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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

AZ CORP COMMISSION
DOCUMENT CONTROL

Arizona Corporation Commission

DOCKETED

JOHN T. WHEATLEY,

AUG 28 2002

DOCKET NO. T-01051B-02-0001

Complainant,

vs.

DOCKETED BY 

**QWEST COPORATION'S
CLOSING BRIEF**

QWEST CORPORATION,

Respondent.

Qwest Corporation ("Qwest") submits the following closing brief at the request of Complainant John T. Wheatley. On July 17, 2002, the Arizona Corporation Commission ("Commission") held a hearing in the above captioned docket to determine whether Mr. Wheatley owes Qwest \$971.76 for telecommunication services rendered from July 2001 to present, which includes his August 4, 2002 bill. These charges include \$590.77 of regulated and unregulated local services and late payment fees, and \$380.99 for wireless services charged by Qwest Wireless, L.L.C., including late payment fees.

Qwest worked with Mr. Wheatley on almost a daily basis, as he demonstrated at hearing through his witness Ms. McCants. He had a direct line to a Qwest representative who was willing and able to help him with any problems he had with the actual provision of service or otherwise. Throughout this time, Qwest offered to credit his account and return Mr. Wheatley's features to what they were prior to ordering the Everywhere Line - all were refused.

Mr. Wheatley has produced no evidence to show that Qwest violated any statute, rule or tariff. He has produced no evidence that his bills or charges were incorrect, and he has produced no evidence (or even asserted) that he did not order the Everywhere Line package of services that

1 is the subject of this complaint. Mr. Wheatley was offered a package of services. He accepted
2 the offer. When parts of that service were found incompatible, which apparently was manifested
3 in the absence of a warning ring for his call forwarding feature not a loss of service and not any
4 lost calls, Qwest thoroughly researched the problem and fixed it.¹ Qwest offered to credit him
5 for more than one month's worth of charges for the entire package of services (\$100 for the
6 \$54.95 in services). He refused the offer. Qwest then offered to credit Mr. Wheatley for all
7 charges incurred during the entire first month after he ordered the package of services (\$150.00
8 for \$143.87 of services). He refused this offer twice. Mr. Wheatley could have gotten all of his
9 money back for these services.² Instead he filed this complaint, and, eight month's worth of
10 litigation ensued.³

11 This Commission should find in favor of Qwest and order Mr. Wheatley to pay \$590.77 to
12 Qwest for regulated and unregulated local telecommunication services rendered plus all
13 associated late payment fees due immediately upon issuance of a final Decision in this
14 proceeding.

15 **I. SUMMARY OF COMPLAINTS**

16 The nature of Mr. Wheatley's complaint has been evolving ever since he filed his initial
17 complaint. As a result, Qwest responds to only those issues raised at hearing. At hearing, Mr.
18 Wheatley summarized his complaints as follows: (A) Certain features of the CUSTOMCHOICE
19 portion of his Everywhere Line for Business package ("Everywhere Line") were not working
20 properly from approximately July 25, 2001 when he first contacted Qwest to August 4, 2001

21 _____
22 ¹ Fixing the problem was no easy task. Mr. Wheatley had placed so many features and had so many change orders
23 placed on his service that the problem could not be readily identified or explained by Mr. Wheatley as Qwest's
24 records indicate.

25 ² Throughout this time, Qwest offered to return Mr. Wheatley's features to what they were prior to ordering the
26 Everywhere Line. This would have included disconnecting his wireless service, as Mr. Wheatley admitted he would
have done had Qwest offered the \$150 back in August as opposed to November during arbitration.

³ Qwest is still unsure what exactly Mr. Wheatley wants done with his service or what he wants period. If he does
not want his service changed, which he told Qwest representatives on many occasions, or does not want his money
back, which he testified to at trial and demonstrated in refusing all of Qwest's offers of credit, Qwest is at a loss as to
what else it can do for Mr. Wheatley.

1 when, according to Qwest's records, the problem was rectified; (B) Qwest gave him a credit of
2 \$3.00 for an additional feature, scheduled greetings, in his July 2001 bill, which he claims is
3 inconsistent with information he received from Qwest regarding this feature; and (C) Qwest has
4 violated A.R.S § 44-1574, which requires "ancillary service providers" to receive authorization
5 from a customer before adding non-telecommunication goods or services, all of which were
6 authorized by Mr. Wheatley, and none of which apply to Qwest or the services at issue in Mr.
7 Wheatley's complaint.

