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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF) DOCKET NO. RT-00000J-02-0066
DISSEMINATION OF INDIVIDUAL)
CUSTOMER PROPRIETARY)
NETWORK INFORMATION BY) CITIZENS' COMMENTS ON THE
TELECOMMUNICATIONS CARRIERS) NPRM REGARDING CPNI RULES

The Citizens Arizona incumbent local exchange carriers ("Citizens") hereby comment on the Arizona Corporation Commission's ("Commission") proposed rules regarding Customer Proprietary Network Information ("CPNI").¹ The Arizona Secretary of State published the Commission's proposed CPNI rules in the *Arizona Administrative Register* on November 26, 2004 ("CPNI Rules"). Prior to publication, the Administrative Law Judge in this Docket issued a Procedural Order on October 28, 2004, inviting initial written comments on or before December 22, 2004.

I. INTRODUCTION

Citizens commends both the Commission and the Staff for their efforts in crafting a rule that attempts to protect the public interest. The Commission's published proposal is significantly improved as compared to earlier versions that the Staff circulated for comment. Although the Commission's proposed CPNI Rules address some of the harms of earlier CPNI

¹ Citizens' ILECs include Citizens Utilities Rural Company, Inc. (d/b/a Frontier Citizens Utilities Rural), Citizens Telecommunications Company of the White Mountains, Inc. (d/b/a Frontier Communications of the White Mountains) and Navajo Communications Company, Inc.

1 proposals, the proposed CPNI Rules contain many of the same problems and inconsistencies
2 previously identified by commentors. The Commission's CPNI Rules are still constitutionally
3 suspect in that the rules undermine protected commercial speech. The rules are not narrowly
4 tailored since they mandate opt-out or opt-in consent with respect to the total group of services
5 already purchased by a consumer. In addition, as a result of the mandatory opt-out
6 verifications included in the CPNI Rules, the opt-out requirements are effectively a
7 constitutionally impermissible opt-in requirement.

8 **II. COMMENTS**

9 **A. The Proposed CPNI Rules Are Not "Narrowly Tailored" With Respect to Related** 10 **Services.**

11 The Federal Communications Commission, in adopting its federal CPNI rules, noted
12 that customers expect that CPNI generated from the services they subscribe to will be used by
13 their carrier to market improved services within the parameters of the customer-carrier
14 relationship. *CPNI Order* at ¶ 24.² Section R14-2-2103 of the Commission's CPNI Rules
15 conflicts with the FCC's assumption and undermines the ability of telecommunications carriers
16 to provide Arizona consumers with information regarding telecommunications services that
17 may be of interest and may provide benefits to Arizona consumers. Specifically, R14-2-
18 2103(A)(1) requires a carrier to obtain either opt-out or opt-in approval to disclose a
19 customer's CPNI to an affiliate for the purposes of marketing **any** communications-related
20 services to that customer. In general, the CPNI Rules do not contain any exception to the opt-
21 out or opt-in requirements nor has the Commission or Staff provided an explanation regarding
22 why "all" communications-related services must be subject to opt-in or opt-out approval.

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24 In contrast, the FCC CPNI rules do not require *any* approval to use customer CPNI to
25 market several categories of services. *See* 47 C.F.R. 64.2005(c)(1) - (3). In addition, under the

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

1 FCC's "total service approach," if a customer subscribes to more than one category of services
2 offered by a carrier, the carrier is permitted to use, disclose and share CPNI among its affiliates
3 that provide service to the customer. Specifically, 47 C.F.R. § 64.2005(a), entitled, "*Use of*
4 *customer proprietary network information without customer approval*", provides:

5 *(a) Any telecommunications carrier may use, disclose, or permit access to CPNI for the*
6 *purpose of providing or marketing service offerings among the categories of service*
7 *(i.e., local, interexchange, and CMRS) to which the customer already subscribes from*
8 *the same carrier, without customer approval.*

9 *(1) If a telecommunications carrier provides different categories of service, and a*
10 *customer subscribes to more than one category of service offered by the carrier, the*
11 *carrier is permitted to share CPNI among the carrier's affiliated entities that provide a*
12 *service offering to the customer.*

13 See also *Third Report and Order* at ¶ 83.³ Under FCC rules, when a customer purchases local
14 and long distance services from a carrier and its affiliates, that carrier and the affiliates may use
15 local and long distance CPNI to market either class of service to the customer because the
16 carrier's existing service relationship includes these two services. However, in contrast, R14-
17 2-2103 of the CPNI Rules would require opt-in or opt-out approval if local and long distance
18 service are provided by two different affiliated entities because both local and long distances
19 services would fall under the definition of "**communications-related services**" in the
20 Commission's rules. The Commission has not provided any analysis explaining the legal basis,
21 necessity or propriety for imposing customer approval requirements associated with the use of
22 CPNI for the package of services the customer purchases from the carrier and its affiliates.

