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EXCEPTION ORIGINAL

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
**EXCEPTIONS TO PROPOSED
ORDER**

Qwest Corporation, Qwest Communications Corporation, and Qwest LD Corporation (collectively referred to herein as "Qwest" or "Qwest Companies") submit these exceptions to the Proposed Order ("Order") filed by Arizona Corporation Commission Staff ("Staff") on March 10, 2006, to be considered at the Commission's March 15-16, 2006 Open Meeting. The Order seeks to modify certain rules adopted by the Commission in Decision No. 68292 concerning the dissemination of individual customer proprietary network information (the "CPNI Rules"). Specifically, the Order would have the Commission now adopt a new rule (*i.e.*, A.A.C. R14-2-2108.I) that (1) makes clear and expands the violations of the speech rights of carriers and their customers already embodied in the CPNI Rules, and (2) is "substantially different from the proposed rule contained in the notice of proposed rule adoption filed with secretary of state" in violation of A.R.S. § 41-1025. The promulgation of the new A.A.C. R14-2-2108.I also does not comply with appropriate Commission and rulemaking

1 procedures. For the reasons set forth below, the Commission should reject the Order.

2
3 **ARGUMENT**

4
5 **A. Procedural Background**

6 This proceeding commenced in January 2002, some six years after the passage of
7 the federal Telecommunications Act of 1996, which established legal guidelines for the
8 use of both interstate and intrastate CPNI. On November 14, 2005, the Commission
9 adopted the CPNI Rules in Decision No. 68292, without any meaningful demonstration
10 that carriers were abusing CPNI in Arizona, or that the public was being harmed by the
11 absence of such rules. Moreover, the CPNI Rules were replete with substantial legal and
12 policy infirmities, which have been discussed at length in Qwest's prior filings made in
13 this docket. Qwest hereby incorporates those filings here by reference, as though fully
14 stated herein, as further grounds for rejection of the Order.

15 Ultimately, the Commission submitted the CPNI Rules to the Arizona Attorney
16 General for certification under A.R.S. § 41-1044. It appears from the face of the Order
17 that the Attorney General's Office has communicated in some fashion with the
18 Commission through its Staff concerning the lack of definitive standards relative to the
19 extension of time provisions in the CPNI Rules.¹

20 On January 23, 2006, at its regular monthly Staff meeting, counsel for Staff
21 reported meeting with the Attorney General's Office on January 19, 2006 concerning the
22 certification status of the CPNI Rules.² Staff advised that the Attorney General's Office

23 _____
24 ¹ Qwest is unable to locate any written communication from the Attorney General's Office to the
Commission or Staff concerning its concerns with the CPNI Rules, and the public docket does
not contain such.

25 ² The Order refers to Staff's regular monthly meeting as "Open Meetings." Although publicly
26 noticed, these meetings are not regular Commission Open Meetings. Rather, they are Staff
meetings noticed in the event that three or more of the Commissioners wish to attend and discuss

1 had identified six areas of concern with the CPNI Rules that would need to be addressed
2 prior to their certification. Although Staff would not identify all six issues outside of an
3 executive session, it did indicate that the Attorney General had issues with the lack of
4 standards in the CPNI Rules concerning the opt-in approval mechanism (*i.e.*, verification
5 regarding CPNI preference) and the provision governing extensions of time to comply
6 with the opt-in rule. Staff requested that the Commission direct Staff to make changes to
7 the CPNI Rules, changes with which Staff claimed the Attorney General had already
8 agreed and determined not to be substantive. Staff was directed to develop a report
9 outlining the proposed "non-substantive" changes.

10 As a result, Staff has developed an entirely new section of A.A.C. R14-2-2108,
11 specifically Subsection I attached to the Order. Such development was done without any
12 public Staff analysis or report, and without public notice and the opportunity for input
13 from stakeholders and other parties to this docket. The new Subsection I was instead
14 presented at the March 2006 monthly Staff meeting.³ Only after carriers objected was the
15 Order submitted and the matter scheduled for a Commission Open Meeting, albeit
16 without providing the requisite ten days for the filing of exceptions. *See* A.A.C.
17 R14-3-110.B.

18
19 **B. The Addition of A.A.C. R14-2-2108.I Constitutes A Substantial Change To**
20 **The CPNI Rules.**

21 A.R.S. § 41-1025.A provides that an agency shall not make a rule that is
22 "substantially different" from the proposed rule published in the notice of proposed rule
23 making or supplemental notice of proposed rule making. The agency must commence a
24 new rule making proceeding for the purpose of making a substantially different rule.

25 internal issues with Staff. They are not Open Meetings through which the Commission issues
26 final orders and decisions.

³ *See* n. 2 *supra*.

1 A.R.S. § 41-1025.A. Accordingly, there may be no certification of any final rule that
2 contains a “substantial change” from the proposed rule.

3 In determining whether a substantial change exists, the agency must consider the
4 following criteria to determine if the rule is substantially different:

5 1. The extent to which all persons affected by the rule should
6 have understood that the published proposed rule would affect their
7 interests.

