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BEFORE THE ARIZONA CORPORATION COMMISSION

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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) SECOND 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 Second Draft - Proposed CPNI Rules.

I. INTRODUCTION

On April 2, 2004, the Staff distributed its second draft of proposed Customer
Proprietary Network Information ("CPNI") rules for comment. Staff's notice states that
the second draft is based on the third set of rules Staff sent to the parties for comment on
April 2, 2004.

Although Staff has attempted to eliminate some to the definitional problems and
inconsistencies with the Federal Communications Commission's ("FCC") CPNI rules, its
latest proposal contains most of the substantive problems identified by AT&T in its
comments dated May 14, 2004. The latest proposal still requires carriers to verify opt-out
approvals, confirm customer opt-in approvals, contains additional information

requirements for opt-in notices, contains even more information requirements for opt-out notices and requires yearly customer reminders of a customer's election to opt-in or opt-out approvals. The notices, verifications, confirmations and reminders must be separate and cannot be contained in bill inserts.

Staff's second draft fails the *Central Hudson* test and is an unconstitutional infringement on commercial speech. *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 Staff fails to consider more narrowly tailored restrictions in protecting any state interest that may exist. Furthermore, Staff appears to have ignored prior legal precedent, *US WEST v FCC*, 182 F. 3d 1224 (10th Cir. 1999) and *Verizon Northwest Inc. v Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003),¹ and continues down a legally unsustainable path.²

Finally, it should not be forgotten that the Staff has the burden of proof and the burden to make a legally sustainable record. Staff must provide evidence of a governmental interest, the governmental interest must be shown to be substantial, the rule must be shown to advance the governmental interest and the Staff must demonstrate the rules are no more extensive than necessary to serve the governmental interest. *Central Hudson* at 566. Staff must show that opt-out would not sufficiently protect customer privacy. *US WEST* at 1239. There must be a "careful calculation of costs and benefits." *Id.* Since the burden is on Staff, the carriers do not have to put on any evidence that the

¹ AT&T discusses these cases at length in its May 14 comments and will not do so again here. See AT&T's Comments on Staff's First Draft – Proposed CPNI Rules at 3-8.

² The Washington U.S. District Court held that the difficulties Qwest had in its initial attempt to provide FCC compliant opt-out notification and the resulting customer complaints were not sufficient to sustain the legality of the Washington Utilities and Transportation Commission's rules. See *Verizon* at 1194-1195. To date Staff has relied on the same justification. Therefore, Staff has not provided any legally sustainable basis for the rules. Furthermore, Staff's rules are definitely not "narrowly tailored."

rules are burdensome, unreasonable, arbitrary or capricious. The lack of such objections to Staff's draft cannot serve as a basis for approval.

II. COMMENTS

A. R14-2xx01 Application of the Rule

R14-2-xx01 uses the term "telecommunications companies." This term is not defined in the proposed rule or Arizona statutes.³ This causes ambiguity and will lead to problems in the future.

B. R14-2-xx02 Definition

The definition section includes a definition for "published." "Published" means authorized for voluntary disclosure by the individual identified in the listing. It is AT&T's understanding that telephone numbers are published unless the customer specifically requests that the telephone number not be published. Therefore, the authorization to publish may be implied. AT&T is concerned that the Staff is creating a substantive requirement that carriers must seek express authorization before a customer's telephone number may be published in directories.

C. R14-2-xx03 Obtaining Customer Approval to Use, Disclose, or Permit Access to CPNI to Affiliates, Joint Venture Partners, and/or Independent Contractors Providing Communications – Related Services

i. R14-2-xx03(A)

R14-2-xx03 creates obligations that go beyond those imposed by the FCC and creates ambiguity regarding when approval must be obtained. For example, R14-2-xx03(A)(1) requires a carrier to obtain either opt-out or opt-in approval to use a

³ A.R.S. § 40-201(26) defines a "telecommunications corporation." R14-2-xx02 defines a "telecommunications carrier." There are a number of other places in the draft rule where the term "telecommunications company" is used.

customer's CPNI for the purposes of marketing communications-related services to that customer. The FCC does not require *any* approval when a carrier uses CPNI to market services encompassed within the "total service approach," that is, among categories of services to which the customer already subscribes from the same carrier. *Third Report and Order*, ¶¶ 83 & 91;⁴ 47.C.F.R.: § 64.2005(a).

