are not used in the rule. The definitions are unnecessary.

The rule defines "third party." Included in the definition of a third-party is an affiliate of the customer's telecommunications service provider. This is inconsistent with the FCC's rules. The FCC places affiliates into two categories – affiliates that provide

¹¹ Although the FCC did adopt opt-in for use in several situations, there has not been a court challenge confirming the constitutionality of opt-in where required by the FCC. The FCC's opt-in rules, therefore, are not entitled to any presumption that they are constitutional.

¹² AT&T's comments do not address whether there is a substantial state interest, or whether the rules directly advance the State's interest. AT&T reserves the right to comment on these issues after Staff makes its case.

communications-related services and those that do not. Only the latter category is treated similar to third parties. The Staff should maintain the FCC's categories.

b. R14-2-xx03 Obtaining Customer Approval

i. R14-2-xx03(A)

R14-2-xx03(A) identifies two scenarios when a carrier must obtain opt-in approval to disclose CPNI: 1) to its affiliates that provide communications-related services to which the customer does not already subscribe, and 2) to its joint venture partners and independent contractors that market and provide communications-related services. In both of these scenarios the FCC's rules permit the use of an opt-out approval process. When read in its entirety, the Staff's rule effectively requires the use of an opt-in approval process in all cases.

ii. R14-2-xx03(B)

R14-2-xx03(B) provides that any solicitation for opt-in customer approval must be accompanied by "written notice" to the customer in conformance with R14-2-xx04. When opt-in approval is required under the FCC rules, written, electronic or oral notice is sufficient. *Third Report and Order*, ¶ 90; 47 C.F.R § 64.2008(a)(1).

iii. R14-2-xx03(C)

R14-2-xx-03(C) requires a carrier that intends to disclose CPNI to an affiliate, joint venture partner or independent contractor to execute a "proprietary" agreement to maintain the confidentiality of the customer's CPNI. The FCC rules require a "confidentiality" agreement only when a carrier intends to disclose CPNI to a joint venture partner or independent contractor that is marketing communications-related

services pursuant to opt-out approval. *Third Report and Order*, ¶ 47.¹³ The FCC does not require a confidentiality agreement between a carrier and an affiliate when the affiliate is marketing communications-related services. In addition, the FCC does *not* require confidentiality agreements when a carrier discloses CPNI to an affiliate that does *not* provide communications-related services, or to a third party. *Id.*, ¶¶ 53-68. The reason the FCC does not is because in these latter two cases a customer must expressly approve the disclosure of CPNI by use of the opt-in approval process; as a result, there is no need to require a confidentiality agreement. Therefore, Staff's proposal requires confidentiality agreements in a number of cases when the FCC does not and in several cases when an agreement is unnecessary. Furthermore, unlike the FCC's rule, Staff's rule does not provide any guidance as to the contents or necessary terms of any confidentiality agreement.

c. R14-2-xx04 Notice Requirements

R14-2-xx04 provides the information requirements for a customer opt-in notice. Staff's requirements substantially exceed the requirements contained in the FCC rule.

i. R14-2-xx04(A)(1)

Staff's proposal requires that the notice contain the definition of customer proprietary network information contained in Section 222 of the Act. The FCC rules do not contain this requirement. The FCC requires that the notification specify that type of information that constitutes CPNI. 47 C.F.R. § 64.2008(c)(2). This permits the carriers some flexibility and avoids the use of legalese.

¹³ There is no apparent reason for using a different terminology in Staff's proposed rule.

ii. **R14-2-xx04(A)(2)**

Staff's proposal states that the notice must be mailed separately from any advertising or promotional information. The notice shall not be included in the customer's bill. By stating that the notice must be "mailed separately" it appears Staff is attempting to limit notice to written notice. The FCC permits the use of oral, written and electronic methods. *Third Report and Order*, ¶ 90; 47 C.F.R. § 64.2008(e).

