

ORIGINAL



0000004725

BEFORE THE ARIZONA CORPORATION COMMISSION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

MARC SPITZER
Chairman
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN MAYES
Commissioner

Arizona Corporation Commission

DOCKETED

MAY 17 2004

DOCKETED BY

AZ CORP COMMISSION
DOCUMENT CONTROL
2004 MAY 17 11:05 AM
RECEIVED

IN THE MATTER OF DISSEMINATION OF
INDIVIDUAL CUSTOMER PROPRIETARY
NETWORK INFORMATION BY
TELECOMMUNICATIONS CARRIERS.

DOCKET NO. RT 00000J-02-0066

QWEST'S NOTICE OF FILING
REGARDING COMMENTS TO
STAFF DRAFT RULES

I. INTRODUCTION

Qwest Corporation, Qwest Communications Corporation, and Qwest LD Corporation (collectively herein "Qwest") file these comments on behalf of Qwest's local exchange and long distance carrier entities and affiliates that will be affected by the Draft Rules, if adopted. As it has previously advised the Arizona Corporation Commission ("ACC" or "Commission"), Qwest takes the matter of customer privacy seriously. Qwest has a long tradition of treating the content of customer communications, as well as the transactional information associated with telecommunications services, confidentially.

Qwest supports a Customer Proprietary Network Information ("CPNI") approval process that reasonably balances the privacy interests of individuals with the interests of service providers. An opt-out CPNI approval regime – similar to that established by the Federal Communications Commission ("FCC") without any additional costly verification or confirmation obligations – best meets the objective of a balanced approach. For this reason, the Commission should adopt CPNI rules more closely aligned with those adopted by the FCC.

1 **II. STAFF DRAFT CPNI RULES**

2 **A. General Comments**

3 Staff has filed a “Staff First Draft – Proposed CPNI Rules.” Although Staff
4 reserves the right to modify its Draft Rules at anytime, it now “encourages all interested
5 parties to provide comments and input.”¹

6 The Draft Rules, however, do not provide any analysis as to their legal basis,
7 necessity or propriety. Rather, their presentation is one merely of description. Thus,
8 interested parties are told that:

9 The first set [of Draft Rules] mandates opt-in as the only
10 mechanism by which a carrier may share CPNI and has
11 additional verification procedures depending on the
12 circumstances, and is based in part on rules adopted by the
13 Washington Utilities and Transportation Commission
14 [“WUTC”].

15 Likewise, the second set of Draft Rules is summarily described as:

16 incorporat[ing] additional verification procedures. [And]
17 [t]he third set of rules uses a combination of opt-in and opt-
18 out procedures modeled on the current FCC rules, combined
19 with additional verification procedures.

20 An extensive record in this proceeding already exists. This record addresses
21 almost every issue raised by the Draft Rules – ranging from the appropriateness of a
22 CPNI opt-in approval regime to the application of such a regime with respect to call
23 detail only, as well as the imposition of verification and confirmation requirements within
24 the context of an opt-out CPNI approval regime.

25 Qwest is on record, and repeats its position here, that an opt-in CPNI rule would

26 ¹ Cover Memo to “All Interested Parties” regarding “CPNI Rules – Docket No. RT-00000J-02-0066” at
1.

1 violate federal constitutional protections, as now articulated by two federal courts.² It
2 would also violate sound regulatory principles adopted by the FCC, which has primary
3 authority regarding the regulation of CPNI, including intrastate CPNI.³ Given the lack of
4 a discrete jurisdictional “nexus” of CPNI (meaning that it cannot be independently
5 categorized as “intrastate” versus “interstate”), the incompatibility of different regulatory
6 regimes for one “type” of carrier data (*i.e.*, CPNI), and the fact that the ACC has no better
7 factual record than the FCC on which to promulgate CPNI rules, any opt-in CPNI rules
8 promulgated by a state regulatory agency would be unconstitutional and unreasonable.

9 Moreover, opt-in CPNI rules are contrary to the public and consumer interest.

10
11 ² The WUTC’s opt-in rules (that form the basis for the Staff’s Draft CPNI Rule (Call Detail Version))
12 were vacated as unconstitutional by a Washington federal district court, *Verizon v. Showalter*, 282 F.
13 Supp. 2d 1187 (W.D. Wa. 2003), based on an earlier federal court appellate opinion. *See U.S. WEST v.*
14 *FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). Moreover, as Qwest has
15 pointed out, whether it be the Tenth Circuit or the Ninth Circuit, an opt-in CPNI approval mechanism will
16 not be upheld absent a materially different record from that currently before the ACC. *See* Qwest
17 Corporation’s Notice of Filing CPNI Comments,” March 29, 2002, at page 7, n.4 and Qwest
18 Corporation’s Notice of Filing Reply Comments Re: CPNI,” April 29, 2002, at page 1 and n.1, both
19 filings being in Docket No. RT-00000J-02-0066, citing to *United Reporting Publishing Corp. v. Los*
20 *Angeles Police Dept.*, 146 F.3d 1133 (9th Cir. 1998), *rev’d sub nom. Los Angeles Police Dept. v. United*
21 *Reporting Publishing Corp.*, 528 U.S. 32 (1999) (where the 9th Circuit held that a statute seeking to limit
22 the release of arrestee records failed to directly and materially advance the government’s interests in
23 protecting an arrestee’s privacy).