Under the FCC's rules a carrier that has a customer that purchases long distance and local services from the carrier may use all CPNI related to the long distance or local services to market additional long distance and local services to that customer without obtaining the customer's approval. The Staff's rules would require approval because the services would fall under the definition of communications-related services. The FCC was "persuaded that customers expect that CPNI generated from their entire service will be used by their carrier to market improved service within the parameters of the customer-carrier relationship." *CPNI Order*, ¶ 24.⁵ Staff's restriction goes to the very heart of the carrier-customer relationship and, therefore, is extremely egregious and blatantly unconstitutional. The section needs to be amended to require approval only for the marketing of services that do not fall within the total service approach.⁶

⁴ *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. Jul 25, 2002) ("*Third Report and Order*").

⁵ *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*").

⁶ Finally, Section (A)(1) is unrelated to the subject matter in the heading for R14-2-xx03.

ii. R14-2-xx03(B)

R14-2-03(B) requires a notice prior to any solicitation. The FCC also establishes a requirement for notice prior to any solicitation. 47.C.F.R. § 64.2008. The Staff's proposal requires the notice to comply with either R14-2-xx05 (opt-in) or R14-2xx06 (opt-out) of the rules. AT&T will discuss the notice requirements in its discussion of these latter two sections.

iii. R14-2-xx03(D)

R14-2-xx-03(D) 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*, ¶ 47.⁷ 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. *Id.*, ¶¶ 53-68. The obvious reason that a confidentiality agreement is not required is because in the latter case 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.⁸ Therefore, Staff's

⁷ There is no apparent reason for using a different terminology in Staff's proposed rule.

⁸ 47 C.F.R. § 64.2008(e) requires the opt-in notice to comply with subsection(c). Subsection (c)(2) states that "[t]he notification must specify the types of information that constitute CPNI *and the specific entities that will receive the CPNI*, describe the purposes for which CPNI will be used, and inform the customer of his or her right to disapprove those uses, and deny or withdraw access to CPNI at any time." Emphasis added.

proposal requires a confidentiality agreement when the FCC does not and when such an agreement is unnecessary.

Finally, 47.C.F.R. § 64.2005(a)(1) permits the sharing of CPNI with an affiliate without *any* customer approval if the affiliate is providing a service offering to the customer. *See also id.*, § 64.2007(b)3. The Staff's proposal to require a proprietary agreement in this situation is inconsistent with this provision.

D. R14-2-xx04 Obtaining Customer Approval to Use, Disclose, or Permit Access to CPNI to Third Parties and Affiliates That Do Not Provide Communications – Related Services

i. R14-2-xx04(B)

R14-2-xx04(B) states that “[a] telecommunications carrier may, subject to express prior written request, use, disclose or permit access to its customer’s individually identifiable CPNI to any third party specifically identified by the customer.” It appears from Staff’s proposal that the only method for obtaining customer approval for use of CPNI by a third party is by written request to the customer. The term “express prior written request” is ambiguous. Furthermore, to the extent the term denotes notice, the requirement appears to conflict with R14-2-xx04(C), which permits oral, written and electronic notice.

R14-2-xx10(A)(3) uses the phrase “express prior written opt-in approval.” This phrase is unique to the draft rule. It is unclear whether the phrase “express prior written opt-in approval” contained in R14-2xx10(A)(3) relates back in any way to the phrase “express prior written request” contained in R14-2-xx04(B), which is also unique.

The FCC’s rules require that prior to any solicitation for approval, the carrier must provide notice of the customer’s right to restrict use of, disclosure of and access to CPNI.

47.C.F.R. § 64.2008(a). The rules also provide that the notice to obtain opt-in approval may be provided orally, in writing or by electronic methods. *Id.*, § 2008(e).⁹ Staff's proposal is more restrictive than the FCC's rules.

The phrase "prior written request" is ambiguous because it is not clear if the "request" refers to the notification, solicitation or approval. The obvious solution is to delete R14-2-xx04(B). This would make this requirement in Staff's rule consistent with the FCC requirement.

ii. R14-2-xx04(D)

R14-2-xx04(D) requires the telecommunications carrier to execute proprietary agreements with affiliates. For the reasons stated above at R14-2-xx03(D) *supra*, a proprietary agreement should not be required by an affiliate.

iii. R14-2-xx04(E)

R14-2-xx04(E) provides that a "telecommunications company"¹⁰ relying on opt-in approval must bear the burden of demonstrating that such approval was given in compliance with Staff's rules.¹¹ This requirement is not contained in the FCC's rules. The FCC rules do contain a provision that requires that a telecommunications carrier relying on an oral approval to bear the burden of demonstrating that such approval has been given in compliance with the FCC's rules. 47.C.F.R. § 64.2007(a)(1).

