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AZ CORP COMMISSION  
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Arizona Corporation Commission

**DOCKETED**

JAN 19 2005

DOCKETED BY *CRP*

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

Docket No. RT-00000J-02-0066

**STAFF'S RESPONSE COMMENTS**

In accordance with the Arizona Corporation Commission's ("ACC" or "Commission") October 28, 2004 Procedural Order, the Commission Staff files its response to the comments of interested parties on the proposed rules filed on December 22, 2004. Parties filing comment included Citizens Arizona ("Citizens"), Cox Arizona Telcom ("Cox"), Sprint Communications Company L.P. ("Sprint"), the Arizona Wireless Carriers Group, MCI, Inc. ("MCI"), and Qwest Corporation ("Qwest"). Staff's response addresses the parties' comments on each section of the proposed rule.

**R14-2-2101 Application of the Rule**

In its comments, Qwest restated all of its previously filed comments. Staff has addressed many of those already, but to the extent it has not, addresses them in these response comments. Qwest argues that the proposed rules would pertain at most to intrastate Customer Proprietary Network Information ("CPNI").

It is Staff's position that the proposed rules apply to all CPNI gathered by telecommunications carriers that provide telecommunications service in Arizona. The FCC in its most recent Order, viewed its interstate CPNI obligations as a floor or minimum standard for application in the various states. The Arizona proposed rules incorporate the FCC rules and go beyond them in some instances. The FCC's Order allows states to go beyond federal

1 standards for purposes of the release of CPNI in that particular state. Thus, the Arizona rules  
2 would apply to all CPNI released in Arizona.

3 **R14-2-2102 Definitions**

4 None

5 **R14-2-2103 Obtaining Customer Approval to Use, Disclose, or Permit Access to CPNI**  
6 **to Affiliates, Joint Venture Partners, and/or Independent Contractors**  
7 **Providing Communications-Related Services**

8 Carriers object to R14-2-2103(D) which requires carriers to execute a proprietary  
9 agreement with any entity with whom the carrier shares CPNI. This rule includes affiliates that  
10 provide communications-related services. Carriers note that carrier affiliates share an interest  
11 in maintaining the customer relationship. Misuse of CPNI by carrier-affiliates is not likely to  
12 occur because the affiliates have an incentive to protect the confidentiality of customer  
13 information to maintain the customer relationship.

14 Staff contends that the confidentiality of CPNI must be protected, and carriers'  
15 assurances that they have enough built-in incentives to protect CPNI, is not enough. To the  
16 extent that affiliates providing telecommunications services do not fall under the jurisdiction of  
17 the ACC, proprietary agreements are necessary to ensure that the CPNI disseminated to these  
18 entities remains confidential.

19 Several carriers also noted that the "Total Services Approach" is not explicitly  
20 referenced in the proposed rules. 47 CFR § 64.2005(a) sets forth the "Total Services Approach"  
21 permitting carriers to use, disclose or permit access to CPNI for the purpose of providing or  
22 marketing service offerings among the categories of service to which the customer already  
23 subscribes. Carriers contend that while the proposed rules incorporate 47 CFR § 64.2001-  
24 2009, proposed rule R14-2-2103(A)(1) contradicts the "Total Services Approach" because it  
25 requires opt-out or opt-in approval for the purpose of marketing communications-related  
26 services to a customer. Staff reiterates its intention to incorporate the "Total Services  
27 Approach" into the proposed rules. To address this concern, Staff recommends the following  
28 italicized language be added to R14-2-2103(A)(1),

1 A) A telecommunications carrier may, subject to opt-out approval or opt-in  
2 approval: 1) Disclose its customer's individually identifiable CPNI, for the  
3 purpose of marketing *to that customer* communications-related services of a  
4 category to which the customer does not already subscribe, to its agents; its  
affiliates that provide communications-related services; and its joint venture  
partners and independent contractors.

5 **R14-2-2104 Obtaining Customer Approval to Use, Disclose, or Permit Access to CPNI**  
6 **to Third Parties and Affiliates That Do Not Provide Communications-**  
7 **Related Services**

8 None

9 **R14-2-2105 Information Requirements for Customer CPNI Opt-In Notice**

10 Citizens objects to R14-2-2105(A)(1) which requires carriers to use the definition of  
11 CPNI found in 47 U.S.C. § 222 in their notice to customers. Citizens asserts that the legal  
12 definition can be confusing to customers and that carriers should be allowed flexibility in how  
13 they define CPNI. The FCC's rules afford carriers flexibility in how they describe CPNI to  
14 customers.

15 Staff notes that it proposed the legal definition of CPNI (47 U.S.C. § 222) in written  
16 notices to standardize the definition across carriers and to ensure that customers would receive  
17 a full and accurate description of CPNI. However, Staff recognizes that the full and accurate  
18 description of CPNI as defined in 47 U.S.C. § 222 may cause confusion to customers that may  
19 outweigh the benefits of providing the legal definition. For this reason, Staff recommends that  
20 the following italicized language be added to R14-2-2105(A)(1):

21 *Include language the same as or substantially similar to the definition of customer*  
22 *proprietary network information contained in 47 USC § 222(h)(1); 1999*  
23 *amendment (and no future amendments) on file with the Arizona Corporation*  
24 *Commission ("ACC"), Legal Division, 1200 West Washington, Phoenix, Arizona*  
25 *85007 and the United States Government Printing Office, P.O. Box 371975M,*  
26 *Pittsburgh, Pennsylvania 15250-7975;*

27 Citizens comments that the R14-2-2105(B)(3) and R14-2-2105(C)(3) requirements to  
28 print written or electronic notice in both English and Spanish unless the customer has  
previously expressed a preferred language is too stringent. Citizens also points out that the  
FCC's rules allow the carrier to translate written or electronic notices into other languages that  
may be more appropriate than Spanish.

1 Staff notes that R14-2-2105(B)(3) and R14-2-2105(C)(3) require that a carrier provide  
2 written and electronic notice in both English and Spanish unless the carrier has previously  
3 established the preferred language of a customer, in which case the carrier may provide the  
4 written or electronic notice in the customer's preferred language alone. Citizen's concern that  
5 Spanish may not be the most appropriate language for some customers is mitigated by the  
6 flexibility afforded to carriers in R14-2-2105(B)(3) and R14-2-2105(C)(3). For example, if a  
7 carrier has previously established that the preferred language of a customer is French, the  
8 carrier may provide the written and electronic notices in French.

