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EXCEPTION ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION
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IN THE MATTER OF DISSEMINATION OF
INDIVIDUAL CUSTOMER PROPRIETARY
NETWORK INFORMATION BY
TELECOMMUNICATIONS CARRIERS

DOCKET NO. RT-00000J-02-0066
EXCEPTIONS OF ARIZONA
WIRELESS CARRIERS GROUP

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EXCEPTIONS OF ARIZONA WIRELESS CARRIERS GROUP
TO RECOMMENDED ORDER URGING
ADOPTION OF CPNI RULES

The Arizona Wireless Carriers Group¹ ("Wireless Carriers Group") submits these exceptions to the recommended order distributed by Commission Staff (the "Staff") on September 24, 2004. The recommended order urges the Commission to adopt a Notice of Proposed Rulemaking for rules governing the use and disclosure of Customer Proprietary Network Information ("CPNI") in Arizona.² The proposed CPNI rules ("Proposed Rules") are inconsistent with the federal rules and contain restrictions that have been flatly rejected by two

¹ For purposes of this proceeding, the Arizona Wireless Carriers Group consists of AT&T Wireless PCS, LLC, Cricket Communications, Inc., Nextel West Corp. d/b/a Nextel Communications, Sprint Spectrum L.P. dba Sprint, Verizon Wireless, ALLTEL Communications and VoiceStream PCS III Corporation d/b/a/ T-Mobile.

² CPNI is defined as:

(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

except that such term does not include subscriber list information.

47 U.S.C. § 222(h)(1)(A). Practically speaking, CPNI includes personal information such as the phone numbers called by a consumer, the length of phone calls, and services purchased by the consumer, such as call waiting.

1 federal courts as unlawful restraints on commercial speech. The Wireless Carriers Group
2 believes that the protections afforded by the federal CPNI rules are more than adequate for
3 consumers in the State, and that additional state-specific rules are therefore unnecessary. There
4 is simply no record demonstrating a need for separate rules in Arizona nor is there a specific
5 harm that the Proposed Rules have been narrowly tailored to address. The Wireless Carriers
6 Group therefore respectfully submits that the Commission should reject the Proposed Rules and
7 reassess whether CPNI rules are necessary in light of the passage and implementation of federal
8 CPNI regulations.

9 **I. DISCUSSION**

10 In order to show that the Proposed Rules pass muster under the First Amendment and
11 related cases, Staff must first identify a specific harm to consumers that the Proposed Rules are
12 designed to address. The asserted harm here, according to Commission Staff, was Qwest's
13 December 2001 plan to share private customer information with divisions within the company.
14 See Staff Memorandum at 2. The Commission opened a generic investigation into CPNI policies
15 and that docket evolved into this rulemaking. It is relevant that this docket was initiated in
16 January 2002, before the FCC issued its final CPNI rules in July 2002, and well before those new
17 rules went into effect in October 2002. Whether or not the Commission faced CPNI related
18 complaints prior to 2002, Staff must show that even *after* the promulgation of the federal CPNI
19 rules there remains a specific harm to consumers for which the Proposed Rules provide a
20 "narrowly tailored" solution. To do so, Staff must produce a record demonstrating that the
21 FCC's comprehensive scheme of CPNI regulations is lacking, and that the Proposed Rules
22 remedy the continuing harm. This has not occurred yet in this docket. Indeed, the recent
23 experience in Washington State is instructive: The Washington Utilities and Transportation
24 Commission, "motivated by consumer complaints regarding the implementation of Qwest's opt-

1 out campaign,” promulgated CPNI regulations, only to see them struck down by a federal district
2 court as unconstitutional. *See Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187, 1195
3 (W.D. Wash. 2003).³ As we show below, the course recommended by the Staff here would lead
4 to the same result.

5 **a. The FCC CPNI Regulations**

6 The use and dissemination of CPNI is subject to a comprehensive set of FCC regulations
7 that are the result of nearly a decade of investigation and deliberation.⁴ The FCC’s rules protect
8 a customer’s CPNI (*i.e.*, information about the customer’s usage and services) from disclosure to
9 third parties for marketing purposes without the customer’s notice and consent. The forms of
10 notice and consent required under the federal regulations depend on the circumstances. The FCC
11 arrived at the current scheme of notice-and-consent requirements after extensive study,
12 interaction with affected parties, and review for constitutionality by a federal circuit court.

