



BEFORE THE ARIZONA CORPORATION COMMISSION

- 1
- 2 JEFF HATCH-MILLER
Chairman
- 3 WILLIAM A. MUNDELL
Commissioner
- 4 MARC SPITZER
Commissioner
- 5 MIKE GLEASON
Commissioner
- 6 KRISTIN K. MAYES
Commissioner
- 7

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 AZ CORP COMMISSION
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8 **IN THE MATTER OF DISSEMINATION**
 9 **OF CUSTOMER PROPRIETARY**
 10 **NETWORK INFORMATION BY**
 11 **TELECOMMUNICATIONS CARRIERS**

Docket No. RT-00000J-02-0066

EXCEPTIONS OF ARIZONA WIRELESS CARRIERS GROUP

12 The Arizona Wireless Carriers Group¹ (collectively, "Wireless Carriers")
 13 submits these exceptions to the October 25, 2005 Recommended Opinion and Order
 14 ("ROO") recommending adoption of the Customer Proprietary Network Information
 15 ("CPNI") Rules ("Proposed Rules") in this Docket.

16

17 **I. THE COMMISSION SHOULD REJECT THE RECOMMENDED ORDER**
 18 **BECAUSE THE PROPOSED CPNI RULES ARE UNCONSTITUTIONAL,**
 19 **UNLAWFUL, UNREASONABLE AND INCONSISTENT WITH FEDERAL LAW.**

20 As detailed in the prior comments filed by the Wireless Carriers in this
 21 Docket, the Proposed Rules adopted by the ROO are legally and factually flawed in
 22 several ways. To start, the underlying evidentiary record in this Docket does not
 23 demonstrate any need or justification for the Proposed Rules. Rather, the record is clear

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25 ¹ For purposes of these exceptions, the Arizona Wireless Carriers Group
 26 consists of Alltel, Cingular Wireless, Sprint Nextel Corporation (Sprint Spectrum L.P.
 d/b/a Sprint and Nextel West Corp. d/b/a Nextel), Cricket and VoiceStream PCS III
 Corporation d/b/a T-Mobile.

1 that Arizona customers are protected adequately by the existing Federal CPNI Rules--as
2 illustrated by the lack of any Arizona CPNI complaints on file with the ACC since the
3 current Federal CPNI Rules went into effect and the lack of CPNI complaints at the
4 various public hearings throughout the state. Further, by adopting the Proposed Rules, the
5 ROO violates First Amendment restrictions on permissible regulation of commercial
6 speech and is unconstitutional. The Wireless Carriers incorporate by reference their
7 previously filed comments in this proceeding. *See Comments of Arizona Wireless*
8 *Carriers Group* filed December 22, 2004; *Comments of Arizona Wireless Carriers Group*
9 *filed August 30, 2004; and Exception of Wireless Carriers Group to Recommended Order*
10 *Urging Adoption of CPNI Rules* filed October 8, 2004.

13 The underlying record in this Docket does not provide any evidence of the
14 need for Arizona-specific CPNI Rules. Indeed, the record does not include any Arizona
15 customer complaints about misuse of CPNI. Instead, Appendix B to the ROO notes that
16 “the CPNI Rules were promulgated as a direct result of concern on the part of the
17 Corporation Commission, and more importantly, on the part of customers, regarding a
18 2001 mailing by Qwest to its customers regarding use of their CPNI.” *See* ROO,
19 Appendix B, p. 11. That Qwest mailing and the subsequent January 16, 2002 open
20 meeting occurred before the current Federal CPNI Rules went into effect on October 21,
21 2002. *See* 67 FR 59211 dated September 20, 2002, adopting 47 CFR 64.2001-2007. In
22 this Docket, the Commission went to extraordinary lengths to gather public input
23 concerning CPNI, holding public meetings in Phoenix, Mesa, Prescott, Sun City, Flagstaff,
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1 Kingman, Lake Havasu City, Yuma, Sierra Vista, Bisbee, Wilcox and Benson. In all of
2 those meetings, the ACC did not receive any complaints about use or treatment of CPNI.

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4 In order to survive a First Amendment challenge, the ROO and Proposed
5 Rules must pass the four-part test set forth in the *Central Hudson* case, including the
6 requirement that these speech restrictions directly advance a substantial interest. *Central*
7 *Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980). In
8 *US WEST v. FCC*, the Tenth Circuit applied the *Central Hudson* test and overturned the
9 FCC's original opt-in requirements as an unconstitutional restriction on commercial
10 speech. *US WEST, Inc. v. Federal Communications Comm'n*, 182 F.3d 1224, 1233 (10th
11 Cir. 1999). Under those cases, the ROO and Proposed Rules are unconstitutional and
12 unlawful because the Commission has not developed a record of the specific harms or
13 concerns expressed by Arizonans and, thus, the ACC has not developed narrowly tailored
14 rules responsive to specific harms or concerns. The Commission has not met its burden of
15 showing that it has a substantial interest justifying the restrictions on constitutionally-
16 protected speech imposed by the Proposed Rules.