9 Several of the carriers have objected to the requirements of R14-2-2105(B)(2) and R14-  
10 2-2105(C)(2) that written and electronic notices be printed in twelve-point or larger type. They  
11 claim that this requirement is burdensome and goes beyond the FCC's rules.

12 Carriers also objected to R14-2-2105(B)(1) which requires written notices to be mailed  
13 separately or as bill insert within a clearly marked envelope. Carriers claim that this  
14 requirement is burdensome and costly.

15 Staff contends that written and electronic notices sent to customers to obtain opt-in or  
16 opt-out approval must be clear and easy for customers to read. In the first place, customers  
17 must be aware of the notice. After considering comments by the industry on Staff's Second  
18 Draft Rules, Staff amended R14-2-2105(B)(1) to allow carriers to include written notices  
19 within customers' bills. Staff maintains that if carriers choose to include written notices along  
20 with bills, the envelopes should be clearly marked to inform customers that important privacy  
21 information is enclosed. Once customers are aware of the written or electronic notices,  
22 minimum requirements governing content and format will ensure that customers have the  
23 opportunity to make informed decisions as to the dissemination of their CPNI.

24 Cox supports adoption of the FCC's rules regarding CPNI. Cox states that "the Federal  
25 rules effectively protect consumer CPNI and foreclose the need for additional Arizona CPNI  
26 rules." However, to the extent the Commission feels Arizona CPNI rules are necessary, Cox  
27 suggests the focus should be on notification procedures. Cox points out that CPNI became an  
28 issue due to Qwest's handling of its CPNI notification procedures several years ago.

1 Staff agrees that CPNI notices sent to customers to obtain opt-in or opt-out approval  
2 must be clear and concise. Proper notification is paramount in ensuring that opt-in and opt-out  
3 approval is both knowing and informed. To that end, the proposed rules contain notification  
4 requirements designed to accomplish these goals.

5 **R14-2-2106 Additional Information Requirements for Customer Opt-Out Notice**

6 None

7 **R14-2-2107 Notification Requirements for Obtaining Customer Approval for Limited**  
8 **One-Time Use of CPNI for Inbound and Outbound Customer Telephone**  
9 **Contact**

9 None

10 **R14-2-2108 Verification of Customer Opt-Out Approval to Use CPNI**

11 Carriers object to R14-2-2108 claiming that it is an unconstitutional restriction on free  
12 speech. Staff disagrees. The cases cited by the carriers have found that an opt-in approval  
13 process prior to the release of CPNI is unconstitutional in some cases. The proposed rules are  
14 consistent with the FCC's rules with respect to the approval mechanism required for release of  
15 a customer's CPNI. R14-2-2108 adds a verification requirement, which has not been the  
16 subject of any judicial review. Carriers' arguments that R14-2108 is nothing more than a back  
17 door opt-in requirement are misplaced. Carriers are given a year under the proposed rules to  
18 verify a customer's CPNI release election and they may also request additional time if they are  
19 unable to accomplish verification within a year. During this time, a carrier may use the  
20 customer's CPNI to the extent permitted under federal and state law. Thus, there is no  
21 unconstitutional restriction on free speech as argued by the carriers. A more detailed legal  
22 discussion follows:

23 To determine whether a regulation improperly restricts speech, courts employ a four-  
24 part test known as the *Central Hudson* test:

25 1) At the outset, it must be determined whether the expression is protected by the  
26 First Amendment. For commercial speech to come within that provision, it at least must  
27 concern lawful activity and not be misleading.

28 2) There must be a substantial government interest that is asserted.

1           3)     If both inquiries yield positive answers, it must be determined whether the  
2 regulation directly advances the governmental interest asserted, and,

3           4)     Whether it is not more extensive than is necessary to serve that interest.

4           As the following analysis shows, the ACC's proposed rules pass the *Central Hudson*  
5 test.

6           **1. The proposed CPNI rules do not regulate speech and carriers are not entitled to**  
7           **First Amendment protection.**

8           The proposed CPNI rules do not infringe on carriers' First Amendment rights because  
9 the rules only restrict carriers' method of collecting and using CPNI and in no way limit their  
10 communication or expressive activities toward a willing audience. By requiring carriers to  
11 obtain customers' approval prior to using CPNI, the rules merely limit the source of  
12 information carriers can use when deciding whom to solicit. A carrier's use of CPNI to  
13 determine the marketability of certain customers is neither speech nor conduct protected by the  
14 Constitution. The First Amendment guarantees freedom of speech, which includes certain  
15 conduct "sufficiently imbued with elements of communication."<sup>1</sup> The Supreme Court has  
16 characterized the communicative elements in conduct as "[a]n intent to convey a particularized  
17 message. . . and the likelihood. . . that the message would be understood by those who viewed  
18 it."<sup>2</sup> A carrier's use of CPNI to determine the marketability of certain customers is neither  
19 speech nor conduct "sufficiently imbued with elements of communication."<sup>3</sup> The collection  
20 and use of CPNI does not convey a "particularized message" that can be readily understood by  
21 consumers. Indeed, most consumers are not even aware that their CPNI are collected and used  
22 for marketing purposes. Because the collection and use of CPNI is neither speech nor  
23 expressive conduct protected by the First Amendment, such action cannot be protected as  
24 commercial speech, which is afforded a lesser protection on "the scale of First Amendment  
25 values."<sup>4</sup>

26  
27 <sup>1</sup> *Spence v. State of Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 2730 (1974).

28 <sup>2</sup> *Spence*, 418 U.S. at 410-11, 94 S.Ct. at 2730.

<sup>3</sup> *Spence*, 418 U.S. at 409, 94 S.Ct. at 2730

<sup>4</sup> *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918 (1978). (rehearing denied)

1           Although the above argument was rejected in *U.S. West v. FCC* on the grounds that the  
2 CPNI regulations impinges upon the audience component of speech, the Tenth Circuit decision  
3 had been criticized for its vagueness and lack of sufficient analysis.<sup>5</sup> Freedom of speech  
4 protects the speaker, the communication, and the audience's right to receive the  
5 communication.<sup>6</sup> Under the Commission's proposed rules, a customer's consent is not  
6 required prior to using CPNI under the opt-out approval mechanism. Carriers, however, must  
7 verify the customer's CPNI release preference within 1 year. If they are unable to verify the  
8 customer's preference in 1 year, they may request an extension of time from the Commission.  
9 Thus, there is no restriction on speech.