8 **II. QWEST DID NOT VIOLATE ANY TARIFF, RULE OR STATUTE IN ITS**
9 **PROVISION OF LOCAL TELECOMMUNICATION SERVICES TO**
10 **WHEATLEY.**

11 **A. Mr. Wheatley Ordered And Qwest Corrected Incompatible Features With**
12 **His Customchoice Package Of Features.**

13 The genesis of Mr. Wheatley's complaint is local telecommunication service features that
14 he ordered as part of his Everywhere Line for Business package ("Everywhere Line"). Qwest's
15 Everywhere Line is a marketing package of regulated and unregulated services that includes the
16 CUSTOMCHOICE⁴ package of features and wireless service at a discounted rate. One of the
17 features available under CUSTOMCHOICE is a call forwarding feature that allows a customer to
18 forward business calls from a landline number to a wireless number when properly activated.

19 On or about July 25, 2001, Mr. Wheatley contacted Qwest complaining that he was not
20 receiving a warning ring on his landline phone prior to the call being forwarded to his wireless
21 phone. After researching the problem, Qwest discovered that the call forwarding feature was not
22 compatible with the call transfer feature, another feature requested by Mr. Wheatley as part of the
23 CUSTOMCHOICE package. Qwest subsequently removed the call transfer feature on August 7,
24 2001. See Testimony of Midge McCants, 7/17/02 Transcripts at 91:16-20; 101:13-102:1-10.
25 This removal resolved the warning ring issue. Shortly thereafter on August 11, Mr. Wheatley

26 ⁴ The regulated service, CUSTOMCHOICE, allows the customer to choose from 24 individual features when available. See Qwest's Exchange and Network Service Price Cap Tariff, 5.9.1(E), for full list of features.

1 testified that he continued contacting Qwest about problems with his service.⁵ He continued to
2 speak with Qwest's representative, Ms. Midge McCants, directly regarding ongoing problems on
3 what seemed to be a daily basis. See 7/17/02 Transcripts at 93:6-8, 18-24; 95:3-8. Regardless of
4 the particular problem, it was fully resolved, according to Mr. Wheatley, on August 11, 2002. Id.
5 at 168:21-169:6; 104:2-10. During this entire time, Mr. Wheatley had a dial tone and was out of
6 service for maybe one hour. Id. at 102:16-22.

7 After resolving this complaint, Mr. Wheatley demanded his account be zeroed out and his
8 service returned to what it was before he ordered the Everywhere Line package of services. At
9 that time, Qwest offered to credit him \$100 dollars for services relating to the Everywhere Line
10 package features during the month that the Everywhere Line package was in place. (The total
11 charges for the month during which he first received the service was \$143.87, which included
12 basic service in addition to the Everywhere Line package.) As testified to at the March 6, 2002
13 procedural conference and at trial, Mr. Wheatley refused the offer and refused to allow Qwest to
14 make any additional changes to his service, including disconnection of his wireless service. Thus,
15 Mr. Wheatley continued to receive these services and incurred charges in the amount of \$380.99,
16 including all late fees. See Trial Exhibit C-7; 7/17/02 Transcripts at 187:3-188:16; 191:25-192:7.

17 On November 7, 2001, the Commission handled Mr. Wheatley's complaint as an
18 arbitration matter in accordance with A.A.C. R14-2-212. At this arbitration hearing, Qwest
19 offered to credit him an additional \$50 for a total of \$150 toward his \$143.87 bill. The nature of
20 relief sought by Mr. Wheatley did not include deactivation of his wireless service. Complainant

21 _____
22 ⁵ It is unclear from his testimony at hearing or the testimony of Wheatley's witness, Midge McCants, with whom he
23 spoke regarding his repair issues, what exactly was wrong with this service. Wheatley claims that he had problems
24 with his One Number service that automatically forwards between the landline, wireless line and voice mail. The One
25 Number service is not part of Qwest's CUSTOMCHOICE package. His testimony, however, indicates that the
26 problem with the call forwarding, as set forth above, was the same problem he claims he had with the One Number
service. Moreover, whether or not the "problem" was the same call forwarding problem, it did not result in him
losing any calls. See 7/17/02 Transcripts at 162:1-164:3; 168:21-169:6. Further, there was no Qwest repair ticket for
this alleged problem. Thus, it is difficult to tell exactly what transpired between August 7 and August 11. Id. at 98;
103:1-15; see also Id. at 204:6-9 ("The basis of my complaint was the Everywhere Line service, and the features on it
were malfunctioning and not compatible with each other.").