8 2. The extent to which the subject matter of the rule or the issues
9 determined by that rule are different from the subject matter or issues
10 involved in the published proposed rule.

11 3. The extent to which the effects of the adopted rule differ from
12 the effects of the published proposed rule if it had been made instead.
13
14

15 A.R.S. § 41-1025.B. Certain principles are apparent from the statute. If the activities of
16 persons affected by the rule were not impacted by the original proposed rule, but are now
17 impacted by the modified rule, without prior notice, a substantial change exists. The
18 same is true if the effects between the original proposed rule and the later modification
19 vary. The new Subsection I both affects the activities of carriers under A.A.C.
20 R14-2-2108 and substantially impacts the rule’s ultimate effect.

21 In submitting the CPNI Rules for certification, the Commission correctly
22 acknowledged that an “opt-in approval process prior to release of CPNI is
23 unconstitutional.” Decision No. 68292, Appendix B at 10:1-6. Nevertheless, the
24 Commission relied upon A.A.C. R14-2-2108 as purportedly providing a procedure for
25 verification of a customer’s “opt-out” approval to use CPNI. For the reasons stated in
26 Qwest’s prior filings, this “opt-out” process is effectively the same as an “opt-in” regime

1 and should fail, being contrary to public interests and operating to withhold truthful and
2 beneficial information from consumers.

3 Notwithstanding the foregoing, however, the new Subsection I effectively creates
4 an additional roadblock to the establishment of any legitimate "opt-out" process. Under
5 Subsection I, before an applicant may receive any extension of the verification period for
6 obtaining a customer's opt-out approval, the carrier must use its "best efforts" (the
7 highest legal standard possible) to obtain customer verification of CPNI sharing
8 preference. The rule does not define what constitutes "best efforts." However, it makes
9 clear the severity of the burden to be born by the requesting carrier through an example of
10 what might constitute "best efforts," *e.g.*, a showing that the carrier has achieved
11 verification with respect to "a minimum of one-third of its customers." Subsection I
12 further requires that twice a year, a carrier contact each of the customers for whom it has
13 used an opt-out mechanism to verify the customer's CPNI sharing preferences. One of
14 these contacts must be made by phone in the customer's language preference. For a
15 company such as Qwest, such contacts could potentially involve over approximately **XX**
16 customers in Arizona. The carrier must also file a compliance plan for achieving
17 verification for *all* of its remaining customers. The rule does not identify the
18 requirements for such a plan, but provides that it must "demonstrate" the additional time
19 the carrier is requesting is no longer than which is "reasonably necessary."

20 The effect of Subsection I is the creation of new and still vague criteria for how a
21 carrier must conduct the entire verification process under A.A.C. 14-2-2108. If adopted,
22 a company would have to design from the start its verification process to comply with the
23 requirements of any future request for an extension, even if the extension related to an
24 individual or a *de minimus* amount of customers. Under the original A.A.C.
25 R14-2-2108(A) through (E), a single verification might have been obtained through a
26 number of less costly means, such as written or electronic methods. As a practical

1 matter, Subsection I eliminates these options, replacing it with multiple telephone
2 contacts with not only the non-responsive customer(s) for whom an extension was
3 sought, but for at least one-third of the carrier's remaining customers. It further imposes
4 an undefined compliance plan that most likely will result in the imposition of additional
5 regulatory review and conditions.⁴ As a result, the requirements of Subsection I (the
6 purpose of which is purportedly to allow carriers an extension of time to comply with
7 something they could not achieve in the first place) impose additional and excessive costs
8 and burdens on carriers, exceeding any reasonable expectation of what a carrier should
9 have to demonstrate to obtain such an extension. Its effect is to create a roadblock that
10 makes the implementation of any opt-out procedure by a carrier economically non-viable.

11
12 **C. The Development of A.A.C. R14-2-2108 Does Not Comport With Appropriate**
13 **Rule Making And Commission Procedure.**

14 Throughout these proceedings, telecommunications carriers have clearly and
15 openly argued that the rules violate the speech rights of customers and carriers, lack
16 clarity, are not concise and understandable, and were promulgated without lawful
17 authority. Even carrier correspondence to the Attorney General's Office relative to the
18 certification process of these rules was copied to the Commission. Carriers have
19 preserved their rights to appeal the promulgation of these rules through the public filing
20 of applications for rehearing.

21 _____
22 ⁴ Qwest has previously submitted with its filed comments in this docket the results of a CPNI
23 affirmative approval study and the First Amendment analysis conducted by Professor Laurence
24 H. Tribe, both of which were filed with the FCC. See Attachments to Qwest Corporation's
25 Notice of Filing CPNI Comments, filed March 29, 2002, and to Qwest Corporation's Notice of
26 Filing Reply Comments Re: CPNI, filed April 29, 2002. Both the trial study and Tribe analysis
make clear that oral approval methodologies, such as the one proposed in the new Subsection I,
are extremely labor-intensive, expensive, and ineffective (if not impossible to secure in large
numbers). *Id.* Customers do not respond to such calls (*e.g.*, hang ups, screen and do not answer,
etc.), often viewing them as a form of solicitation. *Id.*

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