10           To the extent that any credence is given to carriers' arguments that the proposed rule  
11 amounts to a back door opt-in requirement, having carriers obtain customers' consent prior to  
12 using CPNI does not impinge upon the customers' *right to receive* any communication from  
13 carriers. Indeed, the notice requirement of the proposed rules would inform customers of their  
14 rights and the consent requirement would allow customers to choose whether to receive or not  
15 receive communication from carriers.

16           Furthermore, contrary to the Tenth Circuit assumption, the CPNI rules do not impose a  
17 blanket ban on carriers' targeted audience. The rules only limit the target to a *willing* audience.  
18 Surely, freedom of speech does not require a captive, unwilling audience. In denying First  
19 Amendment protection for an art exhibit at a public university, the First Circuit recognized that  
20 where there is in effect a captive audience, the audience is entitled to protection against  
21 "assault upon individual privacy."<sup>7</sup> As the court notes, "Freedom of speech must recognize, at  
22 least within limits, freedom not to listen."<sup>8</sup> In light of the First Circuit's holding, a First  
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24

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25 <sup>5</sup> See *U.S. West v. F.C.C.*, 182 F.3d 1224, 1243-44 (10<sup>th</sup> Cir. 1999) (Briscoe, J., dissenting) (Majority failed to  
26 distinguish between expressive and non-expressive activities and failed to cite adequate support for its limited  
analysis); see also Julie Tuan, *U.S. West, Inc. v. FCC*, 15 Berkeley Tech. L.J. 353, 362-63 (2000) (10<sup>th</sup> Circuit  
failed to establish that CPNI order passed the threshold test for First Amendment scrutiny).

27 <sup>6</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 96 S.Ct.  
1817, 1823 (1976).

28 <sup>7</sup> *Close v. Lederle*, 424 F.2d 988, 990-91 (1<sup>st</sup> Cir. 1970).

<sup>8</sup> *Close*, 424 F.2d at 991.

1 Amendment analysis of CPNI rules must also consider the captive nature of the customer-  
2 carrier relationship. As one commentator points out:

3  
4 CPNI is incidental to the customer-carrier relationship: by subscribing to phone  
5 service, customers do not voluntarily choose to disclose the numbers which they  
6 call, or when they most frequently use the phone. Moreover, in many localities,  
7 customers do not have a choice between local carriers; in these cases, customers  
8 must reveal personal information if they wish to have phone service.<sup>9</sup>

9 Because the CPNI rules only restrict carriers' targeted audience to *willing* customers  
10 and in no way prevent carriers from speaking to customers or limit what they might say to  
11 customers, the rules do not infringe upon the carriers freedom of speech and do not warrant  
12 First Amendment scrutiny.

13 Even assuming that the proposed CPNI rules interfere with carriers' commercial  
14 speech, misleading commercial speech is not protected by the First Amendment.<sup>10</sup> The  
15 presumption that when a customer does business with a carrier, the customer agreed to the use  
16 and dissemination of his/her CPNI for the marketing of unrelated services by the carrier is  
17 misleading to the customer who intended only to transact the business and is unaware that  
18 information relating to his/her transaction may be shared with affiliates and third parties  
19 providing other services. In summary, the proposed CPNI rules do not regulate speech and  
20 even if they do, the commercial speech carriers seek to protect may be misleading to  
21 consumers. Thus, carriers are not entitled to First Amendment protection.

22  
23 **2. The rules present a substantial state interest because the interest is specifically  
24 articulated and is properly justified by federal law, state law, and public  
25 opinions.**

26 Even if the proposed CPNI rules infringe upon carriers protected commercial speech,  
27 the rules meet the *Central Hudson* test and the Arizona Corporation Commission is justified in  
28 promulgating the rules. Arizona has a substantial interest in protecting the privacy of its  
29 citizens. Not only is the broad concept of protecting privacy recognized by the U.S. Supreme  
30 Court as a substantial government interest,<sup>11</sup> the concept was specifically articulated by

31  
32 <sup>9</sup> See Tuan, *supra* note 5 at 370.

33 <sup>10</sup> *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350 (1980).

34 <sup>11</sup> *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625, 115 S.Ct. 2371, 2376 (1995) (quoting *Edenfiled v. Fane*,

1 Congress when it enacted Section 222 of the Telecommunications Act of 1996.<sup>12</sup> Besides  
2 Congressional mandate, the justification for a substantial government interest in the protection  
3 of a customer's CPNI from unauthorized use and dissemination can also be drawn from the  
4 Arizona Constitution.<sup>13</sup> Although carriers have raised the arguments that the Arizona  
5 Constitution does not apply to lawfully collected CPNI or to limit the protection of commercial  
6 speech afforded by the U.S. Constitution,<sup>14</sup> it cannot be said that Arizona lacks a substantial  
7 interest in protecting its citizens' privacy or that it is preempted from regulating commercial  
8 speech. The constitutional protection of commercial speech is not absolute; the government  
9 may regulate commercial speech if it meets the *Central Hudson* test.<sup>15</sup>

10 Additionally, as in *Verizon Northwest, Inc. v. Showalter*<sup>16</sup> which relied upon studies and  
11 surveys to show substantial state interest, statistical evidence also indicates a substantial state  
12 interest in protecting a customer's privacy. Several national consumer surveys fielded by  
13 Harris Interactive have shown that a major privacy concern for consumers is that the  
14 "companies they patronize will provide their information to other companies without [their]  
15 permission"<sup>17</sup> and that consumers are increasingly taking privacy protection into their own  
16 hands.<sup>18</sup> Perhaps the public sentiment is best illustrated in the government's successful  
17 implementation of the Do-Not-Call List. According to a Federal Trade Commission press  
18 release dated June 24, 2004, 60 percent of the consumers surveyed said that they have  
19 registered their phone numbers on the Do-Not-Call List and of the numbers registered, 83  
20 percent came from direct consumer registration.<sup>19</sup> To put the numbers in context, Arizona is

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22 507 U.S. 761, 769, 113 S.Ct. 1792, 1799 (1993)).