24 ³ The CPNI rules promulgated by the FCC are applicable both in an intrastate and interstate context, with
25 the FCC exercising its preemption authority as necessary on a case-by-case basis. *See, e.g., In the Matter*
26 *of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of*
Customer Proprietary Network Information and Other Customer Information; Implementation of the
Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,
Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, 8073-78
¶¶ 14-20 (1998) (“CPNI Order”); *In the Matter of Implementation of the Telecommunications Act of*
1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other
Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the
Communications Act of 1934, As Amended, Order on Reconsideration and Petitions for Forbearance, 14
FCC Rcd. 14409, 14465-67 ¶¶ 112-14 (1999) (“CPNI Reconsideration Order”); *In the Matter of*
Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer
Proprietary Network Information and Other Customer Information; Implementation of the Non-
Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; 2000
Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of
Consumers’ Long Distance Carriers, Third Report and Order and Third Further Notice of Proposed
Rulemaking, 17 FCC Rcd. 14860, 14890 ¶ 69 (2002) (“July 2002 CPNI Order”).

1 Such rules operate to withhold truthful information from consumers, information
2 calculated to improve their buying decisions and quality of life. For all these reasons,
3 Qwest opposes any form of opt-in CPNI approval rule, such as the proffered TSA Opt-in.

4 Similar considerations should mitigate against adoption of the opt-in component of
5 the Call Detail Version, as well. The FCC Plus Verification model of the Draft Rules
6 should likewise be rejected, absent a cost benefit analysis demonstrating either a need or
7 a material benefit to consumers. For the reasons stated herein and in Qwest's prior
8 filings, the Commission should adopt rules identical to those promulgated by the FCC in
9 the area of CPNI regulation.

10 Below, Qwest comments briefly on some of the more technical aspects of the rules
11 on a discrete Draft Rule basis.

12 **B. Staff Draft CPNI Rules (TSA Opt-In)**

13 **1. R14-2-xx01 – Application Of The Rule**

14 This Draft Rule incorporates by reference the FCC's CPNI rules. Yet the
15 remaining Draft Rules generally ignore the FCC rules – rules that currently apply to *both*
16 interstate *and* intrastate CPNI -- without demonstrating the existence of a record
17 materially different from that before the FCC when the FCC felt compelled to reject opt-
18 in CPNI approval rules.⁴ In many instances, the Draft Rules conflict with the FCC's
19 rules. For this reason, the Draft Rules overall cannot be read "together with the FCC
20 rules" to "*lawfully* govern the release of CPNI in Arizona."

21 **2. R14-2-xx02 -- Definitions**

22 **a. Definition of CPNI (xx02.1)**

23 This proposed Draft Rule does not adopt the most recent definition of CPNI under the
24 federal statute or rules, notwithstanding the fact that Staff references both the most recent
25

26 ⁴ See July 2002 CPNI Order, 17 FCC Rcd. at 14895-96 ¶¶ 81-82.

1 FCC regulation language in R14-2-xx01 (Application of the Rule) and the most recent
2 statutory amendment in this definitional section.⁵ Differences in definitions regarding a
3 commonly used term create ambiguity, conflict and confusion for customers and carriers
4 alike. Qwest proposes Staff use the definition of CPNI currently found in federal statutes
5 and rules in its Draft Rules.⁶

6 **b. Definition of "Opt-out Approval" (xx02.5)**

7 It is unclear whether Staff's definition of "Opt-out approval" as a mechanism
8 whereby a person is "deemed to have consented" to CPNI use is meant to imply the
9 approval is less *bona fide* than "opt-in approval."⁷ If Staff intends that this definition be
10 interpreted in a manner whereby opt-out approval becomes a suspect mechanism for
11 determining CPNI approvals, then Qwest objects to the wording and the suggestion. An
12 opt-out approval mechanism results in actual approval being associated with an
13 individual's status. *See Griggs-Ryan v. Smith* (noting that "implied consent is not
14 constructive consent [but, rather] 'consent in fact' which is inferred 'from surrounding
15 circumstances [citation omitted].[']").⁸

16 **3. R14-2-XX03 (Obtaining Customer Opt-In Approval)**

17 This Draft Rule on its face violates the federal constitution for the reasons already
18

19 ⁵ Congress amended Section 222 in October, 1999 to incorporate "location" information into the
20 definition of CPNI. The FCC's rules now reference Congress' revised CPNI definition. *See* 47 C.F.R.
§ 64.2003(d).

21 ⁶ These comments also pertain to similarly numbered provisions in the Draft CPNI Rules (FCC Plus
22 Verification). In the Draft CPNI Rules (Call Detail Version) the provision is R14-2-xx02.2 (rather than
.1).

23 ⁷ These comments also pertain to similarly numbered provisions in the Draft CPNI Rules (Call Detail
Version) and the Draft CPNI Rules (FCC Plus Verification).

24 ⁸ 904 F.2d 112, 116-17 (1st Cir. 1990). In Qwest Corporation's Notice of Filing CPNI Comments, March
25 29, 2002, in Docket No. RT-00000J-02-0066, at pages 5-6, Qwest discusses this court case. *See also*
26 Qwest's April 29, 2002 submission of "Qwest's Corporation's Notice of Filing Reply Comments Re:
CPNI," in Docket No. RT-00000J-02-0066, wherein Qwest attached as Appendix D the Comments of
Qwest Services Corporation, in FCC Docket Nos. 96-115 and 96-149, dated Nov. 1, 2001, at page 17.

