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BEFORE THE ARIZONA CORPORATION COMMISSION

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

DOCKET NO. RT-00000J-02-0066
APPLICATION FOR REHEARING
OF DECISION NO. 68292
ON BEHALF OF QWEST
CORPORATION, QWEST
COMMUNICATIONS
CORPORATION, AND QWEST LD
CORPORATION

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Pursuant to A.R.S. § 40-253 and A.A.C. R14-3-111, Qwest Corporation, Qwest Communications Corporation, and Qwest LD Corporation (collectively referred to herein as "Qwest" or "Qwest Companies") apply for rehearing of Decision No. 68292 entered in this docket by the Arizona Corporation Commission ("Commission") on November 14, 2005 (the "Decision"), which adopts rules (A.A.C. R14-2-2101, *et seq.*) concerning the dissemination of individual customer proprietary network information (the "CPNI Rules").

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ARGUMENT

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The CPNI Rules are unconstitutional for several reasons. As set forth below, the CPNI Rules conflict with and violate federal law. They not only interfere with interstate commerce and the carriers' right to commercial speech but preclude customers from receiving truthful, non-misleading information that has the potential to improve their financial position and quality of life. From a public policy perspective, they are also

1 overreaching and fail to reflect in any measure a meaningful cost/benefit analysis. Such
2 analysis would reveal that customers' privacy interests in Arizona are not now being
3 threatened, compromised, or abused by carriers, nor have those privacy interests been in
4 jeopardy for the decades the Commission has been regulating telecommunications
5 companies.

6 In addition to carriers' long-standing practices of protecting information about
7 their customers, federal statutory protections that have existed for nine years (*see*
8 47 U.S.C. § 222), coupled with Federal Communications Commission ("FCC") rules,
9 operate to provide a solid foundation and assure reasonable protection of
10 telecommunications customers' privacy. In the current environment, and given the
11 substantial federal CPNI privacy protections, state regulatory mandates compelling
12 carriers to affirmatively verify and confirm customer CPNI choices, even if
13 constitutional, would be unnecessary. When considering the cost of creating and
14 maintaining systems and processes to underwrite this type of government initiative, the
15 chasm between the proposals and the public interest becomes even larger.

16 As the Decision notes, this proceeding commenced in January 2002, some six
17 years after the passage of the federal Telecommunications Act of 1996 that established
18 legal guidelines for the use of both interstate and intrastate CPNI. During the four years
19 this docket has been pending, a number of drafts of the rules regarding CPNI have been
20 proposed for comment. In each instance, the proponents of state CPNI rules failed to
21 demonstrate that carriers were abusing CPNI in Arizona or that the public was being
22 harmed by the absence of such rules. At every opportunity, the Qwest Companies
23 provided comments and analysis. Qwest Companies' filings in this docket are as follows:

- 24 1. Qwest Corporation's Notice of Filing CPNI Comments, filed March 29,
25 2002.
- 26 2. Qwest Corporation's Notice of Filing Reply Comments re: CPNI, filed

1 April 29, 2002.

2 3. Notice of Supplemental Authority, filed July 10, 2002.

3 4. Qwest's Notice of Filing Regarding Comments to Staff Draft Rules, filed
4 May 17, 2004.

5 5. Qwest's Notice of Filing Comments to the Staff's Second Draft Proposed
6 CPNI Rules, filed August 30, 2004.

7 6. Qwest's Exceptions to Arizona Corporation Commission Staff's Proposed
8 CPNI Rule, filed October 8, 2004.

9 7. Qwest's Comments filed December 21, 2004.

10 8. Qwest Corporation's Exceptions to Commission Opinion and Order, filed
11 November 3, 2005.

12 Unfortunately, many of the same legal and policy infirmities discussed at length in these
13 prior filings have persisted, in one variation or another, and are present in the current
14 CPNI Rules. Therefore, Qwest hereby incorporates its previous filings in this
15 Application for Rehearing by reference, as though fully stated herein, as further statement
16 of grounds for rehearing.

17 **A. The CPNI Rules Are Arbitrary and Advance No Public Good.**

18 The Decision lacks any serious legal analysis in support of the CPNI Rules. The
19 CPNI Rules continue to pose constitutional concerns and are rife with unduly
20 burdensome proposals concerning a matter never demonstrated to be a serious problem in
21 Arizona – carriers' misuse of customer information. The primary flaw with the CPNI
22 Rules is the concept that it is lawful for the government to require an affirmative
23 customer response for verification of CPNI approvals. The concept is incorrect. From a
24 constitutional perspective, there is little material difference between a rule prescribing
25 that customers must affirmatively consent (respond) to the use of CPNI and one that says
26 customers must affirmatively act to acknowledge (respond) an opt-out choice made

1 earlier. Recasting the matter from one involving customer consent to one involving
2 customer acknowledgement does not insulate the proposal from constitutional scrutiny.
3 In both cases, the failure to secure affirmative action from a customer would preclude the
4 carrier from using the information in speech-laden activities; and the customer from
5 benefiting from the information desired to be conveyed.