The FCC also permits the carrier to make the notice and solicitation at the same time. In fact, the FCC requires that the solicitation be proximate to the notification. *Third Report and Order*, ¶ 89. In the *CPNI Order*, the FCC stated that "[t]he notification may be in the same conversation or document as the solicitation for approval, as long as the customer would hear or read the notification prior to the solicitation for approval." *CPNI Order*, ¶ 141.¹⁴ The FCC allows a customer to opt-in by email, by checking a box on a web-site, by a 1-800 number and even by a shrink-wrap method. *Third Report and Order*, ¶¶ 92-96, 118. The FCC recognizes that a customer may agree to the use or disclosure of CPNI during the carrier selection process on a web-site. *Id.*, ¶ 94.

The Staff's notice requirements also prohibit including the notice in a customer's bill. The FCC permits bill inserts. *CPNI Order*, ¶ 132.

iii. **R14-2-xx04(A)(3)**

Staff's proposal contains a requirement that the notice must be clearly legible, in twelve-point or larger print. The FCC's requirement states that the notice must be clearly legible and "use sufficiently large type." 47 C.F.R. § 64.2008(c)(5).

¹⁴ The FCC "largely affirm[ed]" the notice requirements contained in *CPNI Order* in its *Third Report and Order*. *Third Report and Order*, ¶ 89.

Many important documents or products contain print smaller than twelve-point print. For example, bank privacy notices, credit card privacy notices, medicine packaging, insurance documents, credit card statements, food packaging – all of these contain print smaller than 12-point print.¹⁵ People taking medicines or food have to be concerned about drug interactions or food allergies that can be life threatening, yet there is no 12 point print requirement. The FCC’s requirement for sufficiently large type is sufficient.

iv. R14-2-xx04(A)(4)

Staff’s proposal requires the notice to be posted on the company’s web site and must be readily accessible from the company’s home page. The FCC rules contain no such requirement.¹⁶ From a practical standpoint, there is some question that all carriers even have a web site. Staff’s proposal also fails to recognize that national companies cannot comply with multiple and conflicting state requirements.

v. R14-2-xx04(A)(5)

Staff’s proposal requires that the notice “[i]nform customers that their name address, and telephone numbers, if published in the telephone directory or associated with a customer who subscribes to non-listed service is not private information and will not be withheld from telemarketers.” The FCC rules do not contain such a requirement. More importantly, even Staff admits that the name, address and telephone number of these

¹⁵ This document uses 12-point print.

¹⁶ AT&T does acknowledge that the FCC has a 24 hours a day, seven days a week requirement to permit a customer to make a CPNI election. *Third Report and Order*, ¶ 118. However, the FCC allows a carrier to satisfy this requirement through a combination of methods, and does not mandate use of a web site. *Id.*

customers is not private.¹⁷

vi. R14-2-xx04(A)(8)

The Staff's proposal requires that the notice state that CPNI includes all information related to specific calls initiated or received by the customer. The FCC rules require that the notification specify the types of information that constitute CPNI. 47 C.F.R. § 64.2008(c)(2). Staff's proposal is unnecessary.

vii. R14-2-xx04(B)

Staff's proposal requires that the notice be in both English and Spanish. The FCC rules state that "[i]f any portion of a notification is translated into another language, that all portions of the notification must be translated into that language." 47 C.F.R. § 64.2008(c)(6).

d. R14-2-xx05 Verification of Customer Approval

Staff's proposal requires opt-in under all circumstances. Second, its notice provisions are more extensive, burdensome and restrictive than the FCC's notice requirements. R14-2-xx05 of Staff's proposal contains additional verification requirements *in situations where the customer has affirmatively decided to opt-in*. Not only must the carrier obtain express approval to use or disclose CPNI, it must go back to the customer to confirm the customer's express approval. The verification requirement is overly burdensome and unnecessary, and the section as a whole is ambiguous and conflicts with other portions of the rule.

¹⁷ The Staff's own definition defines "published" as "authorized for voluntary disclosure by the individual identified in the listing." The Staff's rules define a non-listed number as one being available from directory assistance. Published numbers are contained in the definition of subscriber list information. 47 U.S.C. § 222(h)(B)(3). Carriers are obligated by law to provide this information to other publishers of directories on a nondiscriminatory basis.

i. **R14-2-xx05(A)**

R14-2-xx05(A) is ambiguous. It appears from the language that this section requires confirmation of a customer's election before the carrier can use CPNI,¹⁸ however, the verification procedures contained in R14-2-xx05(A) are the same methods one uses under the FCC's to provide customer notice.