1 also refused this offer. See 7/17/02 Transcripts at 188:17-189:13. The arbitrator found, among
2 other things, that “Qwest did not violate the provisions of the Service Quality Plan Tariff or
3 Commission rules.” (The arbitrator’s decision is attached as Exhibit A to Qwest Answer.)

4 Qwest acted reasonably, did not violate any tariff or rule in Arizona, and was under no
5 obligation to credit Mr. Wheatley’s account, although it made several offers to do so. As a result,
6 Mr. Wheatley is entitled to nothing based on his complaint regarding incompatible features.

7 **B. Wheatley’s Complaints Regarding Scheduled Greetings Have No Basis**
8 **Whatsoever.**

9 At hearing, Mr. Wheatley claimed that Qwest incorrectly represented the cost of his
10 scheduled greetings feature, which is not offered as one of the features available under Qwest’s
11 CUSTOMCHOICE package. See 7/17/02 Transcripts at 172:20-174:8. The scheduled greetings
12 feature is a tariffed feature that costs \$3.00 per month. Mr. Wheatley does not dispute that he
13 ordered it only that he was given incorrect information from Qwest about its cost because he
14 received a \$3.00 credit on his July 2001 bill. Id. See also Exhibit B-1 to the Complaint.

15 Qwest provided Mr. Wheatley with a \$3.00 credit in July as part of a promotion for 30
16 days of free scheduled greetings that was offered to him in June. Subsequent to July 2001, Mr.
17 Wheatley continued utilizing the scheduled greetings feature at \$3.00 per month and did not
18 remove it until March 12, 2002. See 7/17/02 Transcripts at 174:11-175:13. Mr. Wheatley
19 presents no actionable claim whatsoever, and again, should be ordered to pay for this feature and
20 the other features and services he used throughout this time period up until final resolution of this
21 complaint.

22 **III. WHEATLEY’S ASSERTIONS THAT QWEST VIOLATED A.R.S. § 44-1574**
23 **LACK ANY BASIS.**

24 In his initial complaint and during the July 17, 2002 hearing, Complainant alleged that
25 Qwest violated A.R.S. § 44-1574. Mr. Wheatley’s apparent basis for this allegation was that
26 Qwest provided ancillary services, such as text messaging through wireless service, and therefore
it was an “ancillary service provider” pursuant to A.R.S. § 44-1571. According to Mr. Wheatley,

1 because Qwest was an ancillary service provider subject to A.R.S. § 44-1574, it violated the
2 statute when it sent a letter confirming his order that contained some print that was not in at least
3 ten-point bold type. Complainant's theory lacks factual and legal basis.

4 **A. The Arizona Corporation Commission Lacks Jurisdiction To Act Under**
5 **A.R.S. § 44-1574.**

6 The plain language of the statute and analogous statutes indicate that the Commission
7 does not have jurisdiction to act under A.R.S. § 44-1574 (hereinafter referred to as § 44-1574).
8 Section 44-1574 is contained in Article 10 of Title 44 of the Arizona Revised Statutes entitled
9 "Unlawful Practices in Telecommunications and Ancillary Services" and consists of §§ 44-1571
10 to 44-1574. Sections 44-1572 and 44-1573 pertain specifically to local and long-distance
11 telecommunications service providers respectively and include provisions regarding unauthorized
12 changes or additions to consumer telecommunication services. On the other hand, § 44-1574
13 relates specifically to "ancillary service providers" and includes provisions regarding
14 unauthorized changes or additions of goods and services (non-telecommunication services) to a
15 consumer's telecommunications bill.