23 <sup>12</sup> See 47 U.S.C. § 222(a) and legislative history relating to CPNI provision in Senate Rpt. 104-230, at 204.

24 <sup>13</sup> See Ariz. Const. Art. II Sec. 8.

25 <sup>14</sup> See AT&T's Comments on Staff's First Draft – Proposed CPNI Rules at 9.

26 <sup>15</sup> See *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351.

27 <sup>16</sup> *Verizon*, 282 F. Supp.2d 1187 (WD Wash. 2003)

28 <sup>17</sup> "First Major Post-9/11 Privacy Survey Finds Consumers Demanding Companies Do More to Protect Privacy; Public Wants Company Privacy Policies to be Independently Verified," [hereinafter Privacy Survey], available at <http://www.harrisinteractive.com/news/printerfriend/index.asp?NewsID=429> (last visited Sept. 10, 2004).

<sup>18</sup> "New P&AB Survey Tracks Dramatic Rise in Consumer Privacy Activism," available at <http://www.pandab.org/pabsurvey04pr.html> (last visited Sept. 10, 2004).

<sup>19</sup> Press Release, Federal Trade Commission, National Do Not Call Registry Celebrates One-Year Anniversary, (June 24, 2004), available at <http://www.ftc.gov/opa/2004/06/dncanny.htm> (last visited Sept. 10, 2004).

1 behind only 8 other states in having the highest percentage of registration per household (43  
2 percent) on the Do-Not-Call List.<sup>20</sup> The numbers demonstrate that Arizona has a substantial  
3 interest in protecting the privacy interest of its consumers by requiring a carrier to obtain a  
4 customer's consent before the carrier may use and distribute CPNI. In conclusion, Arizona has  
5 a substantial interest in promulgating the CPNI rules because the interest is specifically  
6 articulated and properly justified by federal law, state law, and public opinions.

7 **3. The rules directly and materially advance the substantial state interest because**  
8 **they seek to prevent a harm that is justifiable and non-speculative. The state is**  
9 **not required to present factual evidence of such harm; common sense or**  
10 **anecdotal evidence is sufficient for the state to enact a prophylactic rule.**

11 While the evidence to satisfy the third prong of the *Central Hudson* test must not be  
12 speculative, there need not be factual proof that the proposed rules, if applied, would alleviate  
13 the harm; studies, history, consensus, anecdotes, and commonsense is sufficient to meet the  
14 burden of proof.<sup>21</sup> While the state may not have factual evidence indicating each and every  
15 specific harm that would result if carriers were to use and disseminate CPNI without  
16 customers' express consent; the harm that the government seeks to prevent is certainly not  
17 speculative. The statistics cited above showing the public's concern over the misuse of their  
18 personal information clearly indicate that requiring carriers to obtain verification of a  
19 customer's CPNI preference under an opt-out approval mechanism within a reasonable time is  
20 a commonsense solution to protecting the public interest of privacy, and attempts to balance the  
21 constitutional concerns associated with requiring consent prior to the use of CPNI. Like in  
22 *United States v. Edge Broadcasting*, the state is using commonsense to enact a prophylactic  
23 rule. Furthermore, as reasoned by the court in *Individual Reference Services Group, Inc. v.*  
24 *FTC*, the harm is not the "specific consequence of the use and disclosure of consumers'  
nonpublic personal information; rather, it is the use and disclosure of that information *without*

25 <sup>20</sup> Hal Varian, Fredrik Wallenberg and Glenn Woroch, *Who Signed Up for the Do-Not-Call List?* 8 (May 7, 2003)  
26 (unpublished article available at <http://www.sims.berkeley.edu/~fredrik/research/papers/DncNber.pdf>) (last  
visited Sept. 10, 2004) (authors' consent obtained Jan. 5, 2005).

27 <sup>21</sup> See *Edenfield v. Fane*, 507 U.S. 761, 770-71, 113 S.Ct. 1792, 1800 (1993) (Government must demonstrate that  
28 the harms it recites are real; burden is not satisfied by mere speculation or conjecture); *United States v. Edge  
Broadcasting Co.*, 509 U.S. 418, 428-31, 113 S.Ct. 2696, 2704-06 (1993) (State entitled to protect its interest  
by applying a prophylactic rule using commonsense judgment)

1 *the consent of the consumer.*<sup>22</sup> Further if the carriers' arguments are accepted that this is a  
2 back-door opt-in approach, requiring carriers to obtain customer's consent prior to the use and  
3 dissemination of their CPNI after a reasonable period of time clearly advances the state interest  
4 in protecting consumers from the harm of having their CPNI used without their consent.  
5 Additionally, the reasoning of *Verizon Northwest v. Showalter* in finding that the CPNI  
6 regulation did not directly and materially advance government interest would not apply here.  
7 As the Tenth Circuit pointed out, the fact that a rule is underinclusive or may be confusing to  
8 apply is not fatal under the *Central Hudson* test.<sup>23</sup> Further, the Proposed Rules are different  
9 from the rules at issue in *Verizon Northwest* because the proposed rules are more clear and  
10 include wireless. Thus, despite the state's lack of factual evidence, given that the harm the  
11 state seeks to prevent is a carrier's use of a customer's CPNI without the customer's informed  
12 consent, commonsense dictates that a rule requiring a carrier to verify a customer's consent  
13 within a reasonable period of time would facially, directly, and materially advance the state's  
14 interest, while at the same time balance the commercial speech rights of carriers.

15 **4. The rules are proportionate and reasonable solutions to protecting the**  
16 **substantial state interest and are not more extensive than necessary to**  
17 **protect that interest.**

18 The various notice and verification requirements of the proposed rules are a reasonable  
19 fit to the state's objective of protecting Arizona consumers from having their personal  
20 information used and disseminated without their consent. To prevent the un-consented use of  
21 CPNI, it is perfectly reasonable that the carrier verify the customer's "implied" consent within  
22 a reasonable period of time. The argument was raised in *Verizon Northwest* and *U.S. West, Inc.*  
23 that opt-out provisions are less restrictive means to protect CPNI. The opt-out argument relies  
24 on an implied consent from the customer: unless the customer opts-out, the customer has in  
25 essence given his/her implied consent to the use and dissemination of his/her CPNI. This  
26 implied consent theory is implausible in light of the statistics indicating that consumers are  
27 overwhelmingly concerned over the use and dissemination of their personal information

28 <sup>22</sup> *Individual Reference Services Group, Inc. v. FTC*, 145 F.Supp.2d 6, 43 (D.C.C. 2001) (emphasis added).