Paragraph A is written in the alternative; confirmation may be made under any one of 4 methods. However, R14-2-xx05(A)(2) states that the carrier can confirm the election by showing that it has obtained authorization in accordance with the requirements of R14-2-xx04. R14-2-xx04 does not provide for authorization; it provides for notice.

The remaining three "authorization" methods in R14-2-xx05(A) are written authorization, internet authorization and use of an independent third party. The Staff should remove any ambiguity regarding the purpose of R14-2-xx05(A) – authorization or confirmation.

ii. **R14-2-xx05(B)**

R14-2-xx05(B) describes written "authorization." The authorization must be a separate, signed and dated document, not be combined with any inducement, "[b]e written in the same language used in the underlying customer education materials," and include electronically signed letters of agency (internet LOAs). The notice requirements require notice in Spanish and English. R14-2-xx04(B). However, the authorization can

¹⁸ R14-2-xx05 states that CPNI shall not be used "unless the customer's *election* authorizing the company to use the CPNI has first been *confirmed*" in accordance with one of 4 subparagraphs (emphasis added). However, portions of the four subparagraphs speak in terms of authorization, not confirmation; and other portions require confirmation. AT&T must assume for purposes of its comments that the Staff's proposal means what it says – that a carrier must verify a prior election, although Staff's proposal is silent on how an opt-in election can be made.

be written in the same language used in the underlying “customer education materials.” The phrase “customer education materials” is not defined. If the materials are the notice, it should simply say so. If not, there is ambiguity regarding what the phrase “customer education materials” actually refers to. Furthermore, since the rules require that the notice be in both Spanish and English, there is some question why the phrase “the same language used in the underlying customer education materials” is used in this paragraph.

R14-2-xx05(B) states that the written authorization shall “[i]nclude electronically signed letters of agency (Internet LOA).” Since R14-2-xx05 does not contain a separate paragraph for internet authorization, AT&T must assume the rest of R14-2-xx05(B) applies to internet authorization. Since R14-2-xx05(A) identifies written authorization separate from internet authorization, internet authorization should be contained in a separate paragraph.

iii. R14-2-xx05(C), (D) & (E)

R14-2-xx05(C) provides for electronic voice recorded authorization. Paragraphs (C) and (D) also refer to or provide for oral recorded authorization.¹⁹ This method is not permitted under R14-2-xx05(A).

iv. R14-2-xx05(F)

It appears that Staff has borrowed the provisions for independent third-party verification from the slamming rules. However, by doing so, Staff has added obligations under this method that are not contained in the other verification sections of the proposed rule. R14-2-xx05(f)(5)(d) and (e) require the independent third party to elicit the telephone numbers for which CPNI information release is authorized and the types of

¹⁹ Paragraph C uses the phrase “shall confirm,” paragraph D uses the phrase “election to confirm” and paragraph E uses the phrase “authorization to use.” These are additional examples regarding the confusion caused by the dual notions of authorization and confirmation contained in R14-2-xx05 generally.

services involved. Although these questions may have some relevance in the slamming rules context, they have not been incorporated into the FCC's rules, or within the provisions of any other Staff verification method.

e. R14-2-xx06 Reminders to Customers

R-14-2-xx006 requires carriers to notify customers on every monthly bill what the customer's current CPNI election is, whether or not the customer has made an election regarding the use or disclosure of his or her CPNI. If the carrier is unable to notify customers on their monthly bills, the company must mail a *separate* notice quarterly. In other words, if customers have elected *not* to release CPNI, the carrier has to spend money *forever* telling the customers they have *not* elected to release their CPNI.

Staff's proposal does not explain what reasons would justify sending separate quarterly notices in lieu of notices on monthly bills. Is lack of space sufficient? Is the cost a valid reason? What if the carrier does not do its own billing?

