



BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

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

Docket No. RT-00000J-02-0066

COMMENTS OF ARIZONA WIRELESS CARRIERS GROUP

The Arizona Wireless Carriers Group<sup>1</sup> (collectively, "Wireless Carriers") submit these comments<sup>2</sup> in response to the Procedural Order issued on October 28, 2004 in the captioned docket, which requests public comment on Decision No. 67355 related to proposed Customer Proprietary Network Information ("CPNI") rules ("Proposed Rules").

<sup>1</sup> For purposes of this proceeding, the Arizona Wireless Carriers Group consists of Cingular Wireless (AT&T Wireless Services), Nextel West Corp. d/b/a Nextel, Verizon Wireless, Sprint, Cricket, T-Mobile, and Western Wireless.

<sup>2</sup> The Wireless Carriers also incorporate by reference their previously filed comments in this proceeding. See *Comments of Arizona Wireless Carriers Group*, filed August 30, 2004 and *Exception of Wireless Carriers Group to Recommended Order Urging Adoption of CPNI Rules*, filed October 8, 2004. These filings respond to the proposed Arizona CPNI rules and provide historical background and context for the federal rules governing the use of CPNI. See 47 C.F.R. § 64.2001-2009 ("Federal CPNI rules").

1 As detailed in depth at the September 2, 2004 Workshop (“Workshop”) in this  
2 docket, the Proposed Rules contain several unlawful deviations from the Federal CPNI  
3 rules. This is the case despite the fact that there is no record of dissatisfaction or  
4 complaints that the Federal CPNI rules are insufficient to protect Arizona consumers from  
5 unlawful use or disclosure of their personal information. Given the lack of evidence of a  
6 need for the Proposed Rules and the high hurdle the Commission faces in justifying these  
7 restrictions on commercial speech, the Commission should either ensure that the Proposed  
8 Rules are identical to the Federal Communications Commission’s (“FCC”) rules or refrain  
9 from adopting them.

10 **I. THERE IS NO RECORD OF A NEED FOR THE PROPOSED RULES**

11 Contrary to Staff’s assertions at the September 2 Workshop, Tr. 109, there is  
12 absolutely no record supporting a need for Arizona-specific CPNI rules. At the  
13 Workshop, Staff did not cite to even one customer complaint about misuse of CPNI.  
14 Moreover, the Commission has gone to extraordinary lengths to gather public input  
15 concerning the treatment of CPNI. The Commission has held public meetings in Phoenix,  
16 Mesa, Prescott, Sun City, Flagstaff, Kingman, Lake Havasu City, Yuma, Sierra Vista,  
17 Bisbee, Wilcox, and Benson. Not a single customer at any of these meetings has raised a  
18 complaint about carriers’ treatment of CPNI.

19 In order to regulate commercial speech as the Commission is attempting to do here,  
20 the government must overcome the four-part test set forth in the *Central Hudson* case,  
21 including the requirement that its regulation directly advances a substantial interest.  
22 *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of N.Y.*, 447 U.S. 557  
23 (1980); see Tr. 40-41. In *U S WEST v. FCC*, the Tenth Circuit applied the *Central Hudson*  
24 test to determine whether the FCC’s opt in requirements were constitutional.<sup>3</sup> Similarly,

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26 <sup>3</sup> *U S WEST v. FCC*, 182 F.3d at 1233; see also *Central Hudson Gas & Elec. Corp.  
v. Public Service Comm’n of N.Y.*, 447 U.S. 557 (1980) (*Central Hudson*).

1 here, the *Central Hudson* test applies and requires the following:

2 The State must assert a substantial interest to be achieved by restrictions on  
3 commercial speech. Moreover, the regulatory technique must be in  
4 proportion to that interest. The limitation on expression must be designed  
5 carefully to achieve the State's goal. Compliance with this requirement may  
6 be measured by two criteria. First, the restriction must directly advance the  
7 state interest involved; the regulation may not be sustained if it provides only  
8 ineffective or remote support for the government's purpose. Second, if the  
9 governmental interest could be served as well by a more limited restriction  
10 on commercial speech, the excessive restrictions cannot survive.<sup>4</sup>

11 In this case, the Commission has not developed a record of the specific harms or  
12 concerns that it believes will be avoided by its CPNI rules. The lack of consumer  
13 participation in public meetings suggests that customers are not concerned with the  
14 privacy interest that the Commission claims to advance and that customers are already  
15 well protected by existing Federal CPNI rules. Even with considerable effort by  
16 Commission staff, there is no evidence supporting a claim that the Commission has a  
17 "substantial interest" that will be advanced by the proposed CPNI rules. The Commission  
18 has not met its burden of showing that it has a substantial interest justifying the proposed  
19 restrictions on constitutionally protected speech, and thus has not satisfied even the first  
20 prong of the *Central Hudson* analysis.

## 19 **II. THE PROPOSED RULES ARE INCONSISTENT WITH THE FEDERAL** 20 **CPNI RULES**

21 Although the FCC has permitted states to adopt CPNI rules that are additional to  
22 the FCC's own rules,<sup>5</sup> it has also stated that "we do not take lightly the potential impact

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24 <sup>4</sup> *Central Hudson*, 447 U.S. at 564.