1 determined by two federal courts and the FCC. The Draft Rule also raises other issues
2 that would make its implementation, if adopted, problematic. As a preliminary matter,
3 any such rule would pertain only to CPNI associated with **intrastate** services, having no
4 effect on CPNI associated with interstate services or transactions.⁹ Moreover, the Draft
5 Rule most likely would be preempted by federal rules in light of the fact that the ACC
6 does not have a substantially different factual record from that developed by the FCC,¹⁰
7 which was compelled – based on its extensive record – to reject an opt-in CPNI approval
8 mechanism.

9 **4. R14-2-xx04 (Information Required for Opt-In Notice)**

10 **a. Separate Mailing (xx04.2)**

11 The Draft Rule must be modified to allow separate cost recovery for the
12 governmentally mandated mailing required thereunder.¹¹

13 **b. Statement About CPNI Information (xx04.8)**

14 Qwest does not agree with the Draft Rule's proposed definition of CPNI as
15 "includ[ing] *all information* related to specific calls initiated or received by a customer"
16

17 ⁹ July 2002 CPNI Order, 17 FCC Rcd. at 14891-92 ¶ 71.

18 ¹⁰ In its July 2002 CPNI Order, the FCC reversed itself with respect to its earlier-adopted "presumptive"
19 preemption position. Under that model, the FCC announced that state CPNI regulations that were either
20 more liberal than the FCC's rules (*i.e.*, allowed greater use of CPNI than the FCC was willing to allow) or
21 were more restrictive than those rules (*i.e.*, restricted the use of CPNI to a greater degree than the FCC
22 deemed appropriate) were most likely preempted because such state rules would unduly upset the
23 privacy/competitive balance the FCC believed it had achieved with respect to the federal statute. *See id.*,
24 17 FCC Rcd. at 14890-92 ¶¶ 70-71. *And see* pages 18-19 *infra*. Currently, the FCC frames the issue of
25 potential preemptive action regarding state CPNI rules that are different from its own as dependent on the
26 nature and quality of the developed state record. It noted that it had to "acknowledge that states may
develop different records should they choose to examine the use of CPNI for intrastate services. They
may find further evidence of harm, or less evidence of burden on protected speech interests. Accordingly,
applying the same standard, they may nevertheless find that more stringent approval requirements survive
constitutional scrutiny, and thus adopt requirements that 'go beyond those adopted by the Commission
[footnotes omitted].'" 17 FCC Rcd. At 14891 ¶ 71.

¹¹ These comments also pertain to similarly numbered provisions in the Draft CPNI Rules (Call Detail
Version) and the Draft CPNI Rules (FCC Plus Verification).

1 (emphasis added).¹² Moreover, the statement in xx04.8 is inconsistent with the portion of
2 the Draft Rule where the “definition” of CPNI is found (*i.e.*, R14-2-xx02.1). The Draft
3 Rule defines CPNI as information that (1) relates to “destination” (the termination of a
4 call), “amount of use” (something applicable in a measured service, toll or wireless
5 “minutes of use” environment) that is “made available to the carrier by the customer
6 solely by virtue of the carrier-customer relationship” and (2) information in carrier bills.
7 This is not “all information” related to specific calls initiated or received by a customer.

8 For example, CPNI would not include calls to a customer where the called party
9 does not pay for the call (*e.g.*, payphone, calling card or prepaid service or calls received
10 by parties with flat-rated 1FR service). CPNI also does not include information
11 associated with calling stations where no calling party number (“CPN”) information is
12 passed to an end user, but the originating and termination carriers’ networks have
13 information as part of carrier and network interconnections.

14 Any notice that a carrier might send to a customer to secure CPNI approval should
15 track the definition of CPNI found in the definitional section of the rules (*compare* A.1)
16 or something substantially the same in more layman’s language that a consumer could
17 understand. A notice certainly should not mischaracterize or overstate what constitutes
18 CPNI.

19 **c. Consequences of Limited CPNI Access (xx04.9)**

20 In its *July 2002 CPNI Order*, the FCC modified its requirement that a carrier’s
21 CPNI approval notice should include a statement informing customers that if they
22 decided not to approve the release of CPNI their decision would not affect the provision
23 of services to which they subscribed. Specifically, the FCC modified its prior rule to

24 _____
25 ¹² These comments also pertain to similarly numbered provisions in the Draft CPNI Rules (FCC Plus
26 Verification), and to a comparable provision in Draft CPNI Rules (Call Detail Version) where it is stated
that “Call Detail Information includes all information related to specific calls initiated or received by a
customer.”

1 permit carriers to advise customers in clear and neutral language about any material
2 adverse consequences that might be encountered by a customer's refusal to provide CPNI
3 approval.¹³ Any Draft Rules submitted by Staff to the ACC should contain a similar
4 modification, particularly since in the Application of the Rule provision (R14-2-xx01),
5 Staff states that it is incorporating FCC rules as revised through September 20, 2002, a
6 date subsequent to the FCC's rule modification.¹⁴

7 **5. R14-2-xx05 (Verification/Confirmations of CPNI Approval**
8 **Status)**

9 As a general matter, the organization of this rule is confusing.¹⁵ The Draft Rule
10 should be revised to more closely link its first reference to a confirmation or verification
11 technique with the specific requirements associated with that technique. For example,
12 what is now A.4 should become associated with the text of what is now numbered F;
13 what is A.1 should become associated with the text in B, and it may be that items C, D,
14 and E should be combined in some fashion under a heading of "Telephonic/Electronic
15 Confirmations."