13 In the course of developing the current rules, the FCC found that customers want and
14 expect to hear from their existing carriers about new products or existing products that better suit
15 their needs that are within the bundle of services they are already receiving.⁵ The FCC
16 determined that individualized customer consent to the use of CPNI in connection with such
17 notices is therefore unnecessary. This approach, of permitting the use of CPNI to market to
18 customers within their existing bundle of services without requiring additional customer consent,
19 is known as the “Total Service Approach.”⁶

21 _____
22 ³ Washington, like Arizona, is within the jurisdiction of the United States Court of Appeals for the Ninth
Circuit.

23 ⁴ 47 C.F.R. § 64.2001-2009.

24 ⁵ For example, a carrier might use CPNI to identify and contact those customers who would be better
served by a national calling plan rather than a local calling plan.

⁶ The Wireless Carriers Group appreciates Staff’s recent memo explaining Staff’s intention to adopt the
Total Service Approach and revising the Proposed Rules to eliminate language that conflicted with that approach.

1 The FCC also determined that the further a proposed use of CPNI moves from the
2 context of a service provider informing its existing customer about services available within the
3 customer's service package, the less the use of CPNI can be said to correspond to the customer's
4 presumed expectations and preferences, and the more rigorous the notice-and-consent
5 requirement ought to be. Thus, the FCC determined that wireless carriers should be permitted to
6 share CPNI with their corporate affiliates that do not already offer service to the same customers
7 for the purpose of informing customers about available communications-related services or
8 products, but only after the customer has been given an opportunity to "opt out" of this use of his
9 or her CPNI. With respect to the sharing of CPNI with third-party companies unaffiliated with
10 the customer's service provider, the FCC required that the customer affirmatively "opt in" to this
11 use of his or her CPNI.⁷ Personal customer information such as a customer's name, address, and
12 phone number is not considered CPNI. A carrier's use and dissemination of this information is
13 subject to the carrier's privacy policies and customer agreements.

14 The current FCC regime was not the FCC's first action implementing 47 U.S.C. § 222.
15 The FCC initially issued regulations that required customers to affirmatively "opt in" as a
16 precursor to *any* use of their CPNI. *See U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1230 (10th Cir.
17 1999). The United States Court of Appeals for the Tenth Circuit struck these initial regulations
18 down as an unconstitutional abridgment of speech. A close review of the Tenth Circuit's
19 decision illustrates why the Proposed Rules would be similarly struck down.

20 The Court first noted that speech intended to inform individuals about potential
21 commercial transactions has long been held to be protected by the First Amendment. Moreover,
22 because "[e]ffective speech has two components: a speaker and an audience," regulations that

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24 ⁷ For example, a customer could "opt-in" to having CPNI used by a third party company to market the latest computer video games to families on a shared wireless plan.

1 restrict a speaker's ability to find a receptive audience thereby restrict speech. *Id.* at 1232. The
2 CPNI regulations restrict a carrier's ability to connect with an "audience" by limiting the
3 carrier's right to use CPNI to direct commercial speech toward a subset of customers likely to
4 benefit from, or be interested in, the speech. The Court accordingly evaluated the FCC's CPNI
5 regulations against the familiar commercial-speech analysis set forth in the Supreme Court's
6 decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557
7 (1980), which places on the government the burden of proving (1) that it has a substantial
8 interest in regulating the commercial speech in question, (2) that the regulation directly and
9 materially advances that interest, and (3) that the regulation is no more extensive than necessary
10 to serve that interest. *U.S. West*, 182 F.3d at 1233.

11 The Court acknowledged the government's asserted interest in protecting customer
12 privacy, but stressed that "[w]hen faced with a constitutional challenge, *the government bears*
13 *the responsibility of building a record* adequate to clearly articulate and justify the state interest."
14 *Id.* at 1234 (emphasis added). The government had failed, the court concluded, to identify with
15 specificity the "privacy" interest it sought to advance or to present evidence showing that the
16 threat to privacy that it sought to address was real. *See id.* at 1235-36. Moreover, the Court
17 continued, even assuming that these showings had been made, the regulations could not survive
18 First Amendment scrutiny because they were not "narrowly tailored" to advance the
19 government's objectives. The Court focused on the fact that the government had failed to give
20 adequate consideration to the "obvious and substantially less restrictive" alternative of allowing
21 customers to "opt out" of the use of their CPNI, rather than requiring them to affirmatively "opt
22 in." *Id.* at 1238-39. It was not good enough, the Court stressed, for the government to "merely
23 speculate that there are a substantial number of individuals who feel strongly about their privacy,
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1 yet would not bother to opt-out if given notice and the opportunity to do so.” *Id.* at 1239. The
2 Court therefore vacated the initial FCC regulations.

