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BEFORE THE ARIZONA CORPORATION COMMISSION Corporation Commission  
**DOCKETED**

JAN 28 2002

DOCKETED BY	JK
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1  
2 WILLIAM A. MUNDELL  
Chairman  
3 JIM IRVIN  
Commissioner  
4 MARC SPITZER  
Commissioner  
5

6 IN THE MATTER OF DISSEMINATION OF )  
INDIVIDUAL CUSTOMER PROPRIETARY )  
7 NETWORK INFORMATION BY TELE- )  
COMMUNICATIONS CARRIERS )  
8 )  
9

DOCKET NO. RT-00000J-02-0066  
DECISION NO. 64375  
ORDER

10 Open Meeting  
January 28, 2002  
11 Phoenix, Arizona

12 BY THE COMMISSION:

**FINDINGS OF FACT**

14 **I. INTRODUCTION**

15 1. In its December, 2001 bills, Qwest Corporation ("Qwest") included an insert to its  
16 Arizona customers notifying them that Qwest would be disseminating individual Customer Proprietary  
17 Network Information ("CPNI") to its affiliates unless the customer contacted Qwest within 30 days  
18 and informed Qwest that they did not want their CPNI shared with other Qwest affiliates. Qwest's  
19 CPNI policy is what is typically known as an "opt-out" policy; which means that the customer must  
20 take some affirmative action or Qwest will share its CPNI with its affiliates. Because of serious  
21 concerns raised regarding the effectiveness of Qwest's notice and the overall propriety of its policies  
22 for sharing CPNI with its affiliates and third parties, the Commission held a Special Open Meeting on  
23 January 16, 2002.

24 2. Due to the concerns expressed at the meeting, the Commission directed Staff to  
25 commence a rulemaking proceeding to adopt rules which would govern the release of CPNI by  
26 telecommunications carriers, the notice provided to customers, and appropriate verification procedures.  
27 To implement the Commission's directives, Staff recommends that the Commission issue this  
28 Proposed Order which commences a fact-finding proceeding designed to adopt rules on an expedited

1 basis to address all of these issues. Staff further recommends that Qwest and other  
2 telecommunications carriers be ordered to delay implementation of any "opt-out" CPNI policy until  
3 the conclusion of the Commission's investigation into this matter and the issuance, on an expedited  
4 basis, of rules or a Commission order adopting appropriate requirements for company notice,  
5 verification and dissemination of CPNI to affiliates and third parties.

### 6 **III. BACKGROUND**

7 3. CPNI is defined in Section 222(f) of the Federal Telecommunications Act of 1934  
8 ("Act") as "(A) information that relates to the quantity, technical configuration, type, destination, and  
9 amount of use of a telecommunications service subscribed to by any customer of a telecommunications  
10 carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer  
11 relationship; and (B) information contained in the bills pertaining to telephone exchange service or  
12 telephone toll service received by a customer of a carrier..." The statute differentiates and exempts  
13 from any "restriction on use" requirement what is known as "subscriber list information" which is  
14 "information which (A) identifies the listed names of subscribers of a carrier and such subscribers  
15 telephone numbers, addresses, or primary advertising classifications... and (B) that the carrier or an  
16 affiliate has published, caused to be published, or accepted for publication in any directory format."  
17 Thus, CPNI includes such information as where, when and to whom a customer places a call, as well  
18 as the types of service offerings to which the customer subscribes and the extent to which the service  
19 is used.<sup>1</sup>

20 4. 47 U.S.C. Section 222(c)(1), specifically restricts a carrier's ability, except as required  
21 by law or with the approval of the customer, to use, disclose or permit access to individually  
22 identifiable CPNI received by virtue of its provision of a telecommunications service, except in the  
23 provision of (A) the telecommunications service from which such information is derived, or (B)  
24 services necessary to, or used in, the provision of such telecommunications service, including the  
25 publishing of directories. The Federal Communications Commission ("FCC") has interpreted this  
26 provision to mean that carriers may disseminate, without the customer's approval, the customer's  
27 CPNI derived from the complete service that the customer subscribes to from that carrier and its

28 <sup>1</sup> *In the Matter of Telecommunications Carriers' Use of Customer Proprietary Network Information and Other  
Customer Information*, 13 FCC Rcd at 8064, para. 2 ("Clarification Order").