16 **a. xx05.A.2**

17 There are no authorization requirements in R14-2-xx04, only content requirements
18 for an opt-in notice.¹⁶ Thus, the wording of this subsection should be changed.

19 **b. xx05.A.4. through F**

20 In a previous submission, Qwest indicated its opposition to CPNI verifications or

21 ¹³ *July 2002 CPNI Order*, 17 FCC Rcd. at 14906-07 ¶¶ 103-06. The FCC added the sentence "However,
22 carriers may provide a brief statement, in clear and neutral language, describing consequences directly
23 resulting from the lack of access to CPNI[.]" to its rule 47 C.F.R. § 64.2008(c)(3).

24 ¹⁴ These comments also pertain to similarly numbered provisions in the Draft CPNI Rules (Call Detail
25 Version) and the Draft CPNI Rules (FCC Plus Verification).

26 ¹⁵ This provision is R14-2-0006 in the Draft CPNI Rules (Call Detail Provision) and the Draft CPNI
Rules (FCC Plus Verification).

¹⁶ Compare provision R14-2-0006.A.2 in the Draft CPNI Rules (FCC Plus Verification) that references
both -xx04 and -xx05.

1 confirmations.¹⁷ As Qwest previously stated:

2 Carriers should not be required to verify or confirm customer CPNI
3 approval decisions. Although carriers might volunteer to do such
4 confirmations (as Qwest did earlier this year), the government
5 should not impose such verifications, particularly in the absence of
any meaningful cost/benefit analysis.

6 As a preliminary matter, Qwest believes that the costs of verification
7 would not be trivial and would lack any overall “public interest”
8 benefit. The “harm” to an individual if CPNI is “accidentally” or
9 “inappropriately” used is that the person may be approached via a
10 marketing contact. The “cost” associated with verifying/noticing
11 thousands of individuals to prevent this limited, personal “harm” is
unwarranted. Conversely, the Commission should only require
carriers to verify/confirm a customer choice if an individual agrees
to bear the cost of the verification or notification.

12 Although Qwest does not support governmentally imposed verification
13 requirements, if such verification or confirmation requirements are imposed, carriers
14 should be permitted to choose the method. For any particular customer, this may be
15 through e-mail, telephone verification, or written communication. Qwest used all these
16 methods as part of its earlier voluntary verification efforts.¹⁸

17 **6. R14-2-xx06 – Reminder Notices**

18 **a. Content of Communication (xx06.A)**

19 Compliance with subsection A appears impossible because the rule is not written
20 in the alternative (“or”).¹⁹ A notice on the bill every month containing the information in
21

22 _____
23 ¹⁷ See “Qwest Corporation's Notice of Filing CPNI Comments,” March 29, 2002, in Docket
No. RT-00000J-02-0066, at pages 17-18.

24 ¹⁸ The comments reflected here also apply to Draft CPNI Rules (Call Detail Version) and Draft CPNI
25 Rules (FCC Plus Verification), both with numbered provisions of R14-2-xx06.

26 ¹⁹ These comments also pertain to R14-02-xx07 in Draft CPNI Rules (Call Detail Version) and Draft
CPNI Rules (FCC Plus Verification).

1 items 1 through 4 would be incorrect and confusing. Qwest believes the Draft Rules
2 meant to say that statements 1 and 2 were required *or* 3 and 4. Assuming this is correct,
3 Qwest has two comments on the mechanics of the proposal.

4 **b. Mechanics of Communication (xx06.A and B)**

5 First, it is unnecessary to take up bill space *every month* to advise a customer
6 about his/her CPNI decision. Alternatively, it is unnecessary to provide a quarterly,
7 separately-mailed communication with this type of information. Staff has made no
8 cost/benefit demonstration that would support this type of government-mandated speech
9 and Qwest cannot imagine that such a case could be mounted in support of such
10 regulation.

11 Second, the government must provide Qwest and other carriers with cost recovery
12 for any governmentally-mandated speech. Cost recovery for monthly or quarterly
13 reminders regarding CPNI status would not be insubstantial. To create such functionality
14 would require Qwest to modify its existing Customer Service Record (“CSR”) operations
15 support systems (“OSS”) so that a customer’s “CPNI approval status” was captured in a
16 way that caused the information to flow through to each monthly billing or permitted it to
17 be captured in a discrete field for purposes of a separate mailing. Qwest expects the costs
18 associated with this type of reminder communication would be prohibitive (particularly
19 in a highly competitive market environment such as long distance) and far outweigh any
20 consumer benefit.

21 **7. R14-2-xx07 – Dissemination of CPNI to Third Parties**

22 This Draft Rule extends beyond CPNI information. Moreover, it is written in too
23 absolute terms to avoid legitimate restraints on alienation and thus serve the public
24 interest.²⁰

25 _____
26 ²⁰ These comments also pertain to provision R14-2-xx08 in the Draft CPNI Rules (Call Detail Version)
and the Draft CPNI Rules (FCC Plus Verification).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

a. Written Customer Approval (xx07.A)

The prohibition on the release of CPNI to third parties without written customer approval is unduly restrictive, not in the public or consumer's interests, and contrary to existing federal mandates. Moreover, it is an undue burden on commerce. For example, in the future, Qwest may decide to sell a portion of its businesses and CPNI may need to be shared in advance of finalizing such a transaction (to allow a purchaser to assess the purported value of the deal) or at closing.²¹ There is nothing to suggest that a customer's interest in seeing that individually-identifiable information about them is not abused requires barriers to trade such as inheres in a written consent requirement, particularly if CPNI were shared in the context of an appropriate protective or confidentiality agreement.