6 Such a rule is not in the public interest. Barring any demonstration of carrier
7 abuse of CPNI or concomitant public harm, burdening carriers with complex, costly and
8 unduly burdensome bureaucratic requirements with respect to the use of customer
9 information is arbitrary and advances no public good. Such requirements are not broadly
10 or uniformly required of other commercial enterprises in Arizona. Customers who
11 approve CPNI use should not be burdened by these added costs before receiving timely
12 and relevant marketing information about products and services that might interest them.
13 Similarly, customers not approving CPNI should also be free of these additional costs,
14 which will be recovered through the products and services they currently buy. On
15 balance, customers as a whole are simply not benefited by the proposed CPNI Rules.

16 Arizona courts will set aside a Commission decision when there is a lack of
17 substantial evidence to support the findings contained therein. *See, e.g., Arizona Corp.*
18 *Commission v. Citizens Utilities Co.*, 120 Ariz. 184, 187, 584 P.2d 1175, 1178 (App.
19 1978). The Order must be based on the evidence presented by the parties in this
20 proceeding, with due regard to the credibility of the witnesses and the authorities and
21 precedent supporting the parties' positions. As shown herein, the substantial evidence
22 presented to the Commission during the past four years does not support the unduly
23 burdensome requirements of the CPNI Rules on telecommunication providers. In such
24 instance, a reviewing court is likely to find the Order arbitrary and capricious for lack of
25 substantial evidence to support its findings. *See, e.g., Arizona Corporation Commission*
26 *v. Arizona Public Service Co.*, 113 Ariz. 368, 555 P.2d 326 (1976).

1 **B. The CPNI Rules are Preempted by Federal Interests, Particularly as They**
2 **Impede and Burden Interstate Commerce.**

3 To the extent the Commission intends that its rules extend to interstate CPNI, the
4 application of the rules is preempted by existing federal principles regarding the use and
5 disclosure of CPNI.¹

6 Moreover, whether the Commission intends the application of its rules to extend to
7 interstate CPNI or not, the application of the rules even confined to intrastate CPNI
8 (assuming there can be any meaningful separation of CPNI in this fashion) would impose
9 an impermissible burden on interstate commerce in violation of the Commerce Clause of
10 the United States Constitution. The CPNI Rules, whether applied to interstate service
11 (purposefully or not) or providing regulation inconsistent with the FCC's rules² and the

12
13 ¹ The FCC currently frames the issue of preemptive action regarding state CPNI rules different
14 from its own as dependent on the nature and quality of the developed state record. The FCC felt
15 compelled to "acknowledge that states may develop different records should they choose to
16 examine the use of CPNI for intrastate services. They may find further evidence of harm, or less
17 evidence of burden on protected speech interests. Accordingly, applying the same standard, they
18 may nevertheless find that more stringent approval requirements survive constitutional scrutiny,
19 and thus adopt requirements that 'go beyond those adopted by the Commission [footnotes
20 omitted; emphasis added].'" *July 2002 CPNI Order*, 17 FCC Rcd. at 14891 ¶ 71. In connection
21 with these comments, the FCC referenced an Arizona CPNI verification proposal that it indicated
22 might be sustainable based on an Arizona record different from that created at the FCC. *Id.* at
23 note 163. That reference was to a verification mailing that did nothing more than state the
24 customer's CPNI decision status – no affirmative action by the customer was required.
25 However, the CPNI Rule approved in this docket, incorporating a requirement for an affirmative
26 customer response to a verification mailing, is far different from the verification proposal
referenced neutrally by the FCC in its earlier *Order*. Coupled with the fact that Arizona has no
substantially different record than was before the FCC suggests that the FCC's cautionary
remark that it does "not take lightly the potential impact that varying state regulations could have
on carriers' ability to operate on a multi-state or nationwide basis" (*Id.* at ¶ 71) provides a solid
foundation for a request for federal preemptive action.

² The CPNI rules promulgated by the FCC are applicable both in an intrastate and
interstate context, with the FCC exercising its preemption authority as necessary on a
case-by-case basis. *See, e.g., In the Matter of Implementation of the Telecommunications Act
of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and*

1 oversight of different states, constitute an undue burden on carriers doing business on an
2 interstate basis.

3 **C. Mandating Opt-In Verifications for Opt-Out Approvals**
4 **Is Unlawful (A.A.C. R14-2-2108)**

5 A CPNI opt-in authorization rule unquestionably violates federal constitutional
6 commercial speech protections as now articulated by two federal courts.³ The standard
7 has been articulated as follows:

8 In the context of a speech restriction imposed [by the government] to protect
9 privacy [of telecommunications customers] by keeping certain information
10 confidential, the government must show that the disseminating of the information
11 desired to be kept private would inflict specific and significant harm on
12 individuals, such as undue embarrassment or ridicule, intimidation or harassment
13 or misappropriation of sensitive personal information for the purposes of assuming

13 *Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271*
14 *and 272 of the Communications Act of 1934, As Amended, Second Report and Order and*
15 *Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, 8073-78 ¶¶ 14-20 (1998) (“CPNI*
16 *Order”); In the Matter of Implementation of the Telecommunications Act of 1996;*
17 *Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other*
18 *Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and*
19 *272 of the Communications Act of 1934, As Amended, Order on Reconsideration and Petitions*
20 *for Forbearance, 14 FCC Rcd. 14409, 14465-67 ¶¶ 112-14 (1999) (“CPNI Reconsideration*
21 *Order”); In the Matter of Implementation of the Telecommunications Act of 1996;*
22 *Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other*
23 *Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and*
24 *272 of the Communications Act of 1934, As Amended; 2000 Biennial Regulatory Review –*
25 *Review of Policies and Rules Concerning Unauthorized Changes of Consumers’ Long Distance*
26 *Carriers, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC*
Rcd. 14860, 14890 ¶ 69, 14891-92 ¶ 71 (2002) (“July 2002 CPNI Order”).