25 <sup>5</sup> Implementation of the Telecommunications Act of 1996: Telecommunications  
26 Carriers' Use of Customer Proprietary Network Information and Other Consumer  
Information, Third Report and Order and Third Further Notice of Proposed Rulemaking,  
17 FCC Rcd 14860 (2002) ("Third CPNI Order"), ¶ 69.

1 that varying state regulations could have on carriers' ability to operate on a multi-state or  
2 nationwide basis."<sup>6</sup> The FCC thus concluded that it would consider whether to preempt  
3 state regulations that conflict with the FCC's rules on a state-by-state basis, and it also  
4 warned that states may have to produce evidence of residual harms not addressed by the  
5 federal regulations and show that additional regulations would not necessarily burden  
6 speech to justify adopting more stringent approval requirements.<sup>7</sup> The Wireless Carriers  
7 urge the Commission to avoid inconsistencies with the FCC rules, both to avoid potential  
8 preemption and constitutional defect.

9 **A. The Commission Should Include the Total Service Approach in the**  
10 **Proposed Rules**

11 Some of the inconsistencies with the Federal rules appear to be inadvertent. For  
12 example, Staff clarified at the Workshop that its intention was to include reference to the  
13 FCC's "Total Service Approach." Tr. 29-30. The Proposed Rules at R14-2-2101 now  
14 specifically incorporate Section 64.2005 of the FCC's Rules, which codifies the FCC's  
15 Total Service Approach by permitting telecommunications carriers to use, disclose, or  
16 permit access to CPNI for the purpose of providing or marketing service offerings among  
17 the categories of service to which the customer already subscribes from the same carrier  
18 without customer notice or approval.

19 Importantly, however, no provision of the Proposed Rules explicitly references the  
20 aspect of the Total Service Approach which provides that customer consent will be  
21 implied when carriers use, disclose, or permit access to CPNI to market enhancements to  
22 the existing service that the carrier offers. To the contrary, R14-2-2103(A)(1) requires  
23 opt-out or opt-in approval for carriers to disclose their customer's CPNI for marketing  
24 communications-related services to that customer.

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26 <sup>6</sup> *Id.* ¶ 71.

<sup>7</sup> *Id.*

1           The Commission should modify the Proposed Rules to include the Total Service  
2 Approach. As set forth in the Wireless Group's prior comments, the Total Service  
3 Approach was the cornerstone of the FCC's CPNI decision balancing privacy interests and  
4 consumers' access to information about products and services. The Total Service  
5 Approach provides carriers with the ability to communicate with their customers about  
6 new plans and services without seeking customers' opt-in consent. Customers expect and  
7 want to hear about new plans and services, and it is not in the public interest to constrain  
8 the free-flow of such information. Failure to include this core principle in the Proposed  
9 Rules would unlawfully burden commercial speech.

10           **B. Opt-Out With Verification Would Be Unconstitutional**

11           As the Wireless Carriers Group has noted in prior comments in this docket, the  
12 Commission's proposed verification requirement would constitute an unconstitutional  
13 restriction on protected speech. Parties at the Workshop made clear that an opt-out with  
14 written follow-up is nothing but a delayed opt-in requirement and may be even more  
15 burdensome than an opt-in requirement. Tr. 85, 99. In *U S WEST v. FCC*, the Tenth  
16 Circuit applied the four-part *Central Hudson* test to the FCC's original CPNI rules, which  
17 provides in relevant part that the government must show that the restriction on commercial  
18 speech directly and materially advances a substantial state interest and is narrowly drawn.<sup>8</sup>  
19 The Tenth Circuit concluded that the FCC could not meet this test with its opt-in system,  
20 particularly because it had not produced evidence of the extensive harm that it was  
21 attempting to remedy. The court concluded that the opt-in requirement was not "narrowly  
22 tailored" because the agency had not demonstrated a sufficiently good fit between the  
23 means chosen (opt-in or express approval) and the desired statutory objectives (protecting  
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26 <sup>8</sup> *Central Hudson*, 447 U.S. at 564-65; *see also U S WEST*, 182 F.3d at 1233.

1 privacy and competition). The court criticized the FCC for failing to consider adequately  
2 the “obvious and less restrictive alternative,” which was an opt-out strategy.<sup>9</sup>

3 As demonstrated at the Workshop, there is no evidence that opt-out with  
4 verification will directly and materially advance privacy interests. For example, some  
5 customers might believe they that had already taken action the first time they received a  
6 notice, and they may throw the second notice away believing they had already dealt with  
7 the issue. Tr. 87, 89. This may result in confusion, and it also might mean that some  
8 customers who do not oppose the use of their CPNI may not receive valuable information  
9 about promotions or upgrades if they fail to send in the verification. Tr. 107; *see also*  
10 Third CPNI Order, ¶ 35 (customers reap substantial benefits from personalized service  
11 offerings, reducing unwanted advertising and providing more efficient and better-tailored  
12 marketing). There is simply no need for customers to restate a previously stated  
13 preference. As stated at the Workshop, there also might be no end to this process. Would  
14 carriers be required to verify the verification? Tr. 94.