16 Sections 44-1572 and 44-1573 specifically grant the Commission authority to act. See
17 A.R.S. §§ 1572(B), (I), (L) and 1573(H), (K). In contrast, the legislature did not grant the
18 Commission any power under § 44-1574. Rather, § 44-1574 grants the attorney general, not the
19 Commission, the authority to investigate any violation of the section and take any appropriate
20 action. See A.R.S. § 44-1574(F).⁶ The plain language of these statutes makes clear that if the
21 legislature had wanted the Commission to have rulemaking and enforcement authority under §
22 44-1574, it would have granted such authority as it did under Sections 44-1572 and 1573.
23 Therefore, assuming arguendo that the statute applies to Qwest, the Commission does not have
24 authority to enforce § 44-1574 or issue rules implementing § 44-1574. If Complainant's actual

25 ⁶ Any violation of the section is an unlawful act or practice pursuant to § 44-1522 et. seq., Arizona's consumer fraud
26 statutes, whereby the attorney general has specific jurisdiction to investigate and prosecute alleged violations. See
A.R.S. §§ 44-1574(F) and 44-1526.

1 basis for his complaint is § 44-1574, Complainant should have filed a complaint with the Arizona
2 attorney general's office, rather than the Commission.

3 **B. Qwest Corporation is Not an Ancillary Service Provider Subject to § 44-1574.**

4 Mr. Wheatley contends that Qwest is an "ancillary service provider" and as such is subject
5 to § 44-1574. His interpretation, however, is incorrect. An ancillary service provider is defined
6 as "any person that provides goods or services other than, or in addition to, telecommunications
7 services to consumers and bills consumers through a long-distance telecommunications service
8 provider or local telecommunications service provider." A.R.S. § 44-1571(1) (emphasis added).

9 A "local telecommunications service provider" is defined as

10 any individual, firm, joint venture, partnership, corporation,
11 association, public utility, cooperative association or joint stock
12 association, including any trustee, receiver, assignee or
13 representative other than a provider of wireless, cellular, personal
communication or commercial radio services, that offers for sale
intrastate, interlata or intralata toll telecommunications service to
an end-use customer.

14 A.R.S. § 44-1571(3) (emphasis added). Qwest, by definition and pursuant to its certificate of
15 convenience and necessity, is a "local telecommunications service provider."⁷

16 Moreover, the § 44-1574 specifically does not apply to local telecommunication service
17 providers regulated by the Commission, such as Qwest, and no evidence has been introduced
18 indicating that Qwest knew that an ancillary or information provider had placed unauthorized
19 services on Wheatley's phone bill, in large part because Mr. Wheatley authorized the services he
20 ordered. See A.R.S. § 44-1574(C).

21
22
23 ⁷ Further, the language of § 44-1571(1) and (3) and § 44-1574, applying only to ancillary service providers,
24 indicates that the types of providers are mutually exclusive, i.e., Qwest falls within either one or the other definition,
25 but not both. For instance, an "ancillary service provider," as defined, must bill through either a long-distance or local
26 telecommunications service provider; thus, by implication, an ancillary service provider cannot be either a local or
long-distance service provider. Additionally, § 44-1574, as mentioned above, expressly excludes from liability local
telecommunications service providers regulated by the Commission that provide billing services, such as Qwest.
Qwest is Mr. Wheatley's local telecommunications service provider and is not and could not also be acting as his
ancillary service provider under § 44-1574 or otherwise.

1 C. Even If Mr. Wheatley's Wireless Services Fit The Definition Of Ancillary
2 Services, § 44-1574 Does Not Apply To Qwest.

3 The only charges Qwest billed to Mr. Wheatley that might be considered as goods and
4 services provided for by an ancillary service provider are for his wireless services. Qwest,
5 however, is not the provider of those services; Qwest Wireless, L.L.C. is the provider of those
6 services.⁸ Therefore, even assuming certain wireless services are "ancillary services," Qwest
7 Wireless, L.L.C. would be the ancillary service provider subject to § 44-1574. Qwest merely
8 provides the billing services for the wireless services and, thus, is specifically exempt under the
9 plain language of the statute. See A.R.S. § 44-1574(C).