There is no justification for requiring reminders. It is paternalistic. If a customer has elected not to opt-in, there is no possible harm to the customer. If the customer has opted in, the customer had to make an informed, express election.

f. R14-2-xx07 Dissemination to Third Parties and Affiliates

R-2-14-xx07 addresses CPNI with respect to third parties and non-published numbers. Staff's proposal with respect to third parties is consistent with the FCC's rules.²⁰ Staff, however, requires the use of opt-in for disclosure of non-published information to *all* affiliates, R14-2-xx07(B), and is not limited to affiliates that do not provide communications-related services.

²⁰ Staff's definition of third party inappropriately includes all affiliates. See AT&T's comments, *supra*, with respect to Staff's definition of "third-party."

The FCC makes no distinction for non-published customer information. If the information is CPNI, it is treated according to the FCC's rules. Therefore, Staff is adding another unnecessary layer of complexity to the FCC's rules.

g. R14-2-xx08 Confirmation of a Change

i. R14-2-xx08(A)

R14-2-xx08(A) requires a carrier to "confirm in writing" a customer CPNI opt-in election within 10 days. This section is ambiguous, and there is some question as to the relation between R14-2-xx08 and R14-2-xx05 on verification.

R14-2-xx04 requires a separate notice. R14-2-xx05 requires verification or confirmation of a customer's election. R14-2-xx08, once again, requires a separate confirmation in writing of a decision to opt-in each time a carrier receives a customer's opt-in approval. Although the verification under R14-2-xx05 may be in writing, by internet, by oral recording or third-party verification, R14-2-xx08 requires confirmation by mail or email.²¹

ii. R14-2-xx08(B)

R14-2-xx08(B) states that a carrier may not use or disclose CPNI based on a customer's *opt-in* approval until 30 days after mailing the confirmation. First, the FCC only requires carriers to wait 30 days before using CPNI when a carrier uses *opt-out* to obtain approval. *Third Report and Order*, ¶ 112; 47 C.F.R. § 64.2008(d)(1). The FCC adopted this time to allow sufficient time to pass so an inference could be drawn that the customer was granting approval to the use of his or her CPNI. *Third Report and Order*, ¶ 112. In the case of opt-in, there is no need to wait for a period of time to *infer* approval

²¹ It should be noted that under the FCC's rules electronic *notice* by email for opt-out purposes requires prior approval from a customer to send notices by email before a carrier can use email to obtain opt-out approval. *Third Report and Order*, ¶ 93. Staff's rule is silent on pre-approval.

because the carrier has received the customer's express approval. Furthermore, under Staff's proposal, a customer must be given notice, must opt-in, the carrier must verify the election and then the carrier must confirm the election. Staff proposes the carrier wait an additional 30 days, apparently on the belief that a customer was somehow impaired throughout the entire, multi-step process Staff proposes. This is unlikely.

h. Conclusion

Staff's first proposal is unquestionably unconstitutional. The notice requirements are more burdensome than the FCC's, a carrier must confirm a customer election not once but twice, the carrier must remind the customer of the status of CPNI approval or disapproval and the carrier must wait 30 days after an express election to use CPNI. It is readily apparent that Staff's proposal is more burdensome than the FCC's current rules. In fact, the Staff's proposal is substantially more burdensome than the FCC's initial rules that were overturned by the Tenth Circuit Court of Appeals as not being narrowly tailored.

There is no question Staff's proposal will make it more difficult for regional and national carriers to do business.²² It appears to AT&T that the purpose of Staff's proposal is to make the process so complex and burdensome that the carriers will simply decide not to go through the expense and bother of obtaining customer approval for use of the customer's CPNI. The Staff's proposal also leads one to believe that Staff sees no benefits to the use of CPNI – that only harm can come from its use or disclosure. If this is Staff's position, it is mistaken. Staff's initial proposal is an invitation to litigation.

²² The FCC stated it will review requests to preempt state rules on a case-by-case basis. *Third Report and Order*, ¶ 69. The FCC stated that it does “not take lightly the potential impact that varying state regulations could have on a carrier's ability to operate on a multi-state or nation-wide basis.” *Id.*, ¶ 71.