Moreover, current federal law requires incumbent local exchange carriers ("ILEC") to provide CPNI to those carriers representing that they have authority to review the information, even if the ILEC is not presented with a signed writing by the customer evidencing such approval.²²

b. Non-published Customer Information

Non-published customer information is *not* CPNI, to the extent it reflects nothing more than a customer's name, address and telephone number.²³ There is no reason, then,

²¹ See "Qwest Corporation's Notice of Filing CPNI Comments," March 29, 2002, in Docket No. RT-00000J-02-0066, at page 10 where Qwest addressed this matter.

²² See 47 U.S.C. §§ 251(c)(3)-(4). And see 47 C.F.R. §§ 51.5, 51.319(g) and accompanying Note (requiring carriers to provide CPNI for purposes of pre-ordering, ordering, provisioning, maintenance and repair and billing functions); *CPNI Order*, 13 FCC Rcd. at 8125-27 ¶¶ 84-85 and *CPNI Reconsideration Order*, 14 FCC Rcd. at 14459-60 ¶ 98 (where the FCC indicates that a refusal to provide CPNI to other carriers when they have less than written approval would likely be considered an unreasonable practice under the Communications Act).

²³ A carrier's customer list, consisting of a customer's name, address and telephone number is *not* CPNI. See *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order, 13 FCC Rcd. 12390, 12395-96 ¶ 8 (1998).

1 to encumber this type of information with an opt-in approval requirement for its
2 legitimate dissemination (e.g., to affiliates or competitors). If an opt-in approval
3 requirement is unlawful for the sharing of CPNI – which encompasses more than non-
4 published customer information – it is certainly unlawful with respect to this subset of
5 customer information.

6 Moreover, as with subsection A, this subsection would be unlawful under federal
7 statutory and regulatory law. For example, Qwest is required to provide non-published
8 customer information (at least service address) to directory publishers for purposes of
9 directory delivery if Qwest's own directory operations use such information²⁴ (which
10 they do). No written customer approval is required to comply with this legal obligation
11 and no approval is sought. Qwest is also required to provide name and address
12 information associated with non-published customers to directory assistance providers
13 (without restriction) to the extent such information is available to Qwest's directory
14 assistance operators (which it is).²⁵ Compliance with both these federal imperatives
15 would be precluded by this Draft Rule.

16 **c. Release to Affiliates Not Providing Telecomm Services**

17 Even if an opt-in provision would otherwise stand as a general matter, the
18 requirement that an individual's permission to release CPNI to certain carrier affiliates
19 (i.e., those that "do not provide telecommunications-related services") or third parties be

20 ²⁴ See *In the Matters of Implementation of the Telecommunications Act of 1996: Telecommunications*
21 *Carriers' Use of Customer Proprietary Network Information and Other Customer Information;*
22 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of*
23 *Directory Listing Information under the Telecommunications Act of 1934 (sic), As Amended*, Third
24 Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and
Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273, 14 FCC
Rcd. 15550, 15638-39 ¶ 167 (1999) ("September 1999 Third Report and Order").

25 ²⁵ See, e.g., *In the Matter of Provision of Directory Listing Information under the Telecommunications*
26 *Act of 1934 (sic), As Amended*, 16 FCC Rcd. 2736, 2748-50 ¶¶ 28-29 (2001); *September 1999 Third*
Report and Order, 14 FCC Rcd. at 15638-40 ¶¶ 167-69. And see 47 C.F.R. §§ 51.311(b), 51.319(f);
September 1999 Third Report and Order, 14 FCC Rcd. at 15575 ¶ 41.

1 evidenced by a **writing** would place an undue burden on carriers and their customers
2 alike. Such a requirement would not produce public interest benefits greater than a
3 carrier's cost of compliance; nor would it seek to minimize burdens on the
4 constitutionally protected communication of truthful speech. There are approval
5 mechanisms other than written ones that can evidence express approval of an individual.

6 **8. R14-2-xx08 – Confirmations of Changes in CPNI Approval**

7 *See* Comments above with respect to R14-2-xx05.

8 **C. Staff Draft CPNI Rules (Call Detail Version)**

9 This Draft Rule suggests that an opt-in rule pertaining only to call detail
10 information would be lawful.²⁶ This is incorrect.

11 The Draft Rule (Call Detail Version) defines the term "Call Detail" (R14-2-
12 xx02.1) the same way the Washington Utilities and Transportation Commission
13 ("WUTC") did in its earlier rulemaking. However, the WUTC rules were struck down by
14 a Washington federal district court. The Court in *Verizon v. Showalter* made clear that a
15 public utility CPNI approval regulation seeking to differentiate between call detail and
16 other types of CPNI fails, at a minimum, to advance a legitimate state interest "given the
17 confusion over the regulations."²⁷ Additional analysis buttresses the conclusion that such
18 a rule would be improper.²⁸

19
20 ²⁶ Many of the provisions of this Draft Rule are identical to those addressed above with respect to the
21 TSA Opt-In Version. Qwest incorporates its objection to those similar provisions here. The most
22 fundamentally different provision with respect to the Call Detail Version is at R14-2-xx03.