<sup>23</sup> *Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228, 1238 (10<sup>th</sup> Cir. 2004).

1 without their knowledge or consent and are increasingly taking matters into their own hands.  
2 When a person signs up for telephone service, he/she is simply in need of the service. It  
3 simply is not plausible to assume that he/she is consenting to the distribution of his/her CPNI  
4 by signing up for the service. As one commentator points out, the harm of un-consented use of  
5 CPNI is even greater in places where customers do not have a choice of local telephone  
6 carriers.<sup>24</sup> Thus, under the implied consent theory, the customers would essentially be forced  
7 to consent to the use and dissemination of their CPNI if they want telephone service.<sup>25</sup>  
8 Moreover, the implied consent theory is entirely contradictory to the purpose of the regulation,  
9 which is to protect customers from the use and dissemination of their CPNI *without their*  
10 *consent*. Obtaining verification from the customer within a reasonable period of time is the  
11 most reasonable fit to achieving the state's desired objective.

12 Like the argument presented in the do-not-call case, even if carriers' arguments are  
13 accepted that the rule amounts to nothing more than a "back door" opt-in requirement,  
14 requiring affirmative consent is less restrictive than a direct prohibition on speech because the  
15 regulation is based on private choice.<sup>26</sup> The state is simply empowering individuals and  
16 allowing them the choice of whether or not to receive the communication. Additionally, the  
17 CPNI rules will still permit carriers the use of alternative channels of communication, such as  
18 print ads, television commercials, and other advertising media.

19 The argument has also been raised that the rules would be burdensome to carriers.<sup>27</sup> In  
20 the alternative, the careful balance of costs and benefits must also be viewed from the  
21 perspective of the consumers.<sup>28</sup> One commentator suggests that consumers may not be aware  
22 of the privacy protection afforded to them and many "may not understand that they must take  
23 affirmative steps to restrict access to sensitive information."<sup>29</sup> Additionally, the activism  
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25 <sup>24</sup> Tuan, *supra* note 5 at 370.

26 <sup>25</sup> *Id.*

27 <sup>26</sup> See *Mainstream Marketing*, 358 F.3d at 1243 ("The Supreme Court has repeatedly held that speech restrictions based on private choice (i.e. - an opt-in feature) are less restrictive than laws that prohibit speech directly.")

28 <sup>27</sup> AT&T's Comments on Staff's Second Draft - Proposed CPNI Rules at 2-3.

29 <sup>28</sup> *Mainstream Marketing*, 358 F.3d at 1244.

<sup>29</sup> Tuan, *supra* note 5 at 365.

1 consumers have shown in limiting the commercial use and dissemination of their personal  
2 information and the fact that 83% of respondents in the 2002 Harris Interactive survey said that  
3 “they would stop doing business with a company entirely if they heard or read that the  
4 company misused customer information”<sup>30</sup> indicate that consumers themselves have balanced  
5 the costs and benefits of receiving commercial speech and have determined that the cost to  
6 their personal privacy far outweighs any benefits they may receive. Thus, the proposed rules in  
7 this case meet the narrow tailoring requirement of the *Central Hudson* test because (1) they  
8 have taken into consideration the costs and benefits of the restriction; (2) alternative means of  
9 communication indicate the reasonableness of the regulation; and (3) the rules reasonably fit  
10 the state’s objective of preventing the use and dissemination of CPNI without the customer’s  
11 consent.

#### 12 **R14-2-2109 Confirming a Customer’s Opt-In Approval**

13 Carriers objected to R14-2-2109 which requires carriers to provide a customer written  
14 confirmation within ten days of receiving that customer’s opt-in approval. The written  
15 confirmation must be mailed or emailed separately. Carriers claim that this requirement is  
16 unnecessary, burdensome and costly.

17 Obtaining a customer’s opt-in approval allows a carrier to use, disclose, or permit  
18 access to that customer’s CPNI to third parties and affiliates that do not provide  
19 communications-related services. These entities do not fall under the jurisdiction of the  
20 Arizona Corporation Commission. As such, Staff contends that it is of great importance that  
21 any customer granting opt-in approval be fully informed of the effect of such approval. A  
22 customer should also have the opportunity to notify the carrier in the event that the customer’s  
23 opt-in approval was unintended or erroneous. For these reasons, Staff finds it to be in the  
24 interest of both the carrier and the customer to provide confirmation of opt-in approval within  
25 ten days.

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27 <sup>30</sup> Privacy Survey, *supra* note 16. *Mainstream Marketing*, 358 F.3d at 1244.

<sup>30</sup> Tuan, *supra* note 5 at 365.

28 <sup>30</sup> Privacy Survey, *supra* note 16

1 **R14-2-2110 Reminders to Customers of Their Current CPNI Release Election**

2 Carriers also objected to R14-2-2110 which requires carriers to provide to customers  
3 that have given opt-in or opt-out approval, annual reminders of the customers' elections  
4 regarding CPNI. The annual reminders must be mailed or emailed separately. Carriers claim  
5 that this requirement is unnecessary, burdensome and costly. Staff maintains that customers  
6 should be kept informed of their elections regarding the treatment of their CPNI. Annual  
7 reminders to customers of their opt-in or opt-out approval will serve to ensure that customers'  
8 ongoing approval continues to be knowing and informed.

9 **R14-2-2111 Duration of Customer Approval or Disapproval to Disseminate the**  
10 **Customer's CPNI**

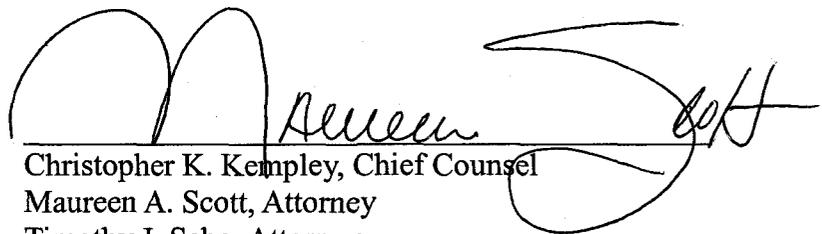
11 None

12 **R14-2-2112 Severability**

13 None

14 Staff believes that the proposed rules appropriately balance the consumer's privacy  
15 interests with the carriers' ability to market to their customers using CPNI. Staff respectfully  
16 requests that the Commission adopt the proposed rules, as modified herein.