3. Staff Proposal No. 2 Call Detail Version

Staff's second proposal makes a distinction between CPNI generally and call detail, permits opt-out in limited circumstances, requires verification of opt-out and opt-in elections and, in all other respects, retains the remaining provisions contained in Staff's first proposal. Accordingly, AT&T will identify the issues raised by the new provisions; and, where the provisions are the same as Staff's first proposal, AT&T will incorporate its comments made on Staff's first proposal for rules.

a. R14-2-xx02 Definitions

Staff adds a definition for "call detail." Staff's proposal simply adds more complexity to the approval process without any apparent benefit. AT&T does not believe any further categories beyond those created by the FCC are necessary or desirable.²³

The Staff's second proposal also contains a definition of "third-party" that is broader than the FCC's use of the word. *See supra* at 10-11.

b. R14-2-xx03 Obtaining Customer Approval

R14-2-xx03 identifies when opt-in approval is required. It contains the same language contained in R14-2-xx03 of Staff's first proposal, except that Staff's second proposal substitutes "Call Detail" for "CPNI." In all other respects, the section is the same. *See AT&T's comments supra* at 11-12.²⁴

²³ The FCC makes a distinction between CPNI disclosed to affiliates that provide communications-related services (opt-out), to joint venture and independent contractors that will use information to market communications-related services (opt-out), to third parties (opt-in) and to affiliates that do not provide communications-related services (opt-in).

²⁴ Unlike Staff's first proposal, there are several scenarios where opt-out is permitted under Staff's second proposal. However, because of Staff's other requirements under its second proposal, the burdens under Staff's opt-out requirements are more burdensome than the FCC's current opt-in rules.

c. R14-2-xx04 Notice Requirements

R14-2-xx04 contains the notice requirements. It contains the same language contained in R14-2-xx04 of Staff's first proposal, except the second proposal inserts "Call Detail" in lieu of "CPNI" in paragraph 8. *See* AT&T's comments *supra* at 12-15.

d. R14-2-xx05 Additional Notice Requirements

In addition to the substantial notice requirements contained in R14-2-xx04, Staff's second proposal imposes additional notice requirements when opt-out is used to obtain customer approval. Under Staff's second proposal, opt-out can be used to obtain customer approval under certain circumstances: 1) disclosure or access to non-call detail CPNI by an affiliate that provides communications-related services to which services that customer does not already subscribe, and 2) the disclosure or use of non-call detail CPNI by a joint venture partner or independent contractor that market or provides communications-related services.²⁵ Having stripped out what Staff apparently believes to be the more sensitive CPNI (call detail), Staff adds even more notice requirements to obtain opt-out approval. This appears counterintuitive, to say the least.

i. R14-2-xx05(A)(1)

Staff adds the following notice requirements for an opt-out notice:

The notice must include a disclaimer that an opt-out directive for customer proprietary information does not prevent the company from making telephone solicitation or telemarketing calls to the customer and does not prevent the company from including the customer's listed name, address, and telephone number lists sold, leased or provided to other firms. This disclaimer is not required if the company's practice is to exclude customers who opt-out of customer proprietary network information use from use of disclosure for telemarketing purposes. Emphasis added.

²⁵ These two scenarios where opt-out is permitted is not stated expressly. It must be deduced from R14-2-xx03 and R14-2-xx08.

Staff requirement requires the carrier to notify the customer that its opt-out approval does not prevent telemarketer from including the customer's *listed* name, address and telephone in lists sold, leased or provided to other firms. This section is absurd, for a number of reasons.

First, the customer will know that this information is going to be released because the FCC notice rules require that the carrier explain to the customer the use that will be made of CPNI. 47 C.F.R. § 64.2008(b)(2). Therefore, Staff's proposal is redundant and unnecessary. However, more importantly, *listed* names, addresses and telephone numbers are public and contained in published directories.

A customer's listed name, address and telephone number is "subscriber list information" as defined by Section 222(e), and *notwithstanding any other requirements of (b) (c) and (d) of Section 222*, a carrier shall provide subscriber list information on an unbundled basis, under nondiscriminatory and reasonable rates terms and conditions, to any person upon request for the purposes of publishing directories. Staff's opt-out notice requirement, therefore, flatly contradicts the express provisions of Section 222 and are unconstitutional and unlawful on their face, and were Staff's provision lawful, would unquestionably be preempted by the federal Act.

ii. **R14-2-xx05(B)**

The FCC rules infer that a customer has given approval to use and disclose 30 days after the notice and solicitation are mailed. The notice must advise the customer of the 30-day waiting period. *Third Report and Order*, ¶ 112; 47 C.F.R. § 64.2008(d)(1).