1 affiliates, for marketing purposes within the existing service relationship. This is known as the "total  
2 service approach." The restriction does not apply to aggregate CPNI (which means that the individual  
3 identities of customers have been removed) (47 U.S.C. Section 222(c)(3), or in instances where the  
4 customer makes an affirmative written request to distribute his or her CPNI to any person or entity.  
5 (47 U.S.C. Section 222(c)(2)).

6 5. 47 U.S.C. Section 222(d) lists three exceptions to the general rule of nondisclosure  
7 where a carrier can disseminate CPNI without the customer's approval which include the following:  
8 1) to initiate, render, bill, and collect for telecommunications services; 2) to protect the rights or  
9 property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive  
10 or unlawful use of, or subscription to such services; and 3) to provide any inbound telemarketing,  
11 referral or administrative services to the customer for the duration of the call, if such call was initiated  
12 by the customer and the customer approves of the use of such information to provide such service.

13 6. The FCC, in its *Second Report and Order and Further Notice of Proposed Rulemaking*  
14 ("*CPNI Order*") released February 26, 1998,<sup>2</sup> adopted rules to implement 47 U.S.C. Section 222 which  
15 can be briefly summarized as follows:

16  
17 a) Carriers were permitted to use CPNI, without customer approval, to market offerings  
18 that are related to, but limited by, the customer's existing service relationship with their carrier.

19 b) Before carriers may use CPNI to market service outside the customer's existing service  
20 relationship, they were required to obtain express customer approval. Such express approval  
21 may be written, oral or electronic. Carriers bear the burden of demonstrating that they have  
22 obtained oral approval under section 222(c)(1). Carriers were required to provide a one-time  
23 notification of customers' CPNI rights prior to any solicitation for approval. (Notice + Opt-In  
24 Approach)

25 c) Telecommunications carriers are required to notify customers of their right to restrict  
26 carrier use of CPNI. A carrier may use either written or oral notification, including a bill  
27 insert, an individual letter, or an oral presentation that advises the customer of his or her right  
28 to restrict carrier access to CPNI. Section 64.2007 contains the minimum form and content  
requirements of the notification a carrier must provide to a customer when seeking approval  
to use CPNI.

<sup>2</sup> *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications of 1934, as Amended, CC Docket Nos. 96-115, Second Report and Order and Further Notice of Proposed Rulemaking (rel. February 26, 1998).*

1 d) The FCC eliminated the *Computer III* framework, as well as sections 33.903(f) and  
2 64.703(d)(3) in light of the comprehensive regulatory scheme established by Congress in  
3 Section 222.

4 7. The FCC adopted what is referred as the "opt-in" approach which is a requirement to  
5 obtain express customer approval prior to the release of individually identifiable CPNI, since the FCC  
6 believed that a common sense understanding of the term "approval" generally connotes an informed  
7 and deliberate response. *CPNI Order* at para. 91.<sup>3</sup> The FCC rejected the "opt-out" approach, because  
8 customers may not read their CPNI notices, and there is no assurance that any implied consent would  
9 be truly informed. *Id.* The FCC further found that it would be difficult to construe a customer's failure  
10 to respond to a notice as constituting an informed approval of its contents. *Id.* They concluded that  
11 a mechanism of express approval was the best means to achieve the goal of ensuring informed  
12 customer approval. *Id.* Finally, the FCC stated that its decision for an express approval requirement  
13 was also justified by the principles of customer control and convenience that are embodied within  
14 Section 222. Those principles contemplate that the customer, not the carrier, will decide whether and  
15 to what extent CPNI is used. *CPNI Order* at para. 99. The FCC also raised competitive concerns  
16 associated with an opt-out policy in that it would likely result in a greater percentage of implied  
17 "approvals" and thus place competitors at a disadvantage relative to incumbent carriers that possess  
18 most of the CPNI. *CPNI Order* at para. 95