21 ³ The WUTC’s opt-in rules were vacated as unconstitutional by a Washington federal district
22 court in *Verizon v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003). That federal district
23 court (within the Ninth Circuit’s jurisdiction) supported its position by reference to and reliance
24 on *U.S. WEST v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). *And*
25 *see United Reporting Publishing Corp. v. Los Angeles Police Dept.*, 146 F.3d 1133 (9th Cir.
26 1998), *rev’d*, *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32
(1999) (where the Ninth Circuit held that a statute seeking to limit the release of arrestee records
failed to directly and materially advance the government’s interests in protecting an arrestee’s
privacy).

1 another's identity.⁴

2 Where the Commission is proposing regulations that restrict speech, the Commission
3 "bears the responsibility of building a record adequate to clearly articulate and justify the
4 state interest" that it asserts justifies the proposed speech restriction.⁵ The Tenth Circuit
5 found that an opt-in CPNI approval regime failed this element of *Central Hudson*⁶ (i.e.,
6 the specific articulation of a governmental interest) because "[w]hile protecting against
7 disclosure of sensitive and potentially embarrassing personal information may be
8 important in the abstract, [it had] no indication of how it may occur in reality with respect
9 to CPNI."⁷ Secondly, even if the Commission had articulated a substantial state interest,
10 it has not demonstrated that the CPNI Rules directly advance the asserted interest and are
11 narrowly-tailored to serve the asserted interest.⁸

12 An opt-in "verification" rule applied to opt-out CPNI authorizations fares no
13 better. Although A.A.C. R14-2-2108 is framed as an opt-out "verification" rule,⁹ it must
14 fail for the same reason an opt-in CPNI consent regime fails in the first instance. Such
15 rules are contrary to both public and consumer interests. They operate to withhold

16 ⁴ *U S WEST v. FCC*, 182 F.3d at 1235.

17 ⁵ *Id.* at 1234.

18 ⁶ *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 57
(1980).

19 ⁷ *U S WEST v. FCC*, 182 F.3d at 1237.

20 ⁸ *Id.* at 1237-38 ("While protecting against disclosure of sensitive and potentially embarrassing
21 personal information may be important in the abstract, we have no indication of how it may
22 occur in reality with respect to CPNI. Indeed, we do not even have indication that the disclosure
23 might actually occur. The government presents no evidence regarding how and to whom carriers
24 would disclose CPNI. . . . [T]he government has not explained how or why a carrier would
25 disclose CPNI to outside parties, especially when the government claims CPNI is information
26 that would give one firm a competitive advantage over another. This leaves us unsure exactly
who would potentially receive the sensitive information.").

⁹ A comparison of the Arizona Corporation Commission Staff's earlier draft opt-in CPNI
approval rules and the verification rule in A.A.C. R14-2-2108 shows no substantive distinction.
The clear relationship of the one to the other is obvious from the fact that the Staff edited a
portion of one of its earlier-proposed rules outlining the requirements for written authorization to
use CPNI by simply striking the word "authorization" and substituting the word "verification."

1 truthful information from consumers, information that is calculated to improve their
2 buying decisions and quality of life. Although neither the FCC nor a court has directly
3 addressed the lawfulness of an affirmative verification program with respect to opt-out
4 CPNI approvals, judicial and regulatory decisions make clear that CPNI opt-in
5 regulations operating to burden the speech interests of carriers and customers are
6 unlawful.

7 In all material aspects, the Commission has no better record on CPNI and
8 customer expectations, carrier uses, or potential harms, than did the FCC or the WUTC.
9 That record creates no doubt but that customers will not affirmatively act with respect to
10 CPNI choices in any substantial volume, empirically suggesting that the *status quo* is
11 quite satisfactory to them. If customers cannot be expected to act to approve CPNI use,
12 they most certainly cannot be expected to act to “verify” their decision about their opt-out
13 approval. The expectation of a contrary customer response is at odds with the existing
14 substantial record in this proceeding, as well as a long line of federal regulatory
15 precedent.

16 Qwest continues to oppose any kind of governmentally-mandated CPNI
17 verifications or confirmations. If any such requirements are imposed, however, the
18 methodology must be one of notice, not carrier-customer interaction, *and* carriers must be
19 permitted to choose the most appropriate interaction for their customers.
20 Verification/confirmation mechanisms might involve e-mail, telephone verification, or
21 written communication. In the past, Qwest used all these methods as part of its earlier
22 voluntary verification efforts.