10 Qwest has repeatedly asserted that it is not the party to which Mr. Wheatley should bring
11 complaints about his wireless service. See Qwest's Motion to Dismiss attached hereto and
12 incorporated herein as Exhibit A. First, wireless charges and credits are outside the jurisdiction
13 of the Commission. Second, Qwest is the billing agent, not the provider of the wireless services.
14 Third, Mr. Wheatley's problems with the call forwarding and call transfer features are wireline
15 not wireless issues. Call forwarding and call transfer are Qwest local telecommunication services
16 that are tariffed features in the state of Arizona. See Qwest's Exchange and Network Service
17 Price Cap Tariff, 5.9.1(E); see also 7/17/02 Transcript at 100:1-8; 162:22-23. Finally, Mr.
18 Wheatley himself stated "the issue is whether Qwest cellular or not was an ancillary service
19 provider and/or is an ancillary service provider and whether it comes under the law...." See
20 7/17/02 Transcripts at 151:12-152:2; 194:2-5. If the issue is Qwest "cellular" then Mr. Wheatley
21 has taken his complaint to the wrong body against the wrong company.

22 Mr. Wheatley has presented no evidence indicating that he failed to authorize any of the

23 ⁸ Mr. Wheatley continues to rely on the fact that Qwest Wireless, L.L.C. provides text messaging as an information
24 service, and thus is considered an ancillary service provider under Title 44. See 7/17/02 Transcripts at 151:14-152:3.
25 Even if that were true: (1) Wheatley has never ordered or ever received text messaging; (2) text messaging is not part
26 of the CUSTOMCHOICE or wireless portions of Qwest's Everywhere Line package; and (3) Qwest Wireless, L.L.C.
would be the proper party for which to file a complaint against. Under Mr. Wheatley's logic, if Qwest Wireless,
L.L.C. is an ancillary service provider, he needs to file a complaint against it. Qwest Corporation, the respondent in
this complaint, is the billing agent for Qwest Wireless, L.L.C., and therefore is specifically exempt from § 44-1574
pursuant to its own terms.

1 services Qwest provided him. In fact, Mr. Wheatley admits that he ordered and authorized his
2 wireless services in the first place, making the entire application of Article 10, Title 44 moot.⁹
3 See 184:23-185:1. Mr. Wheatley would have the Commission, without jurisdiction, broadly
4 apply § 44-1574 to situations where the customer authorized changes to its telecommunications
5 service, problems were discovered, and the customer requested a refund of charges, which the
6 provider offered and the customer subsequently refused. This is an improper interpretation and
7 application of § 44-1574. Mr. Wheatley has not alleged that Qwest charged him for services he
8 did not authorize; rather, Mr. Wheatley has complained about the charges for services he did
9 request and authorize. Therefore, the statute he relies on does not and cannot apply.

10 **IV. CONCLUSION**

11 Qwest worked with Mr. Wheatley on almost a daily basis, as he demonstrated at hearing
12 through his witness Ms. McCants. He had a direct line to a Qwest representative who was willing
13 and able to help him with any problems he had with the actual provision of service or otherwise.
14 Throughout this time, Qwest offered to credit his account and return Mr. Wheatley's features to
15 what they were prior to ordering the Everywhere Line – all were refused.

16 Mr. Wheatley has offered no evidence that Qwest violated any tariff, rule, or statute.
17 Rather, Mr. Wheatley has expressed frustration with ordering services that did not or could not
18 work as he had hoped. The services to which the credits would have been applied are Qwest local
19 telecommunication services that are filed as part of Qwest's tariff in Arizona. They are not
20 wireless features, and they are not "ancillary" or non-telecommunication services as described by
21 Mr. Wheatley. As such, the Commission has no jurisdiction to refund or order credits to Mr.

22 ⁹ Exhibit C-6 is not a "written authorization agreement" subject to § 44-1574. Rather it is a confirmation letter sent
23 by Qwest to Mr. Wheatley after he ordered the Everywhere Line package. The terms and conditions that Mr.
24 Wheatley uses to demonstrate 10 point pica is virtually identical to the terms and conditions set forth in the
25 advertisement that Mr. Wheatley says induced him to order the Everywhere Line package. See Exhibit A-1 to the
26 Complaint. Moreover, the "terms and conditions" Mr. Wheatley refers to as being smaller than 10 point bold do not
add or change anything. The language is just that – "terms and conditions" of services ordered by Mr. Wheatley,
which, despite his protestations to the contrary are almost identical to the "terms and conditions" set forth in Qwest's
advertisement regarding this package that apparently "induced" him into ordering it in the first place. See 7/17/02
Transcripts 156:6-10; Exhibits A-1 to Complaint and C-6.