3 Last year, the federal District Court in Seattle followed the *U.S. West* decision in striking
4 down Washington State regulations requiring customer “opt in” as a condition to any non-billing
5 use of certain types of CPNI. *See Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187
6 (W.D. Wash. 2003). The court stressed that the “opt in” requirement could not pass the *Central*
7 *Hudson* test because the State had failed to consider such less speech-restrictive alternatives as
8 using a carefully-designed “opt out” system combined with a publicity campaign to inform
9 consumers of their rights. *See id.* at 1193-95.

10 The FCC revised its CPNI regulations following the Tenth Circuit’s *U.S. West* decision.
11 The FCC’s current regulations in most circumstances require “opt out” authorization from the
12 customer for the use of CPNI by a carrier’s partners to provide communications-related services
13 or products, and only require “opt in” when the use, disclosure, or access to CPNI is substantially
14 unrelated to the purpose for which the CPNI was originally gathered (*e.g.*, disclosure to third
15 parties or affiliates providing non-communications products or services). The FCC’s rules are in
16 this way carefully tailored to avoid the constitutional difficulty identified by the Tenth Circuit.
17 These regulations are straightforward, are not unduly burdensome to customers or carriers, and
18 are working properly. Indeed, the FCC publishes quarterly summaries of complaints received,⁸
19 and these complaints do not demonstrate any pattern of misuse of CPNI or general privacy
20 violations. Each member of the Wireless Carriers Group has implemented notice-and-consent
21 procedures consistent with the FCC regulations, and there is no record of widespread
22 dissatisfaction or complaint in Arizona arising after FCC rules were implemented. In sum,
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24 ⁸ *See* <http://www.fcc.gov/cgb/>

1 existing federal CPNI regulations protect consumers from the unauthorized use of CPNI and the
2 Staff has not produced any evidence to the contrary.

3 **b. The Proposed Rules: Verification Requirement**

4 The Proposed Rules nevertheless seek to change the FCC regulations without providing
5 the necessary basis or rational reason for doing so. One of the major distinctions between the
6 Proposed Rules and the FCC regulations is that the Proposed Rules add what the Staff calls a
7 “verification” requirement to the “opt out” procedures. See Proposed R14-2-2108. The
8 proposed “verification” rule specifies that within one year of obtaining a customer’s “opt out”
9 approval, a carrier must secure “verification” that the customer does not want to “opt out” of the
10 use of his CPNI. Proposed R14-2-2108(A). The “verification” requirement forces carriers to go
11 through the “opt out” process and then seek affirmative confirmation that a person intended to
12 opt out. The verification provision is, in fact, an “opt in” requirement that requires the same sort
13 of affirmative expression of consent that was declared unconstitutional when it was included in
14 the FCC’s initial CPNI regulations.

15 There is a fundamental difference between “opting out” and “opting in.” Compare
16 Proposed R14-2-2102(A)(8) (“Opt-In approval” means the customer’s “affirmative, express
17 consent” to the use of her CPNI) with Proposed R14-2-2102(A)(9) (“Opt-Out approval” means
18 the customer’s “fail[ure] to affirmatively object” to the use of her CPNI after receiving notice of
19 her right to do so). The Tenth Circuit recognized this distinction as critical to the First
20 Amendment analysis: An “opt in” regime requiring an affirmative expression of consent from
21 the customer imposes a much greater speech restriction than an “opt out” regime, the Court
22 concluded, because customers are more likely to decline to raise an affirmative objection to the
23 use of CPNI than they are to take the trouble of affirmatively consenting to it. See *U.S. West*,
24 182 F.3d at 1238-39. It was precisely because the government had failed to justify its selection

1 of the more speech-restrictive “opt in” approach that the Court struck down the FCC’s initial
2 rules. *See id.* at 1239-40. The “verification” is, for all practical purposes, a opt-in that must
3 occur within a year. There is, however, no suggestion in the Tenth Circuit decision that the
4 FCC’s initial “opt in” regime would have passed scrutiny under the First Amendment if it had
5 included a built-in one-year delay. Staff’s rationale for the “verification” – that it is required to
6 ensure that a customer’s “opt out” approval is “knowing and informed” (Staff Memorandum at
7 1) – does not lessen the force of the Tenth Circuit’s holding that, by requiring an affirmative
8 expression of consent, the FCC imposed too great a speech-restriction under the First
9 Amendment.⁹ In short, relabeling an “opt in” requirement a “verification” will not make it an
10 acceptable restriction under the First Amendment.