23 ²⁷ 282 F. Supp. 2d at 1193. While focusing, of necessity, on the WUTC rules and supporting rationale,
24 the Court in *Verizon v. Showalter* noted that "[t]he new rules incomprehensibly divide CPNI into call
25 detail and private account information, requiring consumers to opt-in in some cases and opt-out in
26 others[.]" and that "it defie[d] credulity that consumers will understand the complicated regulatory
framework sufficiently to effectively implement their preferences." *Id.*

27 ²⁸ *See* Qwest Corporation's Notice of Filing Reply Comments Re: CPNI, April 29, 2002, in
Docket No. RT-00000J-02-0066, at pages 9-15 where Qwest provided arguments against an
opt-in approval mechanism for call detail.

1 First, there is no reason to create a “type” of CPNI termed “call detail” because
2 such information is already captured in the federal statutory definition of CPNI,
3 essentially replicated in the Draft Rules. It is clear that some call detail information is
4 included in the phrase “destination” and “amount of use.”²⁹

5 Moreover, as defined, “call detail” would include not only fully dialed digits
6 associated with terminating calls (3 or 7 or 10 or more digits) but also information
7 associated with the dialing of NPA (area code) or NXX (central office) information, as
8 well as the number of minutes associated with such calls, the location from which a call
9 was made and the “amount spent” in calling the NPA/NXX.³⁰ This is true even though
10 there has been no demonstration by the government that the use of this information
11 requires limitation or restriction in order to accomplish the protection of a

12 ²⁹ “Much CPNI, however, consists of highly personal information, particularly relating to call destination,
13 including the numbers subscribers call and from which they receive calls, as well as when and how
frequently subscribers make their calls.” See FCC’s *CPNI Order*, 13 FCC Rcd. at 8108-09 ¶ 61.

14 The Tenth Circuit, in *U.S.WEST v. FCC*, actually considered the question of imposing an opt-in
15 requirement on call detail information. The Court stated that “[g]iven the sensitive nature of some CPNI,
16 such as when, where, and to whom a customer places calls,” Congress afforded CPNI the highest level of
17 privacy protection under § 222.” *U.S.WEST v. FCC*, 182 F.3d at 1229 n.1. (Note: the reference is to full
18 dialing information.) The Court was comparing § 222(c) with other subsections of § 222, such as the
19 provisions dealing with aggregated information. The Court was commenting on the fact that, in the
former case, customer “approval” was necessary before a carrier could use CPNI; whereas with respect to
20 aggregate information, no such “high[] level of privacy protection” was provided for in the statute (*id.*).
The Court said nothing that would suggest that call detail information would warrant a different type of
21 approval process than appropriate for individually-identifiable CPNI generally – an opt-out approval
22 process.

23 ³⁰ The use of less than “complete telephone number” information by carriers (*e.g.*, NPA or NXX
24 information, as well as associated billing information) for marketing or other purposes fails to raise a
25 significant and material privacy concern as between the carrier that transports the calls and bills for them
and the customer who receives the services. And beyond NPA/NXX/billed amount information, the fact
26 that the term “call detail” includes the number of answered or unanswered calls seeks to extend privacy
“protection” to information that few individuals would find highly offensive or threatening of “privacy.”
Indeed, the information may not contain any actual call detail at all. If the information at issue indicated
that 100 unanswered calls came from 303-355-6758, there would be information associated with call
detail. Similarly, if the information said 100 calls came from 303-355 or merely from 355 central office,
then the information would contain “call detail” under the Draft Rules. But, the information could also be
that on Tuesday, April 2, 2002, Customer A experienced 100 unanswered calls. That information does
not even contain “call detail” in a literal sense but is included in the proposed definition.

1 telecommunications subscriber's privacy.

2 Under the terms of the Draft Rule, carriers would be prohibited, without express
3 written customer approval, from even associating NPA/NXX information with "general
4 calling patterns" such as "peak, off-peak, weekends" or "amounts spent." Additionally,
5 without express written customer approval, carriers could not use information about calls
6 answered or unanswered to individuals, even if that information contained no separate
7 call detail with respect to the incoming call traffic.³¹

8 What the Draft Rule defines as "call detail" is truthful information properly
9 generated and retained by carriers providing telecommunications services. Plainly, the
10 communication of this type of information within a corporate enterprise is as much
11 speech as telling an affiliate, "Susan has 7 lines – 3 more than she had last week and 6
12 more than she had last month." Use of this information by a carrier in the context of the
13 individual associated with the call detail has not been demonstrated to be highly offensive
14 across a broad base of telecommunications consumers,³² even though the information
15 might be a reflection that Susan (a) is starting a highly lucrative "calling parlor" for those
16 wanting to make overseas calls or (b) just needs a lot more telephone lines for reasons no
17 one cares about. Moreover, the inclusion of this information in databases "used" for

18 _____
19 ³¹ Qwest currently monitors some customer's network traffic patterns to advise customers of hourly,
20 daily, weekly call volumes and calls answered/unanswered. This monitoring is sometimes done at the
21 request of customers and sometimes prior to approaching them about particular services that could help
22 them better manage their telecommunications services. The customers are almost always businesses, but
could include home-based businesses. The Staff has made no demonstration that the use of this truthful,
lawfully-generated information is "sensitive" or should be burdened with an opt-in approval requirement
before a carrier can use the information.

