



ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

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

COMMISSIONERS

JEFF HATCH-MILLER, CHAIRMAN
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

2005 DEC -5 P 3: 06
AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF DISSEMINATION OF
INDIVIDUAL CUSTOMER PROPRIETARY
NETWORK INFORMATION BY TELECOM-
MUNICATIONS CARRIERS

Docket No. RT-00000J-02-0066

**COX ARIZONA TELCOM'S APPLICATION FOR REHEARING
OF DECISION NO. 68292**

Pursuant to A.R.S. § 40-253, Cox Arizona Telcom, L.L.C. (Cox) submits this Application for Rehearing and Reconsideration of Decision No. 68292 (November 14, 2005) (the "Decision") adopting rules concerning dissemination of customer proprietary network information ("the Arizona CPNI rules"). Cox respectfully requests that the Arizona Corporation Commission (the "Commission") grant this Application and modify Decision No. 68292 with respect to the Arizona CPNI Rules.

GROUND FOR REHEARING

I. THE CPNI RULES ARE UNLAWFUL AND UNNECESSARY.

The record in this docket does not support a conclusion that the current federal CPNI rules (47 C.F.R. §§64.2001-2009 (adopted September 20, 2002)) are inadequate to protect CPNI of Arizona consumers. The record also does not support either need or sufficient justification for the Arizona CPNI rules.

A. The Federal CPNI Rules Adequately Protect CPNI.

The current federal CPNI rules provide adequate and appropriate protection for CPNI. The federal CPNI rules already require, for example, opt-in procedures before using CPNI for marketing non-communications services. Cox has followed the requirements set forth in the

1 federal CPNI rules and is unaware of any of its customers having expressed displeasure with Cox's
2 handling of CPNI, including the CPNI notice that is sent to Cox customers.

3 The sole instance cited by the Decision concerning inadequate CPNI protection involves an
4 opt-out procedure used by Qwest in the fall of 2001 – before the current federal CPNI rules went
5 into effect. Cox submits that the procedure used by Qwest in that instance would not necessarily
6 comport with the current federal CPNI rules. The critical flaws in Qwest's 2001 opt-out procedure
7 were the form of Qwest's notice and Qwest's inadequate operational support for the opt-out
8 procedure. The Decision is silent on whether adherence to the current federal CPNI rules would
9 have avoided the CPNI concerns raised in connection with Qwest's 2001 procedure.

10 In fact, the current federal CPNI rules adequately protect CPNI and the record in this
11 docket supports that conclusion. This confirms the information provided by the Commission in
12 response to data requests concerning CPNI complaints. Since the effective date of the federal rules
13 in September of 2002, this Commission has received no complaints about specific CPNI misuse.
14 See Staff's Notice of Filing Responses to Arizona Wireless Carriers (filed April 13, 2005);
15 Comments of Arizona Wireless Carriers Group on Staff's Notice of Filing (filed April 25, 2005).
16 Moreover, at the November 8, 2005 Open Meeting, the Commission's Consumer Services Section
17 indicated that since the Qwest incident in late 2001, it had received virtually no CPNI-related
18 complaints. Finally, the numerous public meetings across the state did not reveal any instances of
19 inadequate CPNI protection. The Arizona CPNI rules are apparently intended to address a
20 perceived, yet speculative need – not a significant and current state interest based on an evidentiary
21 record. Given the lack of evidence of CPNI misuse since that time, the federal CPNI rules are
22 more than sufficient to provide notice to consumers concerning the use of CPNI and to properly
23 protect CPNI. There is no need for Arizona-specific CPNI rules at this time.