17 RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of January, 2005.

18  
19  
20  
21 

22 Christopher K. Kempley, Chief Counsel  
23 Maureen A. Scott, Attorney  
24 Timothy J. Sabo, Attorney  
25 Legal Division  
26 Arizona Corporation Commission  
27 1200 West Washington Street  
28 Phoenix, Arizona 85007  
Telephone: (602) 542-6022

27 The original and thirteen (13) copies  
of the foregoing were filed this  
28 19<sup>th</sup> day of January, 2005 with:

1 Docket Control  
Arizona Corporation Commission  
2 1200 West Washington Street  
3 Phoenix, Arizona 85007

4 Copies of the foregoing were  
mailed this 19<sup>th</sup> day of January, 2005 to:

5  
6 Jeffrey Crockett  
Snell & Wilmer  
7 One Arizona Center  
Phoenix, Arizona 85004

Catherine Fox  
Adelphia  
712 North Main Street  
Coudersport, PA 16915-1141

8 James Harlan  
Allegiance Telecom of Arizona  
9 9201 N. Central Expressway,  
Bldg. B6th Fl.  
10 Dallas, TX 75231

Rob Heath  
AFN  
9401 Indian Creek Pkwy, Suite 140  
Overland Park, KS 66210

11 Letty Freisen, Counsel  
AT&T Communications  
12 1875 Lawrence Street, Suite 1503  
Denver, CO 80202-1870

Dennis D. Alhers, Sr. Attorney  
Eschelon Telecom of AZ  
730 Second Ave. South, Suite 1200  
Minneapolis, MN 55402

13 Curt Huttsell, Director  
14 State Government Affairs  
4 Triad Center, Suite 200  
15 Salt Lake City, UT 84180

Thomas F. Dixon  
MCI WorldCom, Inc.  
707 - 17<sup>th</sup> Street  
Denver, CO 80202

16 Michael W. Patten  
Roshka Heyman # DeWulf PLC  
17 One Arizona Center  
400 E. Van Buren Street, Suite 800  
18 Phoenix, AZ 85004

Thomas H. Campbell  
Lewis & Roca  
40 N. Central Avenue  
Phoenix, AZ 85004

19 Mark DiNunzio  
Cox Arizona Telcom LLC  
20 1550 West Deer Valley Road  
MS:DV3-16, Bldg. C  
21 Phoenix, AZ 85027

Mark P. Trincherro  
Davis, Wright Tremaine  
1300 SW Fifth Avenue, Suite 2300  
Portland, OR 97201

22 Timothy Berg  
Fennemore Craig, PC  
23 3003 North Central Ave., Suite 2600  
Phoenix, AZ 85012

Lynn Abraham  
Mpower Communications  
175 Sully's Trail, Suite 300  
Pittsford, NY 14534

24 Eric S. Heath  
25 Sprint Communications Company, LP  
100 Spear Street, Suite 930  
26 San Francisco, CA 94105

Thomas Bade  
Touch Home Phone  
7170 Oakland Street  
Chandler, AZ 85226

27 Mark Kioguardi  
Tiffany and Bosco PA  
500 Dial Tower  
1850 N. Central Avenue  
Phoenix, AZ 85004  
28

1 Patrick Chow Brooks Fiber  
Communications of Tucson  
2 201 Spear Street, Floor 9  
San Francisco, CA 94105  
3  
4 Mike Duke  
KMC Telecom V, Inc.  
KMC Data, L.L.C.  
5 1755 N. Brown Road  
Lawrenceville, GA 30043  
6  
7 Michael Bagley, Director of Public  
Policy  
Verizon Wireless  
8 15505 Sand Canyon Avenue  
Irvin, CA 92618  
9  
10 Jennifer Martin  
460 Herndon Pkwy, Suite 100  
Herndon, VA 20170  
11  
12 Beverly Jackson  
CI2  
200 Galleria Pkwy, Ste. 1200  
13 Atlanta, GA 30339  
14  
15 Jodi Caro  
Looking Glass  
1111 West 22nd Street  
Oak Brook, IL 60523  
16  
17 James Falvey  
Espire  
7125 Columbia Gate Drive, Suite 200  
18 Columbia, MD 21046  
19  
20 Karen S. Frame, Senior Counsel  
Covad Communications Company  
7901 Lowry Boulevard  
HQB02D84  
21 Denver, CO 80230  
22  
23 Jacqueline Manogian  
Mike Hazel  
Mountain Telecommunications  
1430 Broadway Road, Suite A200  
24 Tempe AZ 85282  
25  
26 Anthony Gillman  
Verizon Select  
6665 N. MacArthur Blvd.  
HQB02D84  
27 Irving, TX 75039  
28

Steven J. Duffy  
Isaacson & Duffy P.C.  
3101 N. Central, Suite 740  
Phoenix, AZ 85012-2638

Todd C. Wiley, Esq.  
Gallagher and Kennedy  
2575 East Camelback Road  
Phoenix, AZ 85016-9225

Manager of Regulatory Affairs  
New Edge Networks  
3000 Columbia House Blvd.  
Suite 106  
Vancouver, WA 98661

Todd Lesser  
North County Communications  
3802 Rosencrans, Suite 485  
San Diego, CA 92110

Al Sterman  
Arizona Consumers Council  
2849 E. 8th Street  
Tucson, AZ 85716

Schula Hobbs  
DSLNet  
545 Long Wharf Drive, Floor 5  
New Haven, CT 06511

Pantios Manias  
El Paso Networks  
El Paso Global Networks Company  
1001 Louisiana Street  
Houston, TX 77002

Charles Steele  
Andrew Crain  
Qwest Communications, Inc.  
1801 California Street, #5100  
Denver, CO 80202

Marla Hanley  
Smoke Signal Communications  
8700 S. Gasser  
Houston, TX 77074

Patrick McGuire  
Trudy Longnecker  
RCN Telecom Services  
105 Carnegie Center  
Princeton, NJ 08540