Staff proposes that 60 days after notice and solicitation of opt-out approval that the carrier provide written confirmation to customers of their selection by a mailing

separate from any advertising or promotion and separate from the customer's bill. Under Staff's proposal, the carrier must inform the customer that he or she elected not to object to use or disclosure of CPNI or he or she notified the carrier that he or she did object to use of CPNI. First, it should not be forgotten that Staff has already severely restricted the use of CPNI by requiring the use of opt-in for the use and disclosure of call detail. Second, it defeats the purpose of the opt-out process to require written confirmation.²⁶

e. R14-2-xx06 Verification of Customer Approval

Paragraphs R14-2-xx06(B)-(G) regarding verification of customer opt-in elections are the same as R14-2-xx05(A)-(G) of Staff's first proposal. Paragraph H (paragraph G in Staff's first proposal) has been amended to add opt-out. *See* AT&T's comments *supra* at 15-17.

R14-2-xx06(A) adds a verification requirement for customers that have elected to allow disclosure or use of CPNI (non call-detail) under an opt-out process where permitted under Staff's second proposal. Verification must be received within a reasonable time pursuant to paragraphs (B) – (H).

Staff's verification proposal requires actual verification. In addition, R14-2-xx05 requires an unnecessary confirmation of a customer's non-election or election. AT&T does not believe either confirmation or verification of opt-out approval is necessary.

The FCC's initial opt-in rules were found to be an unconstitutional infringement on the First Amendment. Those rules required express customer approval in all cases and permitted the use of oral, written or electronic means to obtain that approval. *CPNI*

²⁶ This raises an issue that AT&T will discuss later -- cost. There generally appears to be a failure to recognize that every time a notice must be given that substantial costs are involved. Furthermore, there appears to be an inherent Staff bias against all use of CPNI, *e.g.*, by making it difficult to use CPNI the carriers will elect not to.

Order, Appendix B, Final Rules, § 64.2007(b). Staff's opt-out with verifications is essentially a back door method of requiring opt-in. The customer's election is no longer inferred. If a carrier has to verify a opt-out by oral, written or electronic means before it can use or disclose the CPNI, the rule for all intents and purposes requires opt-in. If the FCC's opt-in rules could not withstand judicial scrutiny, Staff's opt-out with verification proposal will not either.

f. R14-2-xx07 Reminders to Customers

R14-2-xx07 requires customer reminders. The language is the same as R14-2-xx06 of Staff's first proposal. *See* AT&T's comments *supra* at 17-18.

g. R14-2-xx08 Dissemination to Third Parties and Affiliates

R14-2-xx08 addresses use and disclosure of CPNI by third parties and affiliates. The language is the same as R14-2-xx07 of Staff's first proposal. *See* AT&T's comments *supra* at 18.

h. R14-2-0-xx09 Confirmation of Change

R14-2-xx09 addresses confirmation of opt-in customer approval. The language is the same as R14-2-xx08 of Staff's original proposal. *See* AT&T's comments *supra* at 18-20.

i. Conclusion

Staff's second proposal is unconstitutional. Not only does it require opt-in in all but two scenarios, the opt-out process is so burdened with notice requirements, confirmation and verification, that for all intents and purposes, Staff's second proposal effectively requires opt-in approval under all circumstances. Furthermore, Staff's second

proposal requires confirmation and verification of opt-in approval. This goes well beyond the requirements contained in the FCC's *CPNI Order*.

There is no possibility that Staff's second proposal can withstand a First Amendment challenge. Once again, Staff's proposal is not narrowly tailored and fails to balance costs and benefits.

Furthermore, Staff notes that its second proposal is based, in part, on the WUTC's CPNI rules. What Staff fails to note is that the WUTC's rules that required the use of opt-in to disclose call detail CPNI were declared unconstitutional. *Verizon Northwest, Inc v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003). The only conclusion that can be drawn from this decision is that Staff's second proposal will also be declared unconstitutional.