24
25
26
27

1 **B. The Arizona CPNI Rules are Unconstitutional.**

2 **1. The Rules Violate the First Amendment**

3 The Arizona CPNI rules contain a requirement to obtain affirmative verification from a
4 customer of that customer's opt-out approval to use CPNI within a prescribed timeframe.
5 Specifically, Rule 2108 requires that carriers must verify a customer's opt-out choice within one
6 year of sending an opt-out notice. If that affirmative verification is not obtained within one year,
7 carriers are no longer authorized to use, disclose, or permit access to that customer's CPNI. In
8 effect, the rules propose a "delayed" opt-in methodology, not a true opt-out methodology. The
9 "delayed" opt-in methodology will be confusing to consumers and even more burdensome to
10 carriers than a straightforward opt-in methodology, which courts have already ruled to be
11 unconstitutional. *See US West v. FCC*, 182 F.3d. 1224 (10th Cir. 1999); *Verizon Northwest, Inc. v.*
12 *Showalter*, 282 F.Supp. 2d. 1187 (W.D. Wash. 2003). Therefore, the Arizona CPNI rules are
13 unconstitutional for the same reasons stated in those decisions. Indeed, the Commission has not
14 developed a record of the specific harms or concerns expressed by Arizonans, nor has it developed
15 narrowly tailored rules responsive to specific harms or concerns. The Commission has not met its
16 burden of showing that it has a substantial interest justifying the restrictions on constitutionally-
17 protected speech imposed by the Arizona CPNI Rules.

18 **2. The Rules Violate the Commerce Clause.**

19 Reliance on the federal CPNI rules ensures consistency across the multiple states and
20 jurisdictions that many telecommunications providers operate. Deviating from the federal CPNI
21 rules requires telecommunications providers to expend additional funds and resources to ensure
22 compliance with at least two sets of rules across the different jurisdictions wherein they operate.
23 The costs associated with implementing and enforcing two distinct sets of CPNI rules can
24 ultimately result in higher costs to consumers as carriers attempt to recover the cost of these
25 additional requirements.

ROSHKA DEWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1 Based on no substantial evidence in the record regarding customer complaints or other
2 documentation, the Commission seeks to impose a myriad of regulatory requirements that interfere
3 with interstate commerce. However, under the Commerce Clause, the Commission cannot adopt
4 rules that are overbroad and may inadvertently act to regulate commerce that takes place wholly
5 outside of Arizona or that will place a burden on interstate commerce that outweighs the legitimate
6 local interests that the regulation seeks to promote. See Brown-Forman Distillers Corp. v. New
7 York State Liquor Auth., 476 U.S. 573, 579 (1986). In assessing the burden created by state
8 regulation, the Supreme Court has cautioned that the prospect of inconsistent regulation among the
9 different states must be considered. See Healy v. The Beer Institute, 491 U.S. 324, 337 (1989)
10 (court must consider “how the challenged statute may interact with the legitimate regulatory
11 regimes of other States.”). The Commission has not expressly determined that the benefits of the
12 Arizona CPNI rules outweigh the burdens placed on interstate commerce, particularly with respect
13 to carriers that operate nationally but that now must implement extensive unique procedures for
14 Arizona.

15 **II. PROPOSED AMENDMENTS TO THE ARIZONA CPNI RULES.**

16 Cox agrees with the notion that notification needs to be clear and understandable. Had
17 Qwest’s 2001 notification fulfilled that requirement, this Commission would not be discussing
18 Arizona-specific CPNI rules. Up to that time, improper release of consumer’s CPNI was not an
19 issue. Since the Commission initiated this docket, improper release of consumers CPNI has not
20 been a problem. The public outcry more than three years ago focused on the form of Qwest’s
21 actual notification to its customers and Qwest’s difficulties associated with managing the phone
22 lines assigned to receive the “opt-out” calls. However, since that time, the forms of notice and
23 opt-out process used by carriers in Arizona pursuant to the federal CPNI rules have not created
24 similar problems, as revealed by the lack of CPNI complaints and the lack of public comment on
25 the issue at the numerous public comment sessions held throughout the state. In rehearing this
26 Decision, if the Commission concludes CPNI rules beyond the federal CPNI rules are needed, *the*

27

ROSHKA DEWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1 *Commission should amend the Arizona CPNI rules by deleting Rules 2108, 2109 and 2110. Such*
2 *amendment would reduce potential constitutional challenges to the rules, yet at the same time*
3 *preserve somewhat-enhanced notice requirements that would address issues related to those that*
4 *arose with Qwest's 2001 procedure.*

5 **CONCLUSION**

6 Arizona consumers are afforded substantial and meaningful protection for their CPNI
7 through the existing federal CPNI rules which were developed and refined over several years and
8 which have successfully provided protection for consumers nationally. The record is devoid of
9 any need to adopt Arizona-specific CPNI rules to remedy existing CPNI problems not addressed
10 by the federal CPNI rules. Moreover, the Commission's adoption of Arizona-specific CPNI rules
11 will only result in additional customer confusion and additional costs to carriers as they attempt to
12 comply with two distinct sets of rules. Cox requests that the Commission rehear Decision No.
13 68292 and adopt CPNI rules that track the existing and effective federal CPNI rules.