1 Wheatley's wireless account nor does it have jurisdiction to act under A.R.S. § 44-1574.
2 Moreover, Mr. Wheatley specifically requested these features and services. He even asked Qwest
3 to replace them throughout this complaint process.

4 Qwest respectfully asks this Commission order Mr. Wheatley to pay his bill for services
5 rendered in the amount of \$590.77 through his August 4, 2002 bill.

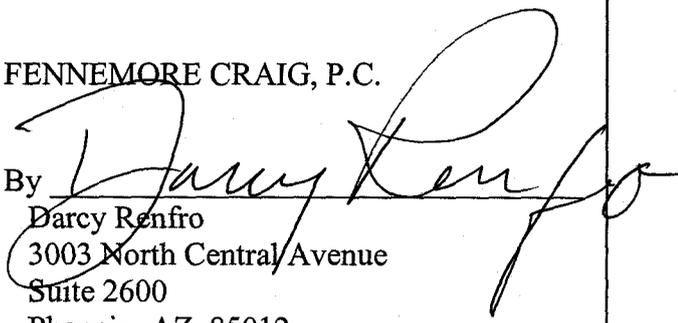
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7 DATED this 28th day of August, 2002.

8

FENNEMORE CRAIG, P.C.

9

By 
Darcy Renfro
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012
Attorneys for Qwest Corporation

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of the foregoing hand-delivered this
28th day of August, 2002, to:

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

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COPY of the foregoing mailed this
28th day of August, 2002, to:

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John Wheatley
5201 North Davis Avenue
Tucson, AZ 85705

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EXHIBIT A

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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

JOHN T. WHEATLEY,
Complainant,
vs.
QWEST CORPORATION,
Respondent

DOCKET NO. T-01051B-02-000
QWEST'S MOTION TO DISMISS

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Qwest Corporation ("Qwest") moves the Arizona Corporation Commission ("Commission") to dismiss all claims relating to wireless charges in the above-captioned complaint pursuant to 47 U.S.C. § 332(c)(3) of the Federal Communications Act ("Act") for lack of jurisdiction. Qwest further moves that the remaining allegations in the complaint be dismissed with prejudice pursuant to Rule 41(b) of the Arizona Rules of Civil Procedure for Complainant's failure to prosecute claims against Qwest and for failure to adhere to Commission orders.

I. COMPLAINANT'S WIRELESS CLAIMS MUST BE DISMISSED FOR LACK OF JURISDICTION

Complainant, Mr. Wheatley, filed a claim against Qwest with the Commission on January 2, 2002. The claim alleges that Mr. Wheatley deserves credit adjustments to his account for problems relating to a feature ordered as part of his Everywhere Line for

1 Business package ("Everywhere Line"). Qwest's Everywhere Line is
2 a marketing package of regulated and unregulated services that
3 includes the CustomChoice package and wireless service at a
4 discounted rate. The regulated service, CustomChoice, allows the
5 customer to choose from 24 individual features when available.
6 See Qwest's Exchange and Network Service Price Cap Tariff,
7 5.9.1(E), for full list of features. One of the features
8 available under CustomChoice is a call forwarding feature that
9 allows a customer's business calls to automatically forward from
10 the landline number to a wireless number.¹

11 On or about August 5 2001, Mr. Wheatley contacted Qwest
12 complaining that he was not receiving a warning ring on his
13 landline phone prior to the call being forwarded to his wireless
14 phone.² After researching the problem, Qwest discovered that the
15 call forwarding feature was not compatible with the call transfer
16 feature, another feature requested by Mr. Wheatley as part of the
17 CustomChoice package. Qwest subsequently removed the call
18 transfer feature.

19 _____
20 ¹ Qwest has available several call forwarding features, including one that
21 allows calls to forward directly to voice mail. Mr. Wheatley has never
22 requested this call forwarding feature prior to disconnection of his cellular
23 service.

24 ² Prior to this complaint, Mr. Wheatley had complained that his custom ring
25 number was not working after he separately ordered a security screen feature.
26 Although custom ring is one of the 24 features available under CustomChoice,
Mr. Wheatley ordered custom ring in May 2001, prior to ordering the Everywhere
Line package of services. The security screen feature is not one of the
features available under CustomChoice and was also ordered prior to Mr.
Wheatley requesting the Everywhere Service package. After researching the
problem, Qwest discovered that due to limitations in Mr. Wheatley's DMS100
switch, the security screen and custom ring features were incompatible and
removed the security screen.