3. Staff Proposal No. 3 FCC Plus Verification

Although Staff labels its third proposal "FCC Plus Verification," Staff's third proposal does far more than add a verification process to the FCC's present CPNI rules. Not only must carriers verify customer elections, they must confirm customer elections and remind customers of their election or non-election. Furthermore, the notice requirements are more burdensome than the FCC's requirements. Taken as a whole, Staff's third proposal also fails the *Central Hudson* test and is contrary to the First Amendment.

a. R14-2-xx02 Definitions

Once again, the Staff's definition of "third party" inappropriately includes all affiliates. See AT&T's comments *supra* at 10-11.

b. R14-2-xx03 Obtaining Customer Approval

i. R14-2-xx03(B)

R14-2-xx03(B) provides that any solicitation for opt-in customer approval must be accompanied by “written notice” to the customer in conformance with R14-2-xx04. When opt-in approval is required under the FCC rules, written, electronic or oral notice is sufficient. *Third Report and Order*, ¶ 90; 47 C.F.R § 64.2008(a)(1). Therefore, Staff’s rules preclude a number of opt-out methods permitted by the FCC.

ii. R14-2xx03(C)

R14-2-xx03(C) of Staff’s third proposal contains the same language as R14-2-xx03(C) of Staff’s first proposal. *See* AT&T’s comments *supra* at 11-12.

c. R14-2-xx04 Notice Requirements

R14-2-xx04 of Staff’s third proposal contains the same language as R14-2-xx04 of Staff’s first proposal. *See* AT&T’s comments *supra* at 12-15.

d. R14-2-xx05 Additional Notice Requirements

R14-2-xx04 of Staff’s third proposal contains the same language as R14-2-xx05 of Staff’s second proposal (except for the deletion of the call detail parenthetical). *See* AT&T’s comments *supra* at 21-24.

e. R14-2-xx06 Verification of Customer Approval

R14-2-xx06 requires verification of a customer election whether the opt-in or opt-out process is used.

i. R14-2-xx06(A)

R14-2-xx06(A) requires verification of customer opt-out approval within a reasonable time by four methods. These are the same methods required for verification of opt-in. AT&T discusses each of the methods its comments on R14-2-xx06(B).

Staff's requirement for verification essentially converts the opt-out process into a opt-in one. The customer's election is no longer inferred since actual verification is required. The methods to verify an election are essentially the same as the FCC's requirements to obtain approval. Merely making the verification subsequent to the opt-out election does not change the nature of the requirement.

The FCC's initial opt-in rules were found to be unconstitutional. Those rules required express customer approval in all cases and permitted the use of oral, written or electronic means. *CPNI Order*, Appendix B, Final Rules, § 64.2007(b). If the FCC's opt-in rules could not withstand judicial review, Staff's opt-out rules with verification will not either.

ii. R14-2-xx06(B)

R14-2-xx06(B)-(I) contains the same language as R14-2-xx05(A)-(H). *See* AT&T's comments *supra* 15-17.

f. R14-2xx07 Reminders to Customers

R14-2-xx07 of Staff's third proposal contains the same language as R14-2-xx06 - of Staff's first proposal. *See* AT&T's comments *supra* at 17-18.

g. R14-2-xx08 Dissemination of CPNI to Third Parties and Affiliates

R14-2-xx07 contains the same language as R14-2-xx07 of Staff's first proposal. *See* AT&T's comments *supra* at 18.

h. R14-2-xx09

R14-2-xx09 of Staff's third proposal contains the same language as R14-2-xx08 of Staff's first proposal. *See* AT&T's comments *supra* at 18-20.

i. Conclusion

Staff's label for its third proposal – FCC Plus Verification – suggests that it had started with the FCC's current rules and simply added a verification requirement. The label is misleading. Staff, in addition to the verification requirement, has limited notice to written notice (R14-2-xx03), added notice requirements (R14-2-xx04 and R14-2-xx05), added two written confirmation requirements, (R14-2-xx05(B) and R14-2-xx09), added a reminder requirement (R14-2-xx07) and limited disclosure to affiliates by use of the opt-in process (R14-2-xx02(8) and R14-2-xx08(A)).