23 Under *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447
24 U.S. 557 (1980), restrictions on truthful and non-misleading commercial speech are valid only
25 if the government establishes: (i) that there is a substantial state interest in regulating the
26 speech; (ii) the regulation directly and materially advances that interest; and (iii) the regulation

27 ³ *Implementation of the Telecommunications Act of 1996: Telecommunications Carrier's Use of Customer*
28 *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").

1 is no more extensive (“narrowly tailored”) than necessary to serve the government’s interest.
2 *Central Hudson*, 447 U.S. at 564-65. To be narrowly tailored, the government’s speech
3 restriction must signify a careful calculation of the costs and benefits associated with the
4 burden on speech imposed by its prohibition.

5 The Commission’s proposed CPNI Rules fail to satisfy the “narrow tailoring” prong of
6 the *Central Hudson* test with respect to the use of CPNI associated with different categories of
7 service provided to customers by a carrier and its affiliates. The Commission has provided no
8 explanation regarding why the opt-in or opt-out requirements in the CPNI Rules should
9 supercede the FCC’s total services approach. In short, the Commission has not show that the
10 CPNI Rules are no more extensive than necessary to serve the stated interests. The
11 Commission’s proposed restriction exceeds customers’ reasonable expectations of privacy and
12 should be amended to require approval only for the marketing of services that do not fall
13 within the total service category of services already provided. Specifically, the Commission
14 should incorporate the language quoted above from 47 C.F.R. § 64.2005(a) into R14-2-2103. If
15 the CPNI Rules are not modified, the rules will impose unsupported restrictions on the
16 commercial speech of telecommunications carriers in Arizona.

17 **B. The Commission’s Verification of Customer Opt-Out Approval to Use CPNI**
18 **Unlawfully Requires Opt-In Approval.**

19 In the context of CPNI restrictions, at least two courts have determined that it is
20 unconstitutional to require an affirmative customer opt-in to receive truthful, non-misleading
21 commercial speech. *U.S. WEST v. FCC*, 182 F.3d 1224 (10th Cir. 1999), cert denied, 530 U.S.
22 1213 (2000); *Verizon v. Showalter*, 282 F. Sup. 2d 1187 (W.D. Wash. 2003). In *U.S. West*, the
23 Tenth Circuit Court of Appeals struck down the FCC’s opt-in regime holding that it was clear
24 from the record that the FCC had not considered less restrictive opt-out alternatives. 182 F.3d
25 at 1238–39. In *Verizon*, the federal district court vacated the Washington Utility and
26 Transportation Commission’s CPNI rules on the basis that the rules violated the First
27 Amendment. The Court held that the WUTC’s customer opt-in requirements for the use of
28 CPNI did not advance the state’s interest in a direct and material way and were not narrowly

1 tailored so as to minimize interference with protected commercial speech. *Showalter*, 282 F.
2 Supp.2d at 1193-1194.

3 The Commission's CPNI Rules seemingly permits the use of an opt-out method for
4 obtaining customer consent for the use of CPNI. However, for all practical purposes, the rule
5 forecloses the opt-out approach and requires the customer's opt-in approval. R14-2-2108
6 requires the telecommunications carrier to verify the customer's opt-out approval within one
7 year. If the customer does not affirmatively respond and verification is not obtained within a
8 year, the opt-out authorization to use, disclose or permit access to a customer's CPNI is no
9 longer valid. The customer's approval is terminated automatically if no verification can be
10 obtained. Consequently, if the customer does not affirmatively respond to the verification, the
11 carrier's commercial speech with that customer must stop. The Commission has provided no
12 explanation of why the affirmative verification of opt-out is reasonable or necessary or
13 addressed how the termination of the opt-out approval is narrowly tailored to satisfied the
14 State's specific interests. The opt-out verification requirements contained in the
15 Commission's Proposed CPNI Rules arbitrarily limit commercial speech and therefore are
16 unlikely to withstand First Amendment constitutional scrutiny.