23 **D. Mandating Prior Consent for Transfer of CPNI to a Third Party**
24 **In All Circumstances is Unlawfully Overbroad (A.A.C. R14-2-**
25 **2104.B).**

26 The CPNI Rules require some kind of customer request (“written, electronic, or

1 oral”) before CPNI can be transferred to a third party, without any exceptions save for
2 “the purpose of sharing customer records necessary for the provisioning of service by a
3 competitive carrier.” See R14-2-2104.B, F. This provision is not constitutional if applied
4 without consideration of the context associated with the transfer. One such context may
5 be the sale or transfer of all or a significant part of the carrier’s business. When
6 considering the sale or transfer of a carrier’s business, the CPNI Rules impose an undue
7 burden on legitimate alienation of property and the reasonable operation of commerce.

8 The CPNI Rules must be modified to allow for legitimate business transactions
9 involving the transfer of CPNI. While the modifications might be different for different
10 situations, they must be sufficient to allow CPNI consents to be secured in sufficient
11 numbers and at reasonable expense so that the restrictions are possible to comply with
12 and do not pose trade barriers. Such accommodations would not compromise the public
13 interest and would enhance commerce.

14 For certain transfers, such as the sale or transfer of a carrier’s business, there are
15 obvious and less restrictive alternatives to protecting customers’ privacy while
16 accommodating carriers’ speech and property interests. Postings on carrier websites
17 advising that CPNI might be transferred in the event of a sale, or direct customer
18 notifications advising of the transfer, are both options that pose fewer barriers to speech
19 and property alienation than do the CPNI Rules.

20 **E. Information Required for Opt-In Notice (R14-2-2105)**

21 **a. Statements About CPNI Should Be Accurate (R14-2-**
22 **2105.A.4)**

23 The CPNI Rules requires carriers to “[s]tate that CPNI includes *all information*
24 related to specific calls initiated or received by a customer” (emphasis added). As Qwest
25 has previously pointed out,¹⁰ the definition of CPNI does not extend so far, as the

26 ¹⁰ See Qwest May 17, 2004 Comments at 6-7.

1 Commission's own rules and definition make clear. See R14-2-2102.5. The CPNI Rules
2 defines CPNI as information that, in part, (1) relates to "destination" (the termination of a
3 call), "amount of use" (applicable in a measured service, toll or wireless "minutes of use"
4 environment) that is "made available to the carrier by the customer solely by virtue of the
5 carrier-customer relationship," and (2) information in carrier bills. This is not "all
6 information" related to specific calls initiated or received by a customer. Carriers should
7 not be required to misstate the law in the fashion proposed by the CPNI Rule.

8 **b. Required Description of the Effect of CPNI Restrictions**
9 **Should Track FCC Rule (R14-2-2105.A.6)**

10 The Arizona Corporation Commission may not adopt a rule requiring carriers to
11 advise customers of something *inconsistent* with an existing federal rule.¹¹ The FCC has
12 modified its requirement that a carrier's CPNI approval notice include a statement
13 informing customers that if they decide not to approve the release of CPNI, their decision
14 will not affect the provision of services to which they subscribe. The FCC's rule now
15 permits carriers to advise customers in clear and neutral language about any materially
16 adverse consequences that might be encountered by a customer's refusal to provide CPNI
17 approval.¹² Any Commission-adopted rule must be modified accordingly.

18 **F. Confirmations of CPNI Opt-In Approvals Are Unnecessary**
19 **(R14-2-2109)**

20 The CPNI Rule that carriers confirm through a separate mailing a customer's
21 opt-in approval decision regarding CPNI is not in the public interest or in the economic
22 interest of Arizona customers who would bear the burden of providing cost recovery for

23 _____
¹¹ See *id.* at 7-8.

24 ¹² July 2002 CPNI Order, 17 FCC Rcd. at 14906-07 ¶¶ 103-06. The FCC added the sentence
25 "However, carriers may provide a brief statement, in clear and neutral language, describing
26 consequences directly resulting from the lack of access to CPNI[.]" to its rule 47 C.F.R.
§ 64.2008(c)(3).

1 such confirmation.

2 CPNI approvals will generally be secured from the mass market through an opt-
3 out approval process. Opt-in approvals will be small in number, except with respect to
4 businesses and more sophisticated purchasers of telecommunications services. These
5 latter types of customers are not going to “make a mistake” about granting CPNI opt-in
6 approval, and there should be no presupposition or prejudgment that some entity or
7 person will falsify about the customers’ decisions.

8 Written confirmations are unnecessary with respect to customers that affirmatively
9 take action to authorize or approve use of CPNI. Establishing the infrastructure to
10 support such a regime is non-productive under any reasonable cost/benefit analysis.

11 **G. CPNI Reminder Notices are Unnecessary (R14-2-2110)**

12 In light of the existing federal requirement that carriers using a CPNI opt-out
13 approval mechanism must notify their customers of their opt-out CPNI election every two
14 years (47 C.F.R. § 64.2008(d)(2)), there is no reasonable cost/benefit demonstration that
15 can be made to support an annual notification to customers regarding their current CPNI
16 elections in Arizona. The proposal remains an arbitrary and bureaucratic requirement
17 that does not advance consumer interests, but only increases a consumer’s economic
18 burden as the bearer of the cost recovery associated with the additional reminder.

