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OPEN MEETING AGENDA ITEM

BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

JEFF HATCH-MILLER, Chairman  
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IN THE MATTER OF  
DISSEMINATION OF INDIVIDUAL  
CUSTOMER PROPRIETARY  
NETWORK INFORMATION BY  
TELECOMMUNICATIONS CARRIERS

DOCKET NO: RT-00000J-02-0066

**VERIZON CALIFORNIA, INC.'S  
COMMENTS TO STAFF'S PROPOSED ORDER**

Verizon California, Inc. files these comments in response to Arizona Corporation Commission Staff's Proposed Order filed in this docket on March 10, 2006.

The addition of newly crafted "standards" for determining when the Commission may, at its discretion, grant a temporary "extension of the verification time period," R14-2-2108(A), does nothing to save the adopted rules from violating the First Amendment. On the contrary, the proposed "standards" actually highlight the nature and magnitude of the adopted rules' restriction on carrier and customer speech.

*First*, as Verizon explained at length in its Application for Rehearing, the "verification" provision of the adopted rules functions as a delayed "opt in" requirement. See Application for Rehearing of Decision 68292 of Verizon California Inc. ("Verizon's Reh'g Application") at 1-3, 5-8. As such, it cannot withstand scrutiny under the First Amendment. See *id.* at 1-3, 5-19; *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999) (invalidating the FCC's opt-in requirement under the First Amendment); *Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003) (invalidating Washington's opt-in requirement under the First Amendment). The fact that a carrier could theoretically obtain an *extension* for obtaining such verification at most *delays* the

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1 effective opt-in requirement. It does not eliminate or alter it in any substantive way that  
2 would alleviate the fundamental First Amendment problems—including, that it places an  
3 affirmative burden on those desiring speech before they can continue to receive such  
4 speech. *See* Verizon’s Reh’g Application at 5-19; *Project 80’s, Inc. v. City of Pocatello*,  
5 942 F.2d 635, 639 (9th Cir. 1991) (“The government’s imposition of affirmative  
6 obligations on the residents’ first amendment rights to receive speech is not  
7 permissible.”).

8 *Second*, just as the one-year delay of the opt-in requirement demonstrates that  
9 there is no substantial government interest in requiring opt-in *at any point*, *see* Verizon’s  
10 Reh’g Application at 2-3, 12-13, the further delay contemplated by an extension, or  
11 successive extensions, of the verification period only further highlights the lack of any  
12 genuine and substantial harm sought to be alleviated through these rules. In this way,  
13 the adopted rules are even more suspect than those that have been struck down by the  
14 federal courts and cannot survive scrutiny under the “substantial governmental interest”  
15 prong of the *Central Hudson* test. *Id.*

16 *Third*, the rigorous nature of the proposed “standards” means that, in practice, no  
17 carrier will be able to obtain an extension of the verification period. (This presumes that  
18 a carrier would undertake a verification campaign in the first instance. *See id.* at 6-7.)  
19 Even assuming *arguendo* that a carrier could meet the “one-third” or other “best efforts”  
20 threshold (standard (1)), most carriers would not be able to satisfy the additional steps  
21 mandated by the “standards” (standards (2) & (3)). Indeed, it is precisely because  
22 obtaining even a small number of affirmative opt-in consents requires numerous time-  
23 intensive, expensive, intrusive, and potentially confusing follow-up contacts that carriers  
24 will be deterred from engaging in a “verification” or opt-in campaign in the first  
25 instance. This is because a delayed opt-in campaign will only succeed in annoying,  
26 frustrating, and confusing customers who desire to receive CPNI-based speech but  
27 believed their consent was already manifested through opt out and do not understand  
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1 why they must take affirmative steps to receive such speech. The proposed “standards”  
2 thus highlight the very reasons why an opt-in regime, even one with a delay, operates as  
3 an effective ban on CPNI-based speech.

4 *Finally*, far from providing much-needed clarity in the rules, the proposed  
5 “standards” are sufficiently ambiguous and vague to compound the First Amendment  
6 problems and exacerbate due process problems raised by the rules. *See, e.g., Bullfrog*  
7 *Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1996) (Because “the guarantees of the  
8 First Amendment are at stake, the Court [must] appl[y] its vagueness analysis strictly.”);  
9 *accord Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also* Arizona  
10 Wireless Carriers Group’s Application for Rehearing of Decision No. 68292 at 7  
11 (outlining ways in which the adopted rules are unclear and confusing). For example, (i)  
12 there is no definition of “best efforts”; (ii) it is not at all clear what other means, in  
13 addition to the one-third consent threshold, could satisfy the “best efforts” requirement;  
14 (iii) it is unclear whether both contacts described in standard (2) must be *in addition to*  
15 the initial opt-out and verification notice; and (iv) there is no explanation as to whether  
16 “technically feasible” means *currently* or *potentially* so. The fact that these vague  
17 “standards” are being considered after the rules were adopted only amplifies the  
18 problems already present; carriers cannot be expected to make robust speech decisions  
19 where they are subject to the “fickle iterations” of the Commission’s post-hoc  
20 interpretations and “clarifications.” *Conant v. McCaffrey*, 172 F.R.D. 681, 696 (N.D.  
21 Cal. 1997) (holding that plaintiffs “raised at least serious questions as to whether the  
22 government’s policy [wa]s unconstitutionally vague” where the government “purported  
23 to ‘clarify’ the reach of its policy” but did so unsuccessfully).<sup>1</sup>

24 For all of these reasons, the adopted rules, even with the addition of the proposed  
25 “standards,” cannot survive constitutional scrutiny.

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27 <sup>1</sup> Also, Verizon agrees with other carriers that the proposed changes to the rule are substantial  
28 and therefore cannot be adopted subject to formal rulemaking requirements.

1 RESPECTFULLY SUBMITTED this 14th day of March, 2006.

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