E. R14-2-xx05 Information Requirements for Customer Opt-In Notice

R14-2-xx05 provides the information requirements for a customer opt-in notice. Staff's requirements substantially exceed the requirements contained in the FCC's rules.

⁹ The FCC's rules also permit the approval to be obtained using the same 3 methods. *Id.*, § 2007(a).

¹⁰ As noted earlier, "telecommunications company" is not defined in the rule.

¹¹ Staff has not incorporated a similar requirement for opt-out.

i. R14-2-xx05(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 the 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.

ii. R14-2-xx05(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 is unclear whether Staff is limiting 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*, ¶ 141.¹² 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.

¹² The FCC "largely affirm[ed]" the notice requirements contained in *CPNI Order* in its *Third Report and Order*. *Third Report and Order*, ¶ 89.

The Staff's notice requirements prohibit the use of bill inserts to give customer notice. The FCC permits bill inserts. *CPNI Order*, ¶ 132. The prohibition on the use of bill inserts is one of the most costly features of the Staff's rule, and this is not the only section of Staff's draft that requires separate mailings. The cost of compliance increases substantially when separate mailings must be made. In Colorado, Qwest stated that the cost to provide customers notice of its deregulation request by bill insert would be about \$30,000. A separate mailing would cost over \$700,000, or 23 times more.¹³ According to Qwest's price cap filing in Arizona, Qwest had 1,394,694 primary residential access lines at the end of 2003.¹⁴ The cost of postage alone to make a mailing to these customers would be over \$500,000. This does not include the cost of 1,394,694 envelopes,¹⁵ paper, printing and stuffing the envelopes.

iii. R14-2-xx05(A)(3)

Staff's proposal contains a requirement that the notice must be clearly legible, in twelve-point or larger print.¹⁶ 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). Many important documents contain print smaller than twelve-point print. The FCC's requirement for sufficiently large type is sufficient.

iv. R14-2-xx05(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

¹³ Denver Rocky Mountain News, Business section (Aug. 12, 2004) at 6B.

¹⁴ Docket Nos. T-01051B-03-0454 and T-00000D-00-0972, Direct Testimony of David L. Teitzel (May 20, 2004) at 6.

¹⁵ Staples sells a small, plain #6 3/4 envelope at \$25.00 per 500. Assuming a 40% discount, that is \$15 per 500, or an additional \$40,000 for envelopes. The cost of envelopes alone could exceed the cost of a bill insert.

¹⁶ This document uses 12-point print.

such requirement.¹⁷ From a practical standpoint, there is some question that all carriers even have a web site. It is unclear whether carrier must create a web site just to comply with Staff's proposal. Staff's proposal also fails to recognize that national companies cannot comply with multiple and conflicting state requirements.

v. **R14-2-xx05(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 customers is not private.¹⁸

vi. **R14-2-xx05(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-xx05(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

¹⁷ 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.*

¹⁸ 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.

all portions of the notification must be translated into that language.” 47 C.F.R. § 64.2008(c)(6).

F. R14-2-xx06 Additional Information Requirements for Customer Opt-Out Notice

In addition to the substantial notice requirements contained in R14-2-xx05, Staff's second draft imposes an additional notice requirement when opt-out is used to obtain customer approval. R-2-xx06(B)(2) adds the following notice requirement 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.

Staff requirement requires the carrier to notify the customer that its opt-out approval does not prevent a telemarketer from including the customer's *listed* name, address and telephone in lists sold, leased or provided to other firms. This subsection was contained in Staff's first draft. AT&T did not understand why this requirement was included in Staff's first draft. It still is at a loss why this provision has been included in Staff's latest draft because the subsection does not have anything to do with CPNI.

Listed names, addresses and telephone numbers are public and contained in published directories and cannot be CPNI. 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.

G. R14-2-xx08 Verification of Customer Opt-Out Approval to Use CPNI

R14-2-xx08 requires the telecommunications carrier to verify the customer's opt-out approval within 180 days. If the verification is not obtained within 180 days, the authorization to use, disclose or permit access to a customer's CPNI is no longer valid. Staff's verification proposal is without question an unconstitutional infringement on commercial speech.

The FCC's initial opt-in rules required express customer approval in all cases and permitted the use of oral, written or electronic means to obtain that approval. *CPNI Order*, App. B, Final Rules, § 64.2007(b). The Tenth Circuit Court of Appeals, based on *Central Hudson*, found that the FCC did not narrowly tailor its CPNI regulations. *U S WEST* at 1238-1239. The FCC subsequently adopted a combination of opt-out and opt-in requirements.