19 8. The FCC did not preempt state regulation of CPNI, since it had no specific state  
20 regulations before it.<sup>4</sup> *CPNI Order* at para. 18. Rather, it decided to examine state rules on a case-by-  
21 case basis, and exercise preemption only if a conflict was found that interfered with interstate CPNI  
22 policies. *Id.* The FCC recognized a strong state interest in CPNI dissemination policies, including,  
23 *inter alia*, company notice and verification procedures. *Id.*

24  
25 <sup>3</sup> A.R.S. Section 40-202(C)(5) also contains an express preference for what may be viewed as an opt-in approach by  
26 providing that: "[i]n supervising and regulating public service corporations, the commission's authority is confirmed  
27 to adopt rules to: 5. Provide that, notwithstanding any other law, customer information, account information and  
28 related proprietary information are confidential unless specifically waived by the customer in writing."

<sup>4</sup> The FCC did state that it believed it had the authority to preempt state regulations that were inconsistent with its own  
rules since the interstate and intrastate aspects of CPNI could not be separated and inconsistent state rules may  
interfere with interstate CPNI policies. *CPNI Order* at para. 18. The FCC also noted that state rules most vulnerable

1           9.       U S WEST appealed the FCC's *CPNI Order* to the Tenth Circuit Court of Appeals on  
2 constitutional grounds.<sup>5</sup> The Tenth Circuit vacated the FCC's *CPNI Order*, concluding that the FCC  
3 failed to adequately consider the constitutional ramifications of the regulations interpreting Section  
4 222 and that the regulations violated the First Amendment. In summary, the Tenth Circuit found that  
5 the FCC did not demonstrate that the CPNI regulations requiring "opt-in" customer approval, directly  
6 and materially advanced its interests in protecting privacy and promoting competition.

7           10.       In September, 2001, the FCC released its *Clarification Order and Second Further*  
8 *Notice of Proposed Rulemaking* ("*Clarification Order*") in response to the Tenth Circuit Court of  
9 Appeal's Decision. The FCC found that the Court's vacatur order related only to the discrete portions  
10 of the *CPNI Order* and rules requiring opt-in customer approval, and that the remainder of its CPNI  
11 rules remained in effect. *Clarification Order* at para. 7. The FCC also stated that pending resolution  
12 of the issues raised by the Tenth Circuit, carriers may obtain consent consistent with the notification  
13 requirements in Section 64.2007(f), using an opt-out mechanism, or should they choose to do so, an  
14 opt-in mechanism.

15           11.       In its *Clarification Order*, the FCC sought comment, *inter alia*, on whether it is  
16 possible for the FCC to implement a flexible opt-in approach that does not run afoul of the First  
17 Amendment, or whether opt-out approval is the only means of addressing the constitutional concerns  
18 expressed by the Tenth Circuit. *Clarification Order* at para. 12. The FCC noted that because the  
19 Tenth Circuit found that the opt-in requirements were not narrowly tailored to promote the  
20 government's asserted interests in protecting privacy and promoting competition, it was initiating this  
21 proceeding to obtain a more complete record on consent mechanisms. *Clarification Order* at para. 16.  
22 The FCC also sought comment on whether modification should be made to the current notification  
23 requirements in its rules so that they are most effective in ensuring that customers are clearly informed  
24 of their rights. *Clarification Order* at para. 22.<sup>6</sup>

25  
26 to preemption would be those permitting greater carrier use of CPNI than section 222 or its implementing regulations,  
as well as state regulations that imposed more limitations on a carriers' use of CPNI. *Id.*

27 <sup>5</sup> *U S WEST v. FCC*, 182 F.3d 1224 (10<sup>th</sup> Cir. 1999).