23 ³² Qwest has committed not to use or share 7 or 10-digit call detail (whether associated with local calls,
24 such as measured service, or toll calls) within its corporate enterprise for marketing purposes. Thus, there
25 is no current demonstrable "privacy" concern or harm associated with its use of this information. While
26 other carriers might not be willing to withhold use of this information, the fact that the information has
been used in the past and has not raised or demonstrated privacy issues of any magnitude, compels the
conclusion that the ACC could not demonstrate a substantial privacy threat with respect to the internal use
of call detail to warrant this kind of government interference with protected speech interests.

1 other than direct marketing purposes – such as information accumulated for modeling or
2 other purposes that might be used to create marketing strategies for customers who do
3 want to hear from telecommunications carriers – poses no “privacy threat” to any
4 individual. Indeed, as the existing record in this docket demonstrates, all the above
5 communications and potential information uses create benefits to consumers and
6 businesses in the form of lower product development and marketing costs as well as the
7 proliferation of products and services that can satisfy consumers’ telecommunications
8 and related service needs.

9 The Draft Rules provide no analysis concerning how their opt-in requirement for
10 the internal corporate use of call detail information appropriately balances customer
11 privacy interests with legitimate carrier-customer expectations and relationships.
12 Adoption of such a rule would generate prolonged litigation, particularly in light not only
13 of the recent *Verizon v. Showalter* decision but the predicate Tenth Circuit opinion in
14 *U.S. WEST v. FCC*, which considered “call detail” CPNI in its analysis.³³ The Tenth
15 Circuit opinion provides no support for the notion that telephone numbers dialed by a
16 called party or associated with inbound calls of a customer are so “sensitive” that the
17 government could mandate an opt-in CPNI regime. That Court determined that an *opt-*
18 *out* CPNI approval regime would most likely address customer privacy concerns because
19 individuals that objected to the use of such information could protect themselves by
20 opting-out of such use. Finally, not only is there no support in federal law for an opt-in
21 CPNI approval regime with respect to call detail, there is none in Arizona’s legal
22 structure either.³⁴

23 ³³ See note 29, *supra*.

24 ³⁴ See “Qwest Corporation’s Notice of Filing CPNI Comments,” March 29, 2002, in Docket No. RT-
25 00000J-02-0066, at page 9 where Qwest addressed this matter. Qwest there pointed out that the Arizona
26 constitutional right to privacy has only “been interpreted more broadly than the Federal Constitution” in
the context of search and seizure cases. More fundamentally, Arizona courts have consistently found that
this constitutional provision applies only to intrusions by the *government* or where there is state action.

1 If the Commission adopts a regulatory regime that deprives carriers of the benefits
2 of the use of call detail information, such rules would not only burden speech but would
3 adversely affect the “bundle of rights” the carrier has with respect to CPNI ownership.³⁵
4 At a minimum Qwest’s search costs and compliance costs would increase were it
5 compelled to implement an opt-in rule. Customers would be doubly burdened under such
6 a regime since they would not only receive less targeted information (meaning they
7 would have to wade through more generalized communications) but would have to pay
8 more for the privilege (to cover the carrier’s costs). Qwest is unaware of any
9 Commission cost/benefit analysis that would support adoption of the Draft Rule.

10 Finally, any rule that would restrict the use of call detail beyond that mandated by
11 the FCC is almost certainly preempted, despite the FCC’s most recent determination not
12 to outline circumstances that would trigger “presumptive” preemptions. Although the
13 FCC’s *CPNI Remand Order* reflects a continuing political will to not foreclose opt-in
14 approval regimes with respect to CPNI use, the fact remains that its *original* preemption
15 analysis was the more correct and most certainly would form the foundation for future
16 preemption analyses. That is, state rules that would be vulnerable to preemption would
17 include those permitting greater carrier use of CPNI than Section 222 and the FCC’s
18 rules, as well as those state regulations that seek to impose more limitations on carriers’

19
20 The right may not be asserted as against or between private parties. *See Hart v. Seven Resorts Inc.*, 190
21 Ariz. 272, 947 P.2d 846, 856 (App. 1997). Additionally, access to the courts for appropriate invasion of
22 privacy actions (*see Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781 (Sup. Ct. 1989)
23 and the ACC for unreasonable carrier conduct (*see* A.R.S. §§ 40-241 through -250 and A.A.C. R14-2-
24 510, R14-3-101 through -112) indicates that there are far less restrictive mechanisms for protecting the
25 privacy interests of customers’ in CPNI than an opt-in approval regime.

26 ³⁵ *See* “Qwest Corporation’s Notice of Filing CPNI Comments,” March 29, 2002, in Docket No. RT-
00000J-02-0066, at page 19, where Qwest addressed this matter. In that filing, Qwest included as
Attachment 10 the Brief for Petitioner and Intervenors, from the Tenth Circuit case of *U.S. WEST v. FCC*,
No. 98-9518, where Qwest describes its *bona fide* and judicially-protected ownership interests in CPNI at
pp. 22, 36-41. *And see* Reply Brief for Petitioner and Intervenors, which was also included as Attachment
11, at pp. 22-24.

1 use.