19 Additionally, as Qwest previously stated,¹³ sending out “reminder notices” of a
20 customer’s CPNI status, parsed as “opt-out approval,” “opt-in approval” and “express
21 prior written opt-in approval” is not a simple process. Creating the systems to allow for
22 such communication will be complex and costly and carriers should be fully
23 compensated for the endeavor. Creating such functionality would require Qwest
24 Companies to modify existing Customer Service Record (“CSR”) operations support
25

26 ¹³ See Qwest May 17, 2004 Comments at 9-10.

1 systems ("OSS") so that a customer's "CPNI approval status" could be discretely
2 captured for purposes of a separate mailing. When compared to the speculative benefit
3 associated with the initiative, a serious investigation of the costs involved would
4 demonstrate that the customers' privacy and economic interests would not be advanced
5 by requiring the issuance of reminder notices.

6 Furthermore, the CPNI Rule forbids a carrier from incorporating the reminder
7 notices in its billing a carrier's routine and ordinary mechanism of communication. The
8 Rule is defective because it does not include a provision that provides for cost recovery
9 of this compelled communication.

10
11 **RELIEF REQUESTED**
12

13 For all of the above reasons, the Qwest Companies respectfully request that the
14 Arizona Corporation Commission grant this Application and modify Decision No. 68292
15 consistent with the foregoing Application. Qwest supports a CPNI approval process
16 aligned with that promulgated by the FCC, without any additional costly and unduly
17 burdensome verification, confirmation or reminder obligations.

18
19 RESPECTFULLY SUBMITTED this 5th day of December, 2005.
20

21
22 By 
23 Norman G. Curtright
24 QWEST SERVICES CORPORATION
25 Suite 1100
26 4041 N. Central Avenue
Phoenix, AZ 85012

And

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6
7
8
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15
16
17
18
19
20
21
22
23
24
25
26

Timothy Berg, Esq.
Theresa Dwyer, Esq.
FENNEMORE CRAIG, P.C.
Suite 2600
3003 N. Central Avenue
Phoenix, AZ 85012

*Attorneys for Qwest Corporation, Qwest
Communications Corporation, and Qwest LD
Corporation*

ORIGINAL and 13 copies of the foregoing
hand-delivered for filing this 3rd day of November, 2005 to:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
this 5th day of December, 2005 to:

Lyn Farmer
Chief Administrative Law Judge
ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
Phoenix, AZ 85007

Ernest G. Johnson, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
Phoenix, AZ 85007

1 Christopher Kempley, Chief Counsel
Legal Division
2 ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
3 Phoenix, AZ 85007

4 **COPY** of the foregoing mailed
this 5th day of December, 2005 to:

5
6 James Harlan
Allegiance Telecom of Arizona
7 9201 N. Central Expressway, Bldg. B 6th Flr.
Dallas, TX 75231

8
9 Curt Huttzell
Director, State Government Affairs
10 4 Triad Center, Suite 200
Salt Lake City, UT 84180

11
12 Eric S. Heath
SPRINT COMMUNICATIONS CO.
13 100 Spear Street, Suite 930
San Francisco, CA 94105

14
15 Mark DiNunzio
Cox Arizona Telecom, LLC
16 1550 West Deer Valley Road
MS:DV3-16, Bldg. C
17 Phoenix, AZ 85027

18 Catherine Fox
Adelphia
19 712 North Main Street
Coudersport, PA 16915-1141

20
21 Rob Heath
AFN
22 9401 Indian Creek Pkwy, Ste. 140
Overland Park, KS 66210

23
24 Dennis D. Alhers
Eschelon Telecom of AZ
25 730 Second Ave. South, Ste. 1200
Minneapolis, MN 55402

26

- 1 Mark P. Trinchero
DAVIS WRIGHT TREMAINE
- 2 1300 SW Fifth Avenue, Ste. 2300
Portland, OR 97201
- 3
- 4 Lynn Abraham
Mpower Communications
- 5 175 Sully's Trail, Suite 300
Pittsford, NY 14534
- 6
- 7 Thomas Bade
Touch Home Phone
- 8 7170 Oakland Street
Chandler, AZ 85226
- 9
- 10 Mark Dioguardi
Tiffany and Bosco PA
- 11 500 Dial Tower
1850 N. Central Avenue
- 12 Phoenix, AZ 85004
- 13 Patrick Chow
Brooks Fiber Communications of Tucson
- 14 2301 Spear Street, Floor 9
San Francisco, CA 94105
- 15
- 16 Mike Duke
KMC Telecom V, Inc.
- 17 1755 N. Brown Road
Lawrenceville, GA 30043
- 18
- 19 Michael Bagley
Director of Public Policy
- 20 Verizon Wireless
15505 San Canyon Avenue
- 21 Irvine, CA 92618
- 22 Jennifer Martin
Teligent Services
- 23 460 Herndon Pkwy, Ste. 100
Herndon, VA 20170
- 24
- 25
- 26