28 <sup>6</sup> In December, 2001, 39 Attorneys General, including the Arizona Attorney General, filed comments with the FCC  
urging it to implement an "opt-in" approach to protect the privacy rights of consumers. They further stated that the  
use of an opt-in approach was sufficiently narrowly tailored to achieve legitimate federal objectives without impinging  
on the First Amendment rights of carriers and encouraged the FCC to cure any record defects found by the Tenth

1 **IV. DISCUSSION**

2 12. On January 16, 2002, the Commission held a Special Open Meeting in response to an  
3 overwhelming number of calls from consumers expressing confusion over Qwest's notice and its  
4 implementation of an "opt-out" policy. Customers also expressed a lot of frustration because they  
5 could not reach Qwest to "opt-out" of having their CPNI released because the toll-free number  
6 provided by Qwest was oftentimes busy and they could not get through to a Qwest representative. In  
7 addition, concern was expressed that an "opt-out" policy, especially as implemented by Qwest, was  
8 misleading and insufficient to protect the privacy rights of Arizona consumers. The Commission  
9 directed Staff at the Special Open Meeting to commence a rulemaking proceeding to address, inter  
10 alia, Qwest's policies to distribute individually identifiable CPNI, the sufficiency of its notice to  
11 customers and its verification procedures. The Commission's directive came after hearing many  
12 complaints by consumers that they did not understand Qwest's notice, that they could not get through  
13 to Qwest representatives in order to opt out, and concerns that the opt out and associated verification  
14 processes used by Qwest were inadequate to protect the privacy rights of Arizona consumers. The  
15 need for adequate notice requirements and dissemination and verification procedures which when  
16 implemented are sufficient to protect customer privacy rights, and the inadequacies of Qwest's notice,  
17 dissemination and verification policies and procedures, was borne out in particular by the following  
18 comments at the January 16, 2002, Open Meeting:

- 19
- 20 a) Qwest's Arizona notice fails to take into consideration proper and adequate provisions for  
21 the Spanish speaking population in Arizona by not providing its notice in Spanish. In  
22 addition, no efforts by Qwest were taken to provide access to bilingual operators for those  
23 consumers who only speak Spanish. Thus, up to 25% of Arizona consumers may not have  
24 been able to read the notice sent out by Qwest.
- 25 b) Qwest's notice was combined with and followed a notice on implementation of a new area  
26 code, and thus many customers may not have read have far enough to recognize that they  
27 were being given an opportunity to "opt-out" of Qwest's plans to disseminate CPNI to  
28 affiliates within its "family of companies".
- 29 c) Qwest's notice was inadequate by being misleading in its title "Important Notice Regarding  
30 Your Qwest Account Information, The following information does not impact your Qwest

31 Circuit They expressed concern that the vast majority of consumers don't even read opt-out notices, and thus, it  
32 cannot be said that they approve the sharing or selling of their personal nonpublic information.

1 billing" The title does not alert customers to the nature or seriousness of the notice's  
2 content. By indicating that the notice does not involve the customers' bill the title implies  
3 that the notice is not important.