1 Wendy Wheeler, Vice President  
ALLTEL  
2 11333 North Scottsdale Rd., Suite 200  
Scottsdale, Arizona 85254  
3  
4 Judith Riley  
Matrix Networks  
Telecom Professionals  
5 300 N. Meridian  
Oklahoma City, OK 73107  
6  
7 Fred Goodwin  
SBC Telecom, Inc.  
1010 N. St. Mary's Room 13K  
8 San Antonio, TX 78125-2109  
9  
10 Sharon Thomas  
Talk America  
12001 Science Drive, Suite 130  
Orlando, FL 32826  
11  
12 Teresa Reff  
Global Crossing Services  
1080 Pittsford Victor Road  
13 Pittsford, NY 14534  
14  
15 Edward Marsh  
Verizon Avenue  
Verizon Select  
2 Conway Park  
16 150 Field Drive, Suite 300  
Lake Forest, IL 60045  
17  
18 Donald Taylor  
Jeff Swickard  
Tel West Communications  
19 P.O. Box 94447  
Seattle, WA 98124  
20  
21 Mindy Kay  
Williams Communications  
1 Technology Center Mail Drop: TC-7B  
22 Tulsa, OK 74103  
23  
24 Mark N. Rogers  
Excell Agent Services, L.L.C.  
PO Box 52092  
25 Phoenix, AZ 85072-2092  
26  
27 Kevin Saville  
Citizens Communications  
2378 Wilshire Blvd.  
Mound, MN 55364  
28

Richard Monte  
Christina Tygielski  
Universal Access of AZ  
233 South Wicker Drive, Suite 600  
Chicago, IL 60606  
  
Diane Bacon  
Legislative Director  
Communications Workers of America  
5818 N. 7th Street, Suite 206  
Phoenix, AZ 85014-5811  
  
Lisa Loper  
Teleport Communications Group  
One AT&T Way  
Bedminster, NJ 07921  
  
Mitchell F. Brecher  
Greenberg Traurig, LLP  
800 Connecticut Avenue, NW  
Washington, DC 20006  
  
Joan Burke  
Osborn Maledon  
Attorney for XO Communications  
2929 N. Central Avenue, Suite 21  
P.O. Box 36379  
Phoenix, AZ 85067-6379  
  
Brian Thomas, VP Reg. - West  
Time Warner Telecom, Inc.  
223 Taylor Avenue North  
Seattle, WA 98109  
  
Rex Knowles  
XO  
111 E. Broadway, Ste. 100  
Salt Lake City, UT 84111  
  
James A. Kuzmich  
DAVIS DIXON KIRBY LLP  
14614 N. Kierland Blvd., Suite S160  
Scottsdale, AZ 85254  
  
Bill Courter  
McLeodUSA, Inc.  
6400 C. Street SW,  
PO Box 3177  
Cedar Rapids, IA 52406-3177  
  
Bryan Sullins, LEC Relations Mgr.  
Z-Tel Communications, Inc.  
601 S. Harbour Island Blvd., Suite 220  
Tampa, FL 33602

1 Joyce Hundley  
Antitrust Division  
2 United States Department of Justice  
1401 H Street NW, Suite 8000  
3 Washington, DC 20530

4 Robert Richards  
Accipiter Communications, Inc.  
5 2238 W. Lone Cactus Drive, Suite 100  
Phoenix, AZ 85027

6 Pam Moorehead  
7 Charles Hamm  
CenturyTel  
8 PO Box 4065  
Monroe, LA 71211

9 Lane Williams  
10 Karen Williams  
Midvale Telephone Exchange  
11 PO Box 7  
Midvale, ID 83645-0000

12 Jennifer Martin  
Teligent Services  
13 460 Herndon Pkwy, Suite 100  
Herndon, VA 20170

14 Brenda Crosby  
15 Rio Virgin Telephone Company  
16 Rio Virgin Telephone & Cablevision  
PO Box 189  
17 Estacada, OR 97023-0000

18 Mark McLemore  
19 South Central Utah Telephone  
Association  
PO Box 555  
20 45 North 100 West  
Escalante, UT 84726

21 Jesse (Jay) B. Tresler  
22 Verizon California  
112 S. Lakeview Canyon Road  
23 Thousand Oaks, CA 91362-3811

24 John E. Zeile  
25 Arizona Telephone Company  
dba TDS Telecom  
2495 Main Street  
26 P.O. Box 220  
Choctaw, OK 73020-0220

27  
28

Dennis Halm  
Pac-West Telecomm, Inc.  
4210 Coronado Avenue  
Stockton, CA 95204

Ivan Sweig  
Net-Tel Corporation  
333 Washington Blvd.  
Marina Del Rey, CA 90292

Jill Blakeley  
Time Warner Telecom of Arizona  
10475 Park Meadows Drive  
Littleton, CO 80124

Steven Murray  
Winstar Communications of Arizona  
1850 M Street, NW, Suite 300  
Washington, DC 20036

Paul Pino  
ICG Telecom Group – AZ  
161 Inverness Drive West  
Englewood, CO 80112

Rosalind Williams  
Talk America  
12001 Science Dr., Suite 130  
Orlando, FL 32826

Jacquett Peace  
Premiere Network Services, Inc.  
1510 North Hampton Road, Suite 120  
DeSoto, TX 75115

Caltech Int'l Telecom  
Bruce A. Ramsey, Esq.  
Morgan, Miller & Blair  
1676 N. California Blvd., Suite 200  
Walnut Creek, CA 94596-4137

Clyde Austin  
Buy-Tel Communications, Inc.  
P.O. Box 136578  
Fort Worth, TX 76136

Barry Anrich  
Comm South Companies, Inc.  
2909 N. Buckner Blvd.  
Dallas, TX 75228-4861

Ron Johnson  
Centurytel Solutions, LLC  
100 Centurytel Drive  
Monroe, LA 71203

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  
27  
28

Joseph Dunbar  
Intermedia Communications, Inc.  
201 Spear Street, 9th Floor  
San Francisco, CA 94105

Robert Sokota  
Metromedia Fiber Network Services, Inc  
360 Hamilton Avenue  
White Plains, NY 10601