14 RESPECTFULLY SUBMITTED this 5th day of December, 2005

15 **COX ARIZONA TELCOM, LLC**

16
17 By 

18 Michael W. Patten
19 ROSHKA DEWULF & PATTEN, PLC
20 One Arizona Center
21 400 East Van Buren Street, Suite 800
22 Phoenix, Arizona 85004
23 (602) 256-6100

24 ORIGINAL and 13
25 copies of the foregoing filed
26 on December 5, 2005, with:

27 Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

ROSHKA DeWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

- 1 COPY of the foregoing hand-delivered/mailed
2 on December 5, 2005, to:
- 3 Lyn Farmer, Chief Administrative Law Judge
4 Hearing Division
5 Arizona Corporation Commission
6 1200 West Washington Street
7 Phoenix, Arizona 85007
- 8 Ernest Johnson, Director
9 Utilities Division
10 Arizona Corporation Commission
11 1200 West Washington Street
12 Phoenix, Arizona 85007
- 13 Christopher Kempley
14 Maureen Scott
15 Legal Division
16 Arizona Corporation Commission
17 1200 West Washington Street
18 Phoenix, Arizona 85007
- 19 Timothy Berg
20 Fennemore Craig, P.C.
21 3003 North Central Avenue, Suite 2600
22 Phoenix, Arizona 85012-2913
- 23 Joan S. Burke
24 Osborn Maledon, P.A.
25 2929 North Central Avenue, Suite 2100
26 Phoenix, Arizona 85012-2794
- 27 Michael W. Patten
Roshka DeWulf & Patten, PLC
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004
- Gregory Kopta
Davis Wright Tremaine
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688

ROSHKA DEWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

- 1 Mary B. Tribby
AT&T Communications
1875 Lawrence Street, Suite 1503
Denver, Colorado 80202
- 2
- 3
- 4 Jon Poston
ACTS
6733 East Dale Lane
Cave Creek, Arizona 85331-6561
- 5
- 6
- 7 Rich Kowalewski
Sprint-Nextel Corporation
100 Spear Street, Suite 930
San Francisco, California 94105-3114
- 8
- 9
- 10 Robert E. Kelly
Allegiance Telecom of Arizona, Inc.
1919 M Street NW, Suite 420
Washington, DC 20036
- 11
- 12 Scott Wakefield
Daniel Pozefsky
Residential Utility Consumer Office
1110 West Washington Street, Suite 220
Phoenix, Arizona 85007
- 13
- 14
- 15
- 16 Jeffrey W. Crockett
Snell & Wilmer LLP
One Arizona Center
400 East Van Buren
Phoenix, Arizona 85004-2202
- 17
- 18
- 19
- 20 Steven J. Duffy
Isaacson & Duffy P.C.
3101 North Central Avenue, Suite 740
Phoenix, Arizona 85012-2638
- 21
- 22
- 23 Curt Hutsell
Citizens Communications
4 Triad Center, Suite 200
Salt Lake City, Utah 84180
- 24
- 25
- 26
- 27

ROSHKA DEWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1 Michael M. Grant
2 Todd C. Wiley
3 Gallagher & Kennedy
4 2575 East Camelback Road
5 Phoenix, Arizona 85016-9225

6 Thomas Dixon
7 WorldCom, Inc.
8 707 17th Street, Suite 2900
9 Denver, Colorado 80404

10 Michael Hallam
11 Lewis & Roca, LLP
12 40 North Central Avenue
13 Phoenix, Arizona 85004-4429

14 By


15
16
17
18
19
20
21
22
23
24
25
26
27