11 The Proposed Rules thus reintroduce the same constitutional flaw that the FCC removed
12 following the Tenth Circuit’s decision. The Tenth Circuit faulted the government for attempting
13 to justify its regulations “by merely asserting a broad interest in privacy,” without specifying
14 “the particular notion of privacy and interest served.” *U.S. West*, 182 F.3d at 1235. Staff in this
15 case has not identified even the “broad interest” that it seeks to advance through the speech-
16 restricting measures contained in the Proposed Rules, let alone compiled a record adequate to
17 show that the harm to privacy (or to some other unexpressed interest) that the Proposed Rules are
18 meant to address “is real.” *U.S. West*, 182 F.3d at 1237. And as shown above, the harm is *not*
19 real: There is simply no evidence that the existing regime of federal CPNI regulation has left
20 untreated a substantial problem of inappropriate use of CPNI in Arizona.

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23 ⁹ Moreover, there are alternative means of providing assurance that a customer knowingly “opts out”
24 without unreasonably restricting speech. The FCC regulations, for example, require carriers using the “opt out”
mechanism to provide notices to their customers every two years. *See* 47 C.F.R. § 64.2008(d)(2).

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c. The Proposed Rules: Additional Inconsistencies

In today's competitive telecommunications market, wireless carriers with a national or regional presence achieve significant economies of scale by national standardization. Members of the Wireless Carriers Group have developed, among other things, national offerings, standard national contracts with customers, and standard collateral for price plans. In addition, tremendous and ongoing investment and resources have been devoted to the creation, maintenance, and improvement of national billing, provisioning, credit, and other systems to offer service; development of various quality distribution channels, including internet, telesales, and national retailers; and creating, training, and staffing large national call centers.

The development of these national offers and national standards for attracting and servicing consumers has significantly benefited consumers. These efficiencies allow carriers to serve more consumers for less cost, driving prices in all areas lower, which in turn attracts more consumers. Each carrier develops its own competitive standard in order to operate more effectively than its competitors.

Carriers lose the efficiency of running a national business when they need to conform to inconsistent requirements on a state-by-state basis. If Arizona adopted state-specific requirements that are inconsistent with the federal CPNI rules, wireless carriers would have to customize service for Arizona consumers.

A number of provisions in the Proposed Rules differ from the federal rules and thus will produce confusing and costly requirements. These provisions include:

- ◆ The proprietary agreement requirement contained in R14-2-2103(D) and -2104(D) is both vague and more extensive than the FCC rules. Each of these sub-parts could be read to apply regardless of whether CPNI is shared. Also, the

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Proposed Rules appear to apply to a broader range of entities than those identified under federal law (joint ventures and contractors).

- ◆ The font and language requirements contained in R14-2-2105(B)(2) and (3) and (C)(2) and (3) are not consistent with the FCC rules and are overly prescriptive.
- ◆ A number of provisions (R14-2-2108, -2109 and -2101) impose onerous approval or notice obligations, many of which are inconsistent with the federal rules.
- ◆ The Total Service Approach (which was approvingly discussed by Staff in a memo) is a cornerstone in the CPNI regulatory scheme. For the sake of consistency, the federal description of this approach (found at 47 C.F.R. § 64.2005(a)) should be expressly incorporated into the Proposed Rules.

II. CONCLUSION

For the Proposed Rules to withstand judicial scrutiny, the record in this CPNI rule-making docket must be supported by compelling rationales. *U.S. West* at 1234. The Staff has failed to produce such rationales, or to compile the record that would be necessary to defend the Proposed Rules. Furthermore, wholly apart from these evidentiary issues, the *U.S. West* and *Verizon Northwest* decisions demonstrate that the Proposed Rules would not pass constitutional muster.

For these reasons, the Wireless Carriers Group urges the Commission to reject the Proposed Rules.

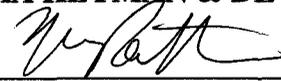
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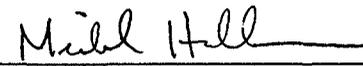
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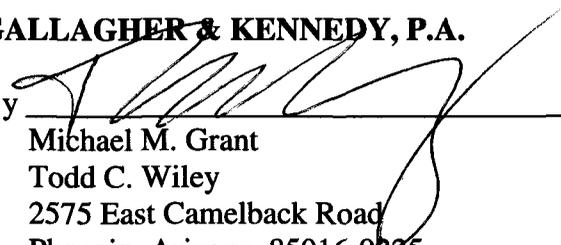
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