William Hunt III  
Level 3 Communications, LLC  
1025 Eldorado Blvd.  
Broomfield, CO 80021

Network Access Solutions  
PO Box 18178  
Philadelphia, PA 19116-0178

Andrew Stollman  
Traffix, Inc.  
1 Blue Hill Plaza  
P. O. Box 1665  
Pearl River, NY 10965  
Pat Howard  
QuantumShift Communications, Inc.  
88 Rowland Way, Suite 145  
Novato, CA 94945

Abdullah Sanders  
San Trac Technologies, Inc.  
P. O. Box 535  
Glendale, AZ 85311

James Flavey  
Xspedius Management Co. of Pima  
County, LLC  
7125 Columbia Gateway Dr., Suite 200  
Columbia, MD 21046

Gregory Lawhon  
Telecom Resources, Inc.  
2020 Baltimore  
Kansas City, MO 64108

M. Andrew Andrade  
Attorney for TESS Communications  
5261 S. Quebec St., Suite 150  
Greenwood Village, Colorado 80111

Michael Morris  
Allegiance Telecom, Inc.  
505 Sansome St., Floor 20  
San Francisco, CA 94111

Lynne Martinez  
Pac-West  
1776 W. March Lane, Suite 250  
Stockton, CA 95207

Sharon Belcher  
El Paso Networks  
1001 Louisiana Street  
Houston, TX 77002

Jeffrey Elkins  
Caltech International Telecom  
P.O. Box 837  
San Ramon, CA 94583

Harold Oster  
Rio Virgin Telephone and Cablevision  
P.O. Box 299  
Mesquite, NV 89024-0299

Marianne Deagle  
Birch Telecom/Ionex Telecommunications  
2020 Baltimore ST.  
Kansas City, Missouri 64108-1014  
Sheri Pringle  
Director Regulatory Affairs  
Comm South Companies  
2909 N. Buckner Blvd., Suite 800  
Dallas, Texas 75228

Lance J.M. Steinhart  
Counsel for Covista and  
Viva Communications  
1720 Windward Concourse, Suite 250  
Alpharetta, GA 30005

Rural Network Services, Inc.  
P. O. Box 217  
Midvale, Idaho 83645-0217

Robert Garcia  
TSI Telecommunications Network  
One Tampa Center #700  
Tampa, FL 33602-0000

M. K. Kitchens  
Valor Telecommunications CLEC of AZ  
201 E. John Carpenter Fwy, Suite 200  
Irving, TX 75062-2707

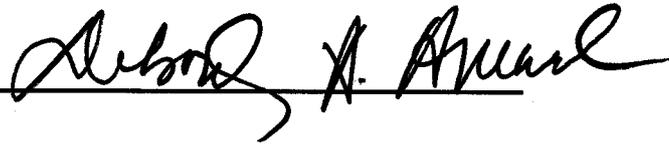
Western CLEC  
Christopher Johnson  
3650 131st Avenue SE, Suite 400  
Bellevue, WA 98006

1	Carl Wolf Billek Entrix Telecom, Inc 520 Broad Street Newark, NJ 07102-3111	Nancy L. Davis, General Counsel, VERIZON WIRELESS – 15505 Sand Canyon Avenue Irvine, CA 92618
2		
3		
4	Anthony Acevedo Entrix Telecom, Inc 520 Broad Street Newark, NJ 07102-3111	T-MOBILE USA, Inc. – Legal Department 12920 SE 38 <sup>th</sup> Street Bellevue, WA 98006
5		
6	Rene J. Rebillot, Chief Counsel Public Advocacy Division Office of the Attorney General 1275 West Washington Phoenix, AZ 85007-2997	Stephanie L. Boyett-Colgan, QWEST LEGAL DEPARTMENT 1801 California Street, Suite 5100 Denver, CO 80202
7		
8		
9	Arizona Community Action Association 2627 N. Third St., Suite 2 Phoenix, Arizona, 85004	Laurie Itkin, Director, Government Affairs LEAP WIRELESS/CRICKET COMMUNICATIONS 10307 Pacific Center Court San Diego, CA 92121
10		
11	Scott S. Wakefield RUCO 1110 West Washington, Suite 220 Phoenix, AZ 85007	CINGULAR WIRELESS West Region Correspondence P.O. Box 755 Atwater, CA 95301
12		
13	Cindy Manheim Regulatory Counsel AT&T Wireless 7277 164th Avenue NE Redmond, WA 98052	WESTERN WIRELESS CORPORATION Legal Department 3650 131st Avenue SE, #600 Bellevue, WA 98006
14		
15	Robert E. Kelly, Sr. Reg. Mgr. Allegiance Telcom of Arizona, Inc. 1919 M Street, NW, Suite 420 Washington, D.C. 20036	Amanda Nix, WESTERN WIRELESS 2001 NW Sammamish Road Issaquah, WA 98027
16		
17	Jon Poston, Consumer Coordinator ACTS 6733 East Dale Lane Cave Creek, AZ 85331	Beth Keiko Fujimoto AT&T WIRELESS SERVICES, INC. Legal Department 16331 NE 72 <sup>nd</sup> Way, Building 1 Redmond, WA 98052
18		
19	NEXTEL COMMUNICATIONS Legal Division 2001 Edmund Halley Drive Reston, VA 20191	ALLTEL CORPORATION Legal Department 11025 Anderson Drive Little Rock, AR 72212
20		
21	Andrew O. Isar TRI 4310 92nd Avenue, N.W. Gig Harbor, Washington 98335	Cindy Manheim, Senior Regulatory AT&T Wireless RTC-1 7277-164 <sup>th</sup> Avenue NE Redmond, WA 98052
22		
23	Gregory Hoffman AT&T Telecommunications 795 Folsom Street, Room 2159 San Francisco, CA 94107-1243	
24		
25		
26		
27		
28		

1 Southwestern Telephone Company  
2 PO Box 5158  
3 Madison, WI 53705-0158

3 Mindy Kay  
4 WilTel Communications  
5 1 Technology Center  
6 Mail Drop: TC-7B  
7 Tulsa, OK 74103

6 Wilshire Connection, LLC  
7 Manager of Regulatory  
8 633 W. Street  
9 56<sup>th</sup> Floor  
10 Los Angeles, CA 90071

10   
11

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
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