15 Opt-out with verification is also not narrowly tailored because there is not a good fit  
16 between the means (verification) and the desired end (protection of consumer privacy).  
17 The Commission appears not to have considered whether there are other more narrowly  
18 tailored approaches that would provide customer privacy such as requiring opt-out  
19 elections that are more frequent. Although the Wireless Carriers do not believe that  
20 anything more than what the FCC requires in 47 C.F.R. § 64.2007 is necessary, if the  
21 Commission does act, it must consider the more narrowly tailored alternatives that exist  
22 for protecting consumers.

23 In addition to the constitutional infirmities with the Commission’s proposal, there  
24 are public policy reasons why the Commission should not adopt the verification proposal,  
25 which has no parallel in the FCC’s rules. Each time the Commission requires carriers to

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<sup>9</sup> *Id.* at 1238.

1 send out customer notifications, customers become annoyed with frequent notices and it  
2 increases the likelihood that the consumer will not read or respond to the notices.  
3 Additionally, the Commission's proposed opt-out verification system would be extremely  
4 costly. Separate mailings are particularly expensive, Tr. 70, and they are also unnecessary  
5 because customers expect to receive communications via bill messages. Tr. 73. Under the  
6 Proposed Rules, carriers must first seek opt-out consent in either written or electronic  
7 form. R14-2-2106(A). If written, the notice must be in 12-point type, and carriers must  
8 mail the notice separately or include it in a monthly bill with a special envelope that states  
9 that there is privacy information included. R14-2-2105. Verification must be obtained in  
10 written, electronic, and oral form, but it must be a separate document if written or  
11 electronic and must be recorded if oral. R14-2-2108. Then the carrier must remind  
12 customers of their CPNI election status annually, and this confirmation may not be  
13 included with advertising and promotional information or included in a customer's bill.  
14 R14-2-21010. Taken together, these requirements are highly burdensome and excessive.

15 Carriers also indicated at the Workshop that there is no evidence of a pattern of  
16 harms that have resulted in complaints, or that the FCC's rules are inadequate to protect  
17 consumers. Tr. 91. The Wireless Carriers are not aware of a single customer complaint  
18 related to misuse of CPNI. For all of the foregoing reasons, the Commission's proposal,  
19 which creates what is essentially an opt-in requirement where the FCC permits opt-out,  
20 would not withstand a legal challenge.

21 **C. There is No Need to Require Proprietary Agreements Between Affiliates**

22 Section 14-2-2103(D) requires carriers to execute proprietary agreements with all  
23 affiliates, joint venture partners, and independent contractors that provide  
24 communications-related services, third parties, and affiliates that do not provide  
25 communications-related services. There was considerable discussion at the Workshop on  
26 whether this requirement is lawful and necessary. Tr. 36-56. Staff concluded discussion

1 of this rule with a question as to whether R14-2-2103(D) is inconsistent with the FCC's  
2 rules. Tr. 55-56.

3 The FCC requires carriers that disclose or provide access to CPNI to their joint  
4 venture partners or independent contractors to enter into confidentiality agreements. 47  
5 C.F.R. § 64.2007(b)(2). There is no similar requirement for carriers to enter into  
6 confidentiality agreements with their own affiliates. Although the FCC did not address the  
7 reason for this difference, it likely relates to the rationale underlying its treatment of  
8 affiliates generally. As the FCC found in its *Third CPNI Order*, customers who believe  
9 their carrier has abused CPNI are likely to switch carriers, and while unaffiliated  
10 companies may not have the incentive to ensure that this does not happen, affiliates have a  
11 strong incentive not to misuse CPNI because a loss of an affiliates' customer is akin to a  
12 loss of a customer of their own. *Third CPNI Order*, ¶ 37.

13 Staff further inquired at the Workshop why carriers oppose the requirement to enter  
14 into confidentiality agreements with their affiliates. Tr. 53. Staff at the Workshop  
15 expressed the concern that without confidentiality agreements, non-carrier affiliates would  
16 be able to misuse CPNI without penalty because 47 U.S.C. § 222 does not apply to non-  
17 carriers. Tr. 55.

18 As stated above, the FCC has found that carrier affiliates have incentives to protect  
19 the confidentiality of customer information from their affiliates because otherwise the  
20 company will lose customers. There is no incentive that could be provided in a  
21 confidentiality agreement that is more imperative than keeping customers. Moreover, a  
22 regulatory requirement such as requiring a confidentiality agreement imposes costs and  
23 administrative burden. Given the lack of evidence that non-carrier affiliates are misusing  
24 CPNI, the Commission should not adopt this requirement.

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**CONCLUSION**

There is no evidence of need for the Proposed Rules. In their current form, the Proposed Rules conflict with the FCC's rules and are contrary to the First Amendment. The Commission should therefore mirror the FCC's rules or avoid adopting CPNI rules all together.

1 RESPECTFULLY SUBMITTED this 22nd day of December, 2004.

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