Carriers must wait a minimum of 30 days after giving customers notice and an opportunity to opt-out before assuming customer approval is given. 47.C.F.R. § 64.2008(d); R14-2-xx03(C). Carriers must make available to customers a no-cost method of opting out that is available 24 hours a day, seven days a week. *Id.*, § 64.2008(d)(3)(E). Approval or disapproval remains in effect until the customer revokes or limits such approval or disapproval. *Id.*, § 64.2007(a)(2); R14-2-xx11. However, under Staff's proposal, if express approval is not obtained within 180 days, approval is presumed revoked and no longer considered valid. The use, disclosure or access to CPNI must cease.

There is no substantive difference between Staff's proposal and the FCC opt-in regime that was rejected by the Court. The only difference is that instead of requiring express approval before using CPNI, Staff requires the express approval within 180 days of obtaining approval. In either event, without express approval, the carrier cannot use, disclose or access CPNI.¹⁹ Any contractual agreements with affiliates, joint venture partners or independent contractors would have to be terminated. It is unlikely any carrier, affiliate, joint venture partner or independent contractor would expend resources or money if large portions of CPNI will be unavailable after 180 days. The result will be that before investments are made to use CPNI, the party or parties will wait until the verification process is completed and the customer list is firmed up. Approval can no longer be assumed and approval is terminated automatically if no verification can be obtained. For all intents and purposes, the Staff has imposed an unlawful opt-in regime.

H. R14-2-xx09 Confirming a Customer's Opt-In Approval

Each time a carrier receives a customer's opt-in approval the carrier must confirm in writing the approval within ten days. The written confirmation must be mailed or emailed²⁰ and must be separate from any other mail. The confirmation must also clearly advise the customer of the effect of his or her decision.

The FCC imposes significant notice requirements. For example, the "[c]ustomer notification must provide sufficient information to enable the customer to make an informed decision as to whether to permit a carrier to use, disclose, or permit access to, the customer's CPNI." 47.C.F.R. § 64.2008(c). "The notification must specify the types

¹⁹ AT&T acknowledges the carrier would be able to use, disclose and access the CPNI until the approval is revoked. This does not, however, remove the constitutional defect.

²⁰ Staff does not identify if there are any conditions on the use of email. The FCC requires prior approval before using email for opt-out notices. 47 C.F.R. § 64.2008(d)(3).

of information that constitute CPNI and the specific entities that will receive the CPNI, describe the purpose for which CPNI will be used, and inform the customer of his or her right to disprove those uses and deny or withdraw access to CPNI at any time.” *Id.*, § 64.2008(c)(2). After receiving the notification and making an express decision to opt-in, Staff’s proposal requires carriers to go through the expense of a separate mailing to “confirm” the opt-in approval. All this expense is required to, in essence, ask the customer “Are you sure?” With all the other requirements contained in Staff’s draft, the requirement to confirm an opt-in approval is not only unlawful, it is unnecessary.

I. R14-2-xx10 Reminders to Customers of Their Current CPNI Release Election

In addition to requiring verification of an opt-out approval within 180 days of approval and confirmation of an opt-in approval within 10 days, Staff also requires a carrier that has obtained opt-out or opt-in approval to mail a separate “reminder” to customers every twelve months. The notice cannot be mailed with any advertising or promotional information and cannot be given by placing an insert in the customer’s bill. Staff’s proposal goes well beyond the FCC’s requirement that carriers using the opt-out process to provide notice to their customers every two years. 47.C.F.R § 64.2008(d)(2). Furthermore, under the FCC’s rules bill inserts are permissible.

The Staff’s proposal is an unnecessary waste of resources. It will suffice to say that Staff will have to justify this requirement as well.

III. CONCLUSION

After reviewing and commenting on Staff’s first and second drafts of proposed CPNI rules, it appears to AT&T that Staff sees no socially beneficial use by permitting carriers to use, disclose or access customers’ CPNI. If Staff did, there would not be so

many roadblocks thrown in the way of its use, nor would all the costs of so many separate mailings be imposed on the carriers. It also appears that Staff has made its proposal in a vacuum, without regard to the constitutional requirements imposed on the state to justify regulations that restrict constitutionally protected speech. After reviewing the FCC rules the Tenth Circuit Court of Appeals rejected and other legal precedent, AT&T does not see how reasonable minds can differ -- Staff's proposed rules simply are not narrowly tailored, are an unconstitutional infringement on protected commercial speech and will not withstand judicial scrutiny.

Dated this 27th day of August, 2004.

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