- 1 Beverly Jackson
CI2
- 2 200 Galleria Pkwy, Ste. 1200
Atlanta, CA 30339
- 3
- 4 Jodi Caro
Looking Glass
- 5 1111 West 22nd Street
Oak Brook, IL 60523
- 6
- 7 James Falvey
Espire
- 8 7125 Columbia Gate Drive, Ste. 200
Columbia, MD 21046
- 9
- 10 Karen S. Frame
Covad Communications Company
- 11 7901 Lowry Boulevard
Denver, CO 80230
- 12
- 13 Jacqueline Manogian
Mountain Telecommunications
- 14 1430 Broadway Rd., Ste. A200
Tempe, AZ 85282
- 15
- 16 Anthony Gillman
Verizon Select
- 17 6665 N. MacArthur Boulevard
Irving, TX 75039
- 18
- 19 Steven J. Duffy
ISAACSON & DUFFY
- 20 3101 North Central Ave., Ste. 740
Phoenix, AZ 85012
- 21
- 22 Todd C. Wiley
Gallagher and Kennedy
- 23 2575 East Camelback Road
Phoenix, AZ 85016-9225
- 24
- 25
- 26

- 1 Manager of Regulatory Affairs
New Edge Networks
- 2 3000 Columbia House Blvd.
Ste. 106
- 3 Vancouver, WA 98661

- 4 Todd Lesser
North County Communications
- 5 3802 Rosecrans, Ste. 485
San Diego, CA 92110
- 6

- 7 Al Sterman
Arizona Consumers Council
- 8 2849 E. 8th Street
Tucson, AZ 85716
- 9

- 10 Schula Hobbs
DSLNet
- 11 545 Long Wharf Drive, Floor 5
New Haven, CT 06511
- 12

- 13 Pantio Manias
Sharon Belcher
- 14 El Paso Networks
1001 Louisiana Street
- 15 Houston, TX 77002

- 16 Maria Hanley
Smoke Signal Communications
- 17 8700 S. Gasser
Houston, TX 77074
- 18

- 19 Patrick McGuire
RCN Telecom Services
- 20 105 Carnegie Center
Princeton, NJ 08540
- 21

- 22 Wendy Wheeler
ALLTEL
- 23 11333 N. Scottsdale Rd., Ste.
Scottsdale, AZ 85254
- 24

- 25 Judith Riley
Telecom Professionals
- 26 300 N. Meridian

- 1 Oklahoma City, OK 73107
- 2
- 3 Fred Goodwin
SBC Telecom, Inc.
1010 N. Ste. Mary's Room 13K
- 4 San Antonio, TX 78125-2109
- 5 Sharon Thomas
Rosalind Williams
- 6 Talk America
12001 Science Drive, Suite 130
- 7 Orlando, FL 32826
- 8 Teresa Reff
Global Crossing Services
- 9 1080 Pittsford Victor Road
Pittsford, NY 14534
- 10
- 11 Edward Marsh
Verizon Select
- 12 2 Conway Park
150 Field Drive, Ste. 300
- 13 Lake Forest, IL 60045
- 14 Donald Taylor
Tel West Communications
- 15 PO Box 94447
Seattle, WA 98124
- 16
- 17 Mark N. Rogers
Excell Agent Services, LLC
- 18 PO Box 52092
Phoenix, AZ 85072-2092
- 19
- 20 Kevin Saville
Citizens Communications
- 21 2378 Wilshire Boulevard
Mound, MN 55364
- 22
- 23 Richard Monte
Universal Access of AZ
- 24 233 S. Wicker Dr., Ste. 600
Chicago, IL 60606
- 25
- 26

- 1 Diane Bacon
Communications Workers of America
2 5818 N. 7th St., Ste. 206
Phoenix, AZ 85014-5811
3
- 4 Lisa Loper
Teleport Communications Group
5 One AT&T Way
Bedminster, NJ 07921
6
- 7 Mitchell F. Brecher
Greenberg Traurig
8 800 Connecticut Avenue, NW
Washington, DC 20006
9
- 10 James A. Kuzmich
Davis Dixon Kirby
11 14614 N. Kierland Blvd., Ste. S160
Scottsdale, AZ 85254
12
- 13 Bill Couter
McLeod USA, Inc.
14 6400 C Street, SW
PO Box 3177
15 Cedar Rapids, IA 52406-3177
- 16 Justin Laughlin
Z-Tel Communications, Inc.
17 601 S. Harbour Island Blvd., Ste. 220
Tampa, FL 33602
18
- 19 Joyce Hundley
U.S. Department of Justice
20 1401 H Street, NW, Ste. 8000
Washington, DC 20530
21
- 22 Robert Richards
Accipiter Communications, Inc.
23 2238 W. Lone Cactus Dr., Ste. 100
Phoenix, AZ 85027
24
25
26