17 In contrast to the Commission's methods, the FCC's opt-out methodology is much
18 more reasonable. Carriers must wait a minimum of 30 days after giving customers notice and
19 an opportunity to opt-out before assuming customer approval is given. *See* 47.C.F.R. §
20 64.2008(d)(1). Carriers must make available to customers a cost-free method of opting out that
21 is available 24 hours a day, seven days a week. *See* 47 C.F.R. § 64.2008(d)(3)(v). Approval or
22 disapproval remains in effect until the customer revokes or limits such approval or disapproval.
23 *See* 47 C.F.R. § 64.2007(a)(2). The FCC's opt-out method both protects consumers while
24 preserving carriers' rights to engage in commercial speech. The Commission should modify
25 its CPNI Rules to eliminate the verification requirements associated with the opt-out election in
26 R14-2-2108 and to rely instead on the FCC's opt-out methodology.
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1 **C. The Information Requirements for Customer CPNI Opt-In and Opt-Out Notices**
2 **are Overly Broad and Burdensome.**

3 R14-2-2105 of the CPNI Rules specifies the information that a carrier must include in a
4 customer opt-in notice. Similarly, R14-2-2106 addresses the information required in a
5 customer opt-out notice. Under the proposed CPNI Rules, the opt-out notice cannot provide
6 notification regarding an opt-out option orally (except as provided in Section R14-2-2107). In
7 addition, the opt-out notice must include all of the information included in the opt-in notice, as
8 well as details regarding the minimum 30 day waiting period associated with opt-out approval.

9 Both the opt-in and opt-out notification information contained in the CPNI Rules
10 substantially exceeds comparable requirements specified in the FCC's CPNI rules. Because
11 the Commission requirements are substantially different than the FCC's rules, the Proposed
12 CPNI Rules will significantly burden carriers doing business on an interstate basis. The FCC
13 had previously noted that it does "not take lightly the potential impact that varying state
14 regulations could have on carriers ability to operate on a multi-state or nationwide basis. July
15 2002 *CPNI Order*, at ¶ 71. Absent the identification of the need for some unique, narrowly
16 tailored safeguards regarding customer opt-in and opt-out notifications in Arizona, the CPNI
17 Rules may be pre-empted by federal law. The Commission should eliminate the onerous
18 notifications requirements contained in R14-2-2104 and R14-2-2105.

19 **i. R14-2-2105(A)(1)**

20 R14-2-2105(A)(1) requires that customer notices include the definition of customer
21 proprietary network information found in Section 222 of the Communications Act of 1934. In
22 effect, the carrier must provide the following information in the customer notice:
23

24 *The term "customer proprietary network information" means—*

25 *(A) information that relates to the quantity, technical configuration, type, destination,*
26 *location, and amount of use of a telecommunications service subscribed to by any*
27 *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

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

1 *except that such term does not include subscriber list information.*

2 The FCC rules do not contain this requirement. Instead, the FCC rules only require that
3 the notification describe the type of information that constitutes CPNI. See 47 C.F.R.
4 § 64.2008(c)(2). Under the FCC's approach, carriers have been granted some flexibility in
5 informing their customers and may avoid the use of the confusing legalese in 47 U.S.C. § 222.
6

7 **ii. R14-2-2105(B)(1)**

8 R14-2-2105(B)(1) states that written notices must be "mailed separately" and may not
9 be included in the customer's bill, unless the outside of the envelope is "clearly and boldly"
10 marked as containing privacy information. This requirement seemingly permits combining
11 notices with customers' bills or advertising and promotional materials. Unfortunately, it is
12 tantamount to prohibiting notice via bill insert altogether. To print legends on the outside of
13 envelopes is often more costly than separate mailings, and not being able to utilize bill inserts
14 is one of the more costly features of the Commission's newly proposed CPNI Rules. In fact,
15 the cost of compliance increases substantially when separate mailings must be made. The
16 Commission has provided no explanation or justification for the separate mailing or outside
17 envelope disclosure requirements included in the CPNI Rules.