- 4 d) Qwest's notice was not written in a clear and concise manner for consumers to fully  
5 understand what the ramifications of sharing their information means. It is not clear from  
6 the notice exactly what information will be shared. It is also not clear from the notice who  
7 the information will be shared with. The use of vague terms such as "commercially  
8 reasonable" inhibits the readers' ability to understand the notice. Qwest itself admitted that  
9 the term "commercially reasonable" was not clear.<sup>7</sup>
- 10 e) The notice did not address how Qwest will inform new customers coming into Arizona of  
11 their right to opt out.
- 12 f) The notice did not address how Qwest will utilize past customer information of customers  
13 that have switched service.
- 14 g) Qwest staffing levels were insufficient to handle the number of calls from customers  
15 requesting to opt out. At the January 16, 2002 Open Meeting Qwest stated that they did  
16 receive more calls than they expected.<sup>8</sup> As such, Qwest had to add 290 additional customer  
17 representatives to handle the number of calls received. Qwest has indicated that only a  
18 small percentage of its customers have chosen to opt-out (3-4%).<sup>9</sup> It could be presumed,  
19 based upon the comments at the hearing, that both inadequate staffing levels and a  
20 confusing notice may have contributed to this low level of customer response.
- 21 h) Qwest's 800 number (877-628-3732) was inadequate in terms of consumer access due to  
22 only being available for consumers to reach between 8 - 5 Monday through Friday. Qwest  
23 has since agreed to extend its hours of availability to include weekends and extended hours  
24 during the workweek to allow consumers to notify Qwest of their option to opt out.
- 25 i) Qwest's website ([www.qwest.com/cpni](http://www.qwest.com/cpni)) was deficient to handle the large number of  
26 customers utilizing this method to opt out. As a result, Qwest had to subsequently make  
27 improvements to its web-site to allow more customers to submit requests simultaneously.
- 28 j) The adequacy of Qwest's verification procedures was called into question, with some  
29 customers discovering that Qwest had made mistakes in recording their expressed desires  
30 for CPNI release. Qwest did not plan on providing any information to its customers that  
31 verified that the customers' account information will not be shared inside the company.  
32 Qwest is working on a system for confirming with customers that they have opted out<sup>10</sup>  
33 but admits that that system has not yet been "solidified."<sup>11</sup>

34 13. While the concerns expressed by consumers at the January 16, 2002 Special Open  
35 Meeting were directed at Qwest's recent notice and implementation of its "opt-out" CPNI policy,  
36

37 <sup>7</sup> January 16, 2002 Special Open Meeting, transcript p.28, line 18

38 <sup>8</sup> January 16, 2002 Special Open Meeting, transcript p.34, line 14

39 <sup>9</sup> January 16, 2002 Special Open Meeting, transcript p.59, line 6

40 <sup>10</sup> January 16, 2002 Special Open Meeting, transcript p.51, line 12

41 <sup>11</sup> January 16, 2002 Special Open Meeting, transcript p.52, line 14

1 neither Section 222 of the Federal Act nor the FCC rules and orders apply only to the Bell Operating  
2 Companies such as Qwest. Rather, Section 222 of the Federal Act and the FCC rules and orders apply  
3 to all telecommunications carriers. Consequently, Staff believes that any proceeding commenced by  
4 the Commission should also review and apply to the CPNI policies and notice requirements of other  
5 telecommunications carriers providing service within the State of Arizona.

6 14. As a result of the concerns identified at the January 16, 2002 Special Open Meeting,  
7 and the Commission's directive to Staff to commence a rulemaking proceeding, Staff recommends that  
8 an investigation be commenced to examine and/or address A.R.S. Section 40-202(C)(5) the CPNI  
9 policies, notice and verification requirements of Qwest and all other telecommunications carriers  
10 providing service within the State of Arizona. Staff further proposes that the record from this  
11 investigation be used as the basis for the adoption, on an expedited basis, of rules or a Commission  
12 Order establishing appropriate guidelines for company CPNI notice, dissemination and verification  
13 requirements. Staff proposes that the investigation be conducted on an expedited basis in accordance  
14 with the schedule set forth below. Staff proposes that it prepare an issues list and that interested parties  
15 be required to address, at a minimum, the issues contained on that list, as well as any other issues  
16 deemed relevant.

17 15. Staff finally recommends that Qwest and other telecommunications carriers be ordered  
18 to delay implementation of an "opt-out" CPNI policy in Arizona until conclusion of this proceeding  
19 and issuance of draft rules and/or a Commission Order which govern customer notice, verification and  
20 other CPNI dissemination requirements in Arizona. Telecommunications carriers may, elect at their  
21 option, to disseminate individually identifiable customer proprietary network information with  
22 affiliates using an "opt-in" methodology at any time, as long as appropriate notice is given to  
23 customers which means that it can be readily understood by the average consumer and as long as it  
24 is bilingual in Spanish since approximately 25% of Arizona's population is Hispanic and adequate  
25 verification procedures are in place.