- 1 Pam Moorehead
CenturyTel
2 PO Box 4065
Monroe, LA 71211
3
- 4 Ron Johnson
Centurytel Solutions
5 100 CenturyTel Drive
Monroe, LA 71203
6
- 7 Lane Williams
Midvale Telephone Exchange
8 PO Box 7
Midvale, ID 83645
9
- 10 Brenda Crosby
Rio Virgin Telephone Company
11 Rio Virgin Telephone & Cablevision
PO Box 189
12 Estacada, OR 97023
- 13 Harold Oster
Rio Virgin Telephone and Cablevision
14 PO Box 299
Mesquite, NV 89024-0299
15
- 16 Mark McLemore
South Central Utah Telephone Association
17 PO Box 226
Escalante, UT 84726
18
- 19 Jesse B. Tresler
Verizon California
20 112 S. Lakeview Canyon Road
Thousand Oaks, CA 91362-3811
21
- 22 John E. Zeile
Arizona Telephone Company
23 2495 Main Street
PO Box 220
24 Choctaw, OK 73020-0220
25
26

- 1 Dennis Halm
Pac-West Telecomm, Inc.
2 4210 Coronado Avenue
Stockton, CA 95204
3
- 4 Ivan Sweig
Net-Tel Corporation
5 333 Washington Blvd.
Marina Del Rey, CA 90292
6
- 7 Jill Blakely
Time Warner Telecom of Arizona
8 10475 Park Meadows Drive
Littleton, CO 80124
9
- 10 Steven Murray
Winstar Communications of Arizona
11 1850 M Street, NW Suite 300
Washington, DC 20036
12
- 13 Steven Miller
Telseon Carrier Services, Inc.
14 7887 E. Belleview Ave., Ste. 600
Engelwood, CO 80111
15
- 16 Paul Pino
ICG Telecom Group - AZ
17 161 Inverness Drive West
Engelwood, CO 80112
18
- 19 Jacquetta Place
Premiere Network Services, Inc.
20 1510 N. Hampton Road, Ste. 120
DeSoto, TX 75115
21
- 22 Bruce A. Ramsey
Morgan Miller & Blair
23 1676 N. California Blvd., Ste. 200
Walnut Creek, CA 94596-4137
24
25
26

- 1 Clyde Austin
Buy-Tel Communications, Inc.
2 PO Box 136578
Fort Worth, TX 76136
3
- 4 Barry Anrich
Comm South Companies, Inc.
5 2909 N. Buckner Blvd.
Dallas, TX 75228-4861
6
- 7 Joseph Dunbar
Intermedia Communications, Inc.
8 201 Spear Street, 9th Floor
San Francisco, CA 94105
9
- 10 Robert Sokota
Metromedia Fiber Network Services, Inc.
11 360 Hamilton Avenue
White Plains, NY 10601
12
- 13 William Hunt III
Level 3 Communications, LLC
14 1025 Eldorado Blvd.
Broomfield, CO 80021
15
- 16 Network Access Solutions
PO Box 18178
17 Philadelphia, PA 19116-0178
- 18 Andrew Stollman
Traffix, Inc.
19 1 Blue Hill Plaza
PO Box 1665
20 Pearl River, NY 10965
- 21 Pat Howard
QuantumShift Communications, Inc.
22 88 Rowland Way, Ste. 145
Novato, CA 94945
23
- 24 Abdullah Sanders
San Tran Technologies, Inc.
25 PO Box 535
Glendale, AZ 85311
26

- 1 James Flavey
Xspedius Management Co. of Pima County
2 7125 Columbia Gateway Dr., Ste. 200
Columbia, MD 21046
3
- 4 Gregory Lawhon
Telecom Resources, Inc.
5 2020 Balitmore
Kansas City, MO 64108
6
- 7 Michael Morris
Allegiance Telecom, Inc.
8 505 Sansome St., Floor 20
San Franciso, CA 94111
9
- 10 Lynne Martinez
Pac-West
11 1776 W. March Lane, Ste. 250
Stockton, CA 95207
12
- 13 Jeffrey Elkins
Caltech International Telecom
14 PO Box 837
San Ramon, CA 94583
15
- 16 Marianne Deagle
Birch Telecom/Ionex Telecommunications
17 202 Baltimore St.
Kansas City, MO 64108-1014
18
- 19 Lance J.M. Steinhart
1720 Windward Concourse, Ste. 250
20 Alpharetta, GA 30005
- 21 Rural Network Services, Inc.
PO Box 217
22 Midvale, ID 83645-0217
- 23 Robert Garcia
TSI Telecommunications Network
24 One Tampa Center, Ste. 700
Tampa, FL 33602
25
26

- 1 M.K. Kitchens
Valor Telecommunications CLEC of AZ
2 201 E. John Carpenter Fwy, Ste. 200
Irving, TX 75062-2707
3
- 4 Christopher Johnson
Western CLEC
5 3650 131st Ave SE Ste. 400
Bellevue, WA 98006
6
- 7 Carl Wolf Billek
Entrix Telecom, Inc.
8 520 Broad Street
Newark, NJ 07102-3111
9
- 10 Renee J. Rebillot
Office of the Attorney General
11 1275 W. Washington
Phoenix, AZ 85007-2997
12
- 13 Arizona Community Action Association
2627 N. Third Street, Ste. 2
14 Phoenix, AZ 85004
- 15 Letty Friesen
AT&T COMMUNICATIONS OF THE MT. STATES
16 919 Congress Avenue, Suite 900
Austin, TX 78701
17
- 18 Teresa Ono
AT&T
19 795 Folsom Street, Room 2159
San Francisco, CA 94107-1243
20
- 21 Thomas F. Dixon
WORLD COM, INC.
22 707 N. 17th Street #3900
Denver, CO 80202
23
24
25
26