The verification requirement alone causes the rules to infringe on commercial speech protected by the First Amendment. However, the addition of the other requirements simply removes all doubt.

C. The Real Costs of Staff's Proposals

It is not the carriers' burden to demonstrate the rules are burdensome or unreasonable. It is the Staff's responsibility to demonstrate the rules pass the *Central Hudson* test, are narrowly tailored, and reflect a careful calculation of cost and benefits. The rules do impose costs on carriers, and these costs are substantial.

The Staff's proposals require a number of additional processes beyond those required by the FCC.

1. The notice must comply with more extensive notice requirements.
2. There are additional notice requirements if a carrier uses the opt-out process.

3. The carrier must verify the election either in writing, by internet or by an independent third party, and possibly orally.
4. The carrier must confirm the election in writing.
5. The carrier must provide a monthly reminder, or quarterly reminder if it is unable to provide monthly notice.

AT&T spent over \$1.3 Million to develop the current process that is compliant with the FCC's current rules. AT&T would have to spend additional sums to make changes to the current process to respond to Staff's proposals. Since Staff's rules add so many additional requirements, the cost could easily exceed \$1.3 Million. AT&T would have to make a decision whether the cost of the process changes exceed any potential benefits.

Staff's notice requirement also add substantial costs. Since the notice must be in twelve point type, must contain additional information and language requirements, and cannot be placed in a bill, it is unlikely a post-card could be used to send the notice. The cost of postage alone to send notice to just AT&T's long distance customers would exceed \$100,000.

The confirmation under an opt-out process would cost in excess of \$100,000 also. If the verification is sent in writing, the total for postage for one opt-out campaign would exceed \$300,000.

AT&T also is required to send a reminder quarterly. Because AT&T uses a third party to do some of its billing and third-party billers place restrictions of the size and frequency of bill notices, AT&T would be forced to do quarterly bill notices. The cost of postage would exceed \$100,000 for it long distance customers. AT&T would incur this cost four times a year, every year, forever. Therefore, to do the notice, verification, confirmation and 4 reminders would cost over \$700,000.

Staff's rules state that the notice must be posted on a company's web site and must be accessible from a company's home page. This will require web page revisions. AT&T estimates the cost to change the web site to be \$50,000.

Oral customer contact is not any cheaper. To obtain opt-in approval by telephone for 100,000 customers would cost more than \$925,000.²⁷ This is not insignificant.

These are only AT&T's estimates of some of the costs that AT&T would incur. Other carriers will also incur costs. Total industry cost to comply with Staff's rules will be in the millions of dollars. Carriers will not be able to recover these costs, and the industry at present simply cannot absorb these costs.

III. CONCLUSION

Staff's proposals will not withstand judicial scrutiny. The rules are not narrowly tailored, the rules do not reflect a careful calculation of the cost and benefits, the proposals are "dauntingly confusing" and it "defies credulity that consumers will understand sufficiently the complicated regulatory framework sufficiently to effectively implement their preferences." *Verizon* at 1193.

The District Court stated that "it appears as though the WUTC was motivated by consumer complaints regarding implementation of Qwest's opt-out campaign." *Id.* This appears to be Staff's motivation as well. However, in response, the District Court stated: "Undoubtedly, the Qwest experience did not go well. That experience, however, does not support the proposition that *all* opt-out presentations are flawed." *Id.*, (emphasis in original).

²⁷ This figure is for the labor costs only, assuming a labor rate of \$37.50 per hour and 15 minutes per customer.

As the District Court noted in *Verizon*, opt-out can adequately inform customers. “*Verizon’s* experience strongly suggests that properly controlled opt-out campaigns can protect consumers from unauthorized use of CPNI without impacting speech to extent that the current [WUTC] rules do.” *Id.*

Even a cursory reading of *Central Hudson*, *U S WEST*, and *Verizon* will lead the reader to conclude that none of Staff’s proposals will pass constitutional muster. Staff should disregard its three proposals and draft rules that are consistent with legal precedent.

Submitted this 14th day of May, 2004.

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