2 The FCC's original articulation of its preemption choices is the more reasonable
3 because, as the FCC stated, state regulation

4 that would permit more information sharing generally would
5 appear to conflict with important privacy protections
6 advanced by Congress through section 222, whereas state
7 rules that sought to impose more restrictive regulations would
8 seem to conflict with Congress' goal to promote competition
9 through the use or dissemination of CPNI or other customer
10 information. In either regard, the balance would seemingly
11 be upset and such state regulation thus could negate the
12 Commission's lawful authority over interstate communication
13 and stand as an obstacle to the accomplishment and execution
14 of the full purposes and objectives of Congress. . . . We find,
15 therefore, that the rules we establish to implement section 222
16 are binding on the states, and that the states may not impose
17 requirements inconsistent with section 222 and our
18 implementing regulations.³⁶

14 In light of the FCC's determination that Congress' intention in drafting Section 222 –
15 which gives the FCC jurisdiction over *both* intrastate and interstate CPNI – was not to
16 parse out different types of CPNI for different approval treatment,³⁷ the FCC would be
17 hard pressed not to preempt a state regulation that seeks to accomplish an opposite result,
18 even if such regulation is confined only to intrastate services.

19 **D. Staff Draft CPNI Rules (FCC Plus Verification)**

20 Qwest has provided comments on this Draft Rule throughout its commentary on
21 the earlier Staff Draft Rules. For convenience, cross-references are provided below:

22 R14-02-xx02.1 = p. 4-5 and note 6

23 ³⁶ *CPNI Order*, 13 FCC Rcd. at 8077-78 ¶ 18, 8078 ¶ 20 (footnotes omitted).

24 ³⁷ *See id.* at 8133 ¶ 94 (“Congress did not intend to require that customer information be delineated into
25 further categories. We thus reject Cox’s contention that the sensitivity of the CPNI should govern the
26 form of . . . approval required (citation omitted).”).

1 ORIGINAL and 13 copies of the
2 foregoing hand-delivered for
filing this 14th day of May, 2004 to:

3 Docket Control
4 ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

5 COPY of the foregoing hand-delivered
6 this 14th day of May, 2004 to:

7 Lyn Farmer
Chief Administrative Law Judge
8 ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
9 Phoenix, AZ 85007

10 Maureen A. Scott
Gary A. Horton
11 Legal Division
ARIZONA CORPORATION COMMISSION
12 1200 W. Washington St.
Phoenix, AZ 85007

13 Ernest G. Johnson, Director
14 Utilities Division
ARIZONA CORPORATION COMMISSION
15 1200 W. Washington St.
Phoenix, AZ 85007

16 COPY of the foregoing mailed
17 this 14th day of May, 2004 to:

18 Eric S. Heath
SPRINT COMMUNICATIONS CO.
19 100 Spear Street, Suite 930
San Francisco, CA 94105

20 Steven J. Duffy
21 RIDGE & ISAACSON, P.C.
3101 North Central Ave., Ste. 1090
22 Phoenix, AZ 85012

23 Richard S. Wolters
AT&T Law Department
24 1875 Lawrence Street, #1575
Denver, CO 80202

25

26

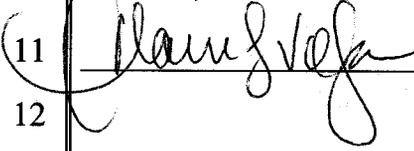
- 1 Teresa Ono
AT&T
- 2 795 Folsom Street, Room 2159
San Francisco, CA 94107-1243
- 3
- 4 Thomas F. Dixon
WORLD COM, INC.
707 N. 17th Street #3900
- 5 Denver, CO 80202
- 6 Joan S. Burke
OSBORN MALEDON, P.A.
2929 N. Central Ave., 21st Floor
- 7 PO Box 36379
- 8 Phoenix, AZ 85067-6379
- 9 Bradley S. Carroll
COX COMMUNICATIONS
20402 North 29th Avenue
- 10 Phoenix, AZ 85027-3148
- 11
- 12 Scott Wakefield
Daniel Pozefsky
Linda Funkhouser
- 13 RESIDENTIAL UTILITY CONSUMER OFFICE
2828 North Central Avenue, Suite 1200
- 14 Phoenix, AZ 85004
- 15 Curt Hutsell
CITIZENS COMMUNICATIONS
4 Trian Center, Suite 200
- 16 Salt Lake City, UT 84180
- 17
- 18 Michael W. Patten
ROSHKA, HEYMAN & DEWULF
One Arizona Center
400 E. Van Buren St., Ste. 800
- 19 Phoenix, AZ 85004
- 20
- 21 Theresa Tan
WORLD COM, INC.
Department 9976
201 Spear Street, Floor 9
- 22 San Francisco, CA 94105
- 23
- 24 Thomas Campbell
Michael Hallam
LEWIS AND ROCA
40 N. Central Avenue
- 25 Phoenix, AZ 85004
- 26

1 Deborah R. Scott
CITIZENS COMMUNICATIONS CO.
2 2901 N. Central Avenue, Ste. 1660
Phoenix, AZ 85012

3 Jon Poston
4 ACTS
6733 E. Dale Lane
5 Cave Creek, AZ 85331

6 Robert E. Kelly
ALLEGIANCE TELECOM OF ARIZONA, INC.
7 1919 M Street, NW, Suite 420
Washington, DC 20036

8 Jeffrey W. Crockett
9 SNELL & WILMER
One Arizona Center
10 Phoenix, AZ 85004-2202

11 

12
13 1546365.1/67817.289

14
15
16
17
18
19
20
21
22
23
24
25
26