1 Joan S. Burke
OSBORN MALEDON, P.A.
2 Attorneys for XO Communications
2929 N. Central Ave., 21st Floor
3 PO Box 36379
Phoenix, AZ 85067-6379

4

5 Brian Thomas
Time Warner Telecom, Inc.
6 223 Taylor Avenue North
Seattle, WA 98109

7

8 Rex Knowles
XO
9 111 E. Broadway, Ste. 100
Salt Lake City, UT 84111

10

11 Bradley S. Carroll
COX COMMUNICATIONS
12 20402 North 29th Avenue
Phoenix, AZ 85027-3148

13

14 Scott Wakefield
Daniel Pozefsky
15 Linda Funkhouser
RESIDENTIAL UTILITY CONSUMER OFFICE
16 1110 W. Washington St., Suite 220
Phoenix, Arizona 85007

17

18 Cindy Manheim
Regulatory Counsel, AT&T Wireless
19 RTC-1
7277 164th Avenue NE
20 Redmond, VA 98052

21

22 Nextel Communications
Legal Division
23 2001 Edmund Halley Drive
Reston, VA 20191

24

25

26

- 1 Andrew O. Isar
TRI
- 2 4310 92nd Avenue, NW
Gig Harbor, WA 98335
- 3
- 4 Gregory Hoffman
AT&T Telecommunications
- 5 795 Folsom Street, Room 2159
San Francisco, CA 94107-1243
- 6
- 7 Nancy L. Davis
Verizon Wireless – Legal Department
- 8 15505 Sand Canyon Avenue
Irvine, CA 92618
- 9
- 10 T-Mobile USA, Inc.
Legal Department
- 11 12920 SE 38th Street
Bellevue, WA 98006
- 12
- 13 Brett D. Leopold
Sprint Corporation, Legal Department
- 14 6450 Sprint Parkway
Overland Park, KS 66251
- 15
- 16 Laurie Itkin
Leap Wireless/Cricket Communications
- 17 10307 Pacific Center Court
San Diego, CA 92121
- 18
- 19 Cingular Wireless
West Region Correspondence
- 20 PO Box 755
Atwater, CA 95301
- 21
- 22 Western Wireless Corporation
Legal Department
- 23 3650 131st Avenue SE Ste. 600
Bellevue, WA 98006
- 24
- 25
- 26

- 1 Amanda Nix
Western Wireless
- 2 2001 NW Sammamish Road
Issaquah, WA 98027
- 3
- 4 Beth Keiko Fujimoto
AT&T Wireless Services, Inc.
- 5 Legal Department
16331 NE 72nd Way, Bldg. 1
- 6 Redmond, WA 98052
- 7 Alltel Corporation
Legal Department
- 8 11025 Anderson Drive
Little Rock, AR 72212
- 9
- 10 Southwestern Telephone Company
PO Box 5158
- 11 Madison, WI 53705-0158
- 12 Mindy Kay
WilTel Communications
- 13 1 Technology Center
MD TC-7B
- 14 Tulsa, OK 74103
- 15 Wilshire Connection LLC
Manager of Regulatory Affairs
- 16 633 W. Street, 56th Floor
Los Angeles, CA 90071
- 17
- 18 Arizona Reporting Service, Inc.
2627 N. Third Street, Ste. 3
- 19 Phoenix, AZ 85004-1103
- 20 Scott McCoy
JENNINGS STROUSS & SALMON, PLC
- 21 201 E. Washington Street, 11th Floor
Phoenix, AZ 85004-2385
- 22
- 23 Michael W. Patten
ROSHKA, HEYMAN & DEWULF
- 24 One Arizona Center
400 E. Van Buren St., Ste. 800
- 25 Phoenix, AZ 85004
- 26

- 1 Thomas Campbell
Michael Hallam
2 LEWIS AND ROCA
40 N. Central Avenue
3 Phoenix, AZ 85004
- 4 Jon Poston
ACTS
5 6733 E. Dale Lane
Cave Creek, AZ 85331
6
- 7 Robert E. Kelly
ALLEGIANCE TELECOM OF ARIZONA, INC.
8 1919 M Street, NW, Suite 420
Washington, DC 20036
9
- 10 Jeffrey W. Crockett
SNELL & WILMER
11 One Arizona Center
Phoenix, AZ 85004-2202
12
- 13 Jennifer Martin
Teligent Services
14 Suite 100
460 Herndon Parkway
15 Herndon, VA 20170
- 16 Rosalind William
Talk America
17 Suite 130
12001 Science Drive
18 Orlando, FL 32826
- 19 Sharon Belcher
El Paso Networks
20 1001 Louisiana Street
Houston, TX 77002
21
- 22 Sheri Pringle
Comm South Companies
23 Suite 800
2909 N. Buckner Boulevard
24 Dallas, TX 75228
25
26

1 Cindy Manheim
AT&T Wireless
2 RTC-1
7277 - 164th Avenue, N.E.
3 Redmond, WA 98052

4
5 

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7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
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