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20 As the Wireless Carriers have noted in prior comments in this docket, the
21 Commission's proposed verification requirement for opt-out customers would constitute
22 an unconstitutional restriction on protected speech. Common sense dictates that opt-out
23 with subsequent written verification is nothing more than a delayed opt-in requirement,
24 and may be even more burdensome than an opt-in requirement. In *US WEST v. FCC*, the
25 court concluded that the FCC opt-in requirement was not "narrowly tailored" because the
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1 agency had not demonstrated a sufficiently good fit between the means chosen (opt-in or
2 express approval) and the desired statutory objectives (protecting privacy and
3 competition). As determined by the Tenth Circuit, the FCC failed to consider adequately
4 the "obvious and less restrictive alternative" of an opt-out strategy. *Id.* at 1238.
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6 For these reasons, the ROO and Proposed Rules are unlawful, contain
7 unconstitutional restrictions on commercial speech and should be rejected by the
8 Commission.
9

10 ***II. CONCLUSION.***

11 As noted above, the Commission should reject the ROO and Proposed
12 Rules. Instead of adopting the ROO, the Commission should adopt CPNI Rules that are
13 identical to the FCC's CPNI Rules. In their current form, the Proposed Rules conflict with
14 the FCC's Rules and violate the First Amendment.
15

16 RESPECTFULLY SUBMITTED this 3rd day of November, 2005.

17 **GALLAGHER & KENNEDY, P.A.**

18
19 By 

20 Michael M. Grant

21 Todd C. Wiley

22 2575 East Camelback Road

23 Phoenix, Arizona 85016-9225

24 Attorneys for Sprint Nextel Corporation
25
26

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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

ROSHKA, DEWULF & PATTEN, P.L.C.

By 
Michael W. Patten
400 East Van Buren, Suite 800
Phoenix, Arizona 85004-2262
Attorneys for Cricket Communications, Inc.,
ALLTEL Communications and VoiceStream
PCS III Corporation d/b/a T-Mobile

OSBORN MALEDON, P.A.

By 
Joan S. Burke
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012
Attorneys for Cingular Wireless

ORIGINAL and thirteen (13)
copies of the foregoing filed this
3rd day of November, 2005, with:

The Arizona Corporation Commission
Utilities Division – Docket Control
1200 West Washington Street
Phoenix, Arizona 85007

COPIES of the foregoing hand delivered
this 3rd day of November, 2005, to:

Maureen Scott
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Ernest Johnson, Director
Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

1 Lyn Farmer, Chief Administrative Law Judge
Arizona Corporation Commission
2 1200 West Washington Street
Phoenix, Arizona 85007

3 Christopher Kempley
4 Legal Division
Arizona Corporation Commission
5 1200 West Washington Street
Phoenix, Arizona 85007

6
7 **COPIES** of the foregoing mailed this
3rd day of November, 2005, to:

8 Timothy Berg
9 Fennemore Craig, P.C.
3002 North Central Avenue, Suite 2600
10 Phoenix, Arizona 85012-2913

11 Joan S. Burke
Osborn Maledon, P.A.
12 2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2794

13 Michael W. Patten
14 Roshka DeWulf & Patten, PLC
One Arizona Center
15 400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004

16 Gregory Kopta
17 Davis Wright Tremaine
2600 Century Square
18 1501 Fourth Avenue
Seattle, Washington 98101-1688

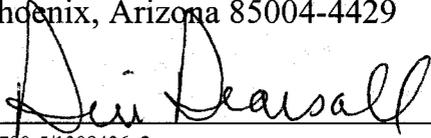
19 Mary B. Tribby
20 AT&T Communications
1875 Lawrence Street, Suite 1503
21 Denver, Colorado 80202

22 Jon Poston
ACTS
23 6733 East Dale Lane
Cave Creek, Arizona 85331-6561

24 Rich Kowalewski
25 Sprint-Nextel Corporation
100 Spear Street, Suite 930
26 San Francisco, California 94105-3114

- 1 Robert E. Kelly
Allegiance Telecom of Arizona, Inc.
1919 M Street NW, Suite 420
Washington, DC 20036
- 2
- 3 Scott Wakefield
Daniel Pozefsky
Residential Utility Consumer Office
1110 West Washington Street, Suite 220
Phoenix, Arizona 85007
- 4
- 5
- 6 Jeffrey W. Crockett
Snell & Wilmer LLP
One Arizona Center
400 East Van Buren
Phoenix, Arizona 85004-2202
- 7
- 8
- 9 Steven J. Duffy
Isaacson & Duffy P.C.
3101 North Central Avenue, Suite 740
Phoenix, Arizona 85012-2638
- 10
- 11
- 12 Curt Hutsell
Citizens Communications
4 Triad Center, Suite 200
Salt Lake City, Utah 84180
- 13
- 14 Teresa Ono
AT&T
795 Folsom Street, Room 2159
San Francisco, California 94107-1243
- 15
- 16
- 17 Bradley S. Carroll
Cox Communications
20402 North 29th Avenue
Phoenix, Arizona 85027-3148
- 18
- 19 Michael M. Grant
Todd C. Wiley
2575 East Camelback Road
Phoenix, Arizona 85016-9225
- 20
- 21
- 22 Thomas Dixon
WorldCom, Inc.
707 17th Street, Suite 2900
Denver, Colorado 80404
- 23
- 24 Robert E. Kelly
Allegiance Telecom of Arizona, Inc.
1919 M Street NW, Suite 420
Washington, DC 20036
- 25
- 26

1 Michael Hallam
2 Lewis & Roca, LLP
3 40 North Central Avenue
4 Phoenix, Arizona 85004-4429



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3
4
5
6
7
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