18 **iii. R14-2-2105(B)(2) and (C)(2)**

19 R14-2-2105(B)(2) and (C)(2) specify that both written and electronic notices must be
20 clearly legible, in twelve-point or larger type. In contrast, the FCC's comparable requirement
21 states that such notice must be clearly legible and "use sufficiently large type." See 47 C.F.R.
22 § 64.2008(c)(5). As the FCC's rules implicitly recognize, many important documents are
23 printed in type smaller than twelve point, including the *Arizona Administrative Register* in
24 which the Commission's CPNI NPRM was published in November.
25

26 **iv. R14-2-2105(B)(3) and (C)(3)**

27 R14-2-2105(B)(3) and (C)(3) require that written and electronic notice be in both
28 English and Spanish. This requirement is more stringent than the FCC's rules. The FCC rules

1 provide that “[i]f any portion of a notification is translated into another language, that all
2 portions of the notification must be translated into that language.” *See* 47 C.F.R. §
3 64.2008(c)(6). The FCC’s approach is much more reasonable. It gives carriers the option of
4 not translating notices into Spanish where only a small fraction of the underlying customer
5 base is Hispanic and may even be offended by Spanish translations, for example, on the Navajo
6 and White Mountains Apache Indian Reservations.

7 **D. The Commission’s Requirements for Proprietary Agreements are Unnecessary.**

8 R14-2-2103(D) requires a carrier that intends to disclose CPNI to an affiliate, joint
9 venture partner or independent contractor to execute a “proprietary” agreement to maintain the
10 confidentiality of the customer’s CPNI. The CPNI Rules also require carriers to file the
11 agreements with the Secretary of State and provide a copy to the Commission. The rules do
12 not contain any detailed explanation regarding why the proprietary agreement is necessary or
13 needs to be filed with the Secretary of State.

14
15 The FCC rules require a “confidentiality” agreement only when a carrier intends to
16 disclose CPNI to a joint venture partner or independent contractor that is marketing
17 communications-related services pursuant to opt-out approval. *See* 47 C.F.R. § 64.2007(b)(2).
18 Unlike R14-2-2103(D), the FCC does not require a confidentiality agreement between a carrier
19 and an affiliate when the affiliate is marketing communications-related services. Moreover,
20 noticeably absent from the FCC’s CPNI rules is a requirement for confidentiality agreements
21 when a carrier discloses CPNI to an affiliate that does *not* provide communications-related
22 services. The FCC does not require a confidentiality agreement in the latter case because a
23 customer must expressly approve the disclosure of CPNI by use of the opt-in approval process;
24 consequently, there is no need to require a confidentiality agreement. *See* 47 C.F.R. §§
25 64.2008(e), which in turn refers to 47 C.F.R. § 64.2008(c)(2). Thus, the CPNI Rules require a
26 confidentiality agreement when such an agreement is completely unnecessary and will not
27 legitimately serve any public interest. The Commission should either eliminate or modify the
28 requirements for proprietary agreements in the CPNI Rules.

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III. CONCLUSION

The Commission's proposed CPNI Rules impose several significant constraints on the ability of telecommunications carriers to effectively serve and communicate with their customers. The rules are not narrowly tailored to the extent they mandate opt-out or opt-in consent with respect to the total groups of services already purchased by consumers. Consequently, the rules fail the *Central Hudson* test and are an unconstitutional infringement on commercial speech. In addition, the Commission has effectively limited the ability of carriers to use an opt-out procedure associated with the use of CPNI as a result of the proposed opt-out verification requirements included in the rules. The resulting opt-in requirement is inconsistent with the established legal precedent in *US WEST v. FCC* and *Verizon v. Showalter* in which the courts vacated opt-in requirements for the use of CPNI. The Commission should modify the CPNI Rules to comply with these constitutional requirements and to either simplify or eliminate the other overly burdensome and complex requirements in the CPNI Rules.

RESPECTFULLY SUBMITTED this 22nd day of December 2004.



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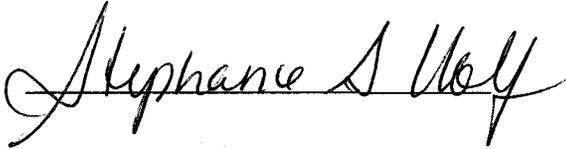
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