26 16. Staff recommends the following schedule for adoption of appropriate CPNI  
27 dissemination, notice and verification requirements:  
28

1	Staff Publishes an Issues List for Comment	
2	By All Interested Telecommunications	
	Carriers	February 15, 2002
3	Written Comments by Interested Parties	March 29, 2002
4	Written Responsive Comments by Interested	
5	Parties	April 29, 2002
6	Workshop/Meeting with all Interested Parties	
7	To Discuss Comments and Respond to	
	Questions	May 15, 2002
8	Staff Recommendation to Commission on	
9	Notice, Verification and Dissemination	
	Requirements	June 15, 2002

10 17. Staff believes that this process will ensure that Arizona consumers receive adequate  
 11 notice regarding dissemination of their CPNI, that sufficient protections are in place to safeguard  
 12 the consumers' privacy interests and that any customer consent is based upon the consumers'  
 13 having been fully and truly informed as to his or her rights and the implications of dissemination,  
 14 so that any consent given is done so knowingly by the consumer.

#### CONCLUSIONS OF LAW

- 16 1. Qwest is an Arizona public service corporation within the meaning of Article XV,  
 17 Section 2 of the Arizona Constitution.
- 18 2. The Commission has jurisdiction over Qwest and over the subject matter of the  
 19 application.
- 20 3. Based upon the comments received at the January 16, 2002 Special Open Meeting and  
 21 having reviewed the Staff Memorandum dated January 25, 2002, the Commission hereby commences  
 22 an investigation into the dissemination of individual customer proprietary network information by  
 23 telecommunications carriers.

#### ORDER

25 THEREFORE, IT IS ORDERED that an investigation is hereby commenced on an  
 26 expedited basis to examine and address the CPNI policies, notice and verification requirements and  
 27 all other telecommunications carriers providing service within the State of Arizona.

28 IT IS FURTHER ORDERED that this investigation shall be commenced on an expedited

1 basis in accordance with the schedule set forth in Staff Finding of Fact 16.

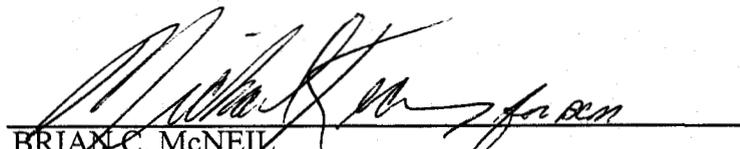
2 IT IS FURTHER ORDERED that the record from this investigation shall be used as the basis  
3 for the adoption, on an expedited basis, of rules or a Commission Order establishing appropriate  
4 guidelines for company notice, verification and CPNI dissemination requirements.

5 IT IS FURTHER ORDERED that Qwest and other telecommunications carriers shall delay  
6 implementation of an "opt-out" CPNI policy in Arizona until the conclusion of this investigation and  
7 the issuance of rules and/or a Commission order which establish requirements for customer notice,  
8 verification and other CPNI dissemination requirements.

9 BY ORDER OF THE ARIZONA CORPORATION COMMISSION

10   
11 CHAIRMAN  COMMISSIONER   
COMMISSIONER

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14  
15  
16 IN WITNESS WHEREOF, I, BRIAN C. McNEIL,  
17 Executive Secretary of the Arizona Corporation  
18 Commission, have hereunto, set my hand and caused the  
19 official seal of this Commission to be affixed at the Capitol,  
20 in the City of Phoenix, this 28<sup>TH</sup> day of JANUARY  
21 \_\_\_\_\_, 2002.

22   
BRIAN C. McNEIL  
Executive Secretary

23  
24 DISSENT: \_\_\_\_\_