1 After resolving this complaint, Mr. Wheatley demanded his
2 account be zeroed out and his service returned to what it was
3 before he ordered the Everywhere Line package of services. At
4 that time, Qwest offered to credit him \$100 dollars for services
5 relating to the Everywhere Line package features during the month
6 that the Everywhere Line package was in place.³ As testified to
7 at the March 6, 2002 procedural conference in this matter, Mr.
8 Wheatley refused to allow Qwest to make any additional changes to
9 his service, including disconnection of his wireless service.
10 Thus, Mr. Wheatley continued to receive wireless service and
11 incurred charges in the amount of \$358.96, including all late
12 fees associated with the wireless service.⁴

13 The call forwarding and call transfer features at issue in
14 Mr. Wheatley's complaints regarding the Everywhere Line package
15 are tariffed features in Arizona that are part of Qwest's
16 Customchoice offering for landline service. These features have
17 nothing to do with his unregulated wireless package of discounted
18 minutes and handsets. As such, the \$358.96 in wireless charges,
19 now bifurcated from Mr. Wheatley's Qwest account at his request,
20 should not be part of this complaint and must be paid in full.
21 This Commission has no jurisdiction over Mr. Wheatley's claims
22 for credit of wireless charges. Therefore, those claims should be

23 ³ Qwest subsequently offered to credit the entire month's charges in the
24 amount of \$143.47; then at arbitration offered \$150 in credit and subsequently
25 offered to waive the \$200 deactivation fee for Mr. Wheatley's wireless
26 service. Mr. Wheatley has continuously refused these offers.

⁴ Mr. Wheatley finally agreed to disconnect his wireless service during the
March 6, 2002 procedural conference. The wireless charges have now been
bifurcated from all other Qwest charges as requested by Mr. Wheatley.

1 dismissed.

2 A. Federal Law Preempts State Regulation Efforts Over
3 Wireless Rates

4 Qwest's charges in dispute relate to Mr. Wheatley's landline
5 features, not his wireless features. Moreover, the Commission
6 does not have jurisdiction to over Mr. Wheatley's wireless
7 claims, and, therefore, those claims must be dismissed. The
8 Federal Communications Commission ("F.C.C."), and not the
9 Commission, has jurisdiction pursuant to the Federal
10 Communications Act (the "Act"). See 47 U.S.C. § 332(c)(3)(A).

11 The rates charged by wireless providers fall under the
12 exclusive jurisdiction of federal regulators. See 47 U.S.C.
13 § 332(c)(3)(A). Under the doctrine of preemption, federal law
14 preempts state law if the federal statute expresses a clear
15 intent to do so. See U.S. Const. Art. VI, cl. 2; see also Dillon
16 v. Zeneca Corp., 202 Ariz. 167, 170, 42 P.3d 598, 601 (App.
17 2002); State v. McMurry, 184 Ariz. 447, 449, 909 P.2d 1084, 1086
18 (App. 1995). Section 332 of the Act states, in part, "[n]o State
19 or local government shall have any authority to regulate the
20 entry of or the rates charged by any commercial mobile service..."
21 See 47 U.S.C. § 332(c)(3)(A). Clearly, the Federal government
22 has exerted jurisdiction over wireless rates. Therefore, if the
23 Commission accepts Mr. Wheatley's arguments that he deserves
24 credits to his account based on wireless service problems, then
25 under the Act, the F.C.C. has jurisdiction to hear his
26 complaints, not this Commission.

1 B. Federal Preemption Applies Since Mr. Wheatley's Claims
2 Fall Under the Category of Wireless Rates.

3 Mr. Wheatley asks the Commission to compel Qwest to credit
4 his account for wireless service charges. If Mr. Wheatley
5 believes, which he has yet to provide any evidentiary basis for,
6 that he should not have to pay for wireless services rendered
7 from July 2001 to March 2001, Mr. Wheatley is asking the
8 Commission to determine whether the rates charged for these
9 services are justified. Thus, the issue clearly involves rates
10 charged by a wireless service provider and falls squarely within
11 those items specifically preempted under the Act. See 47 U.S.C.
12 § 332(c)(3)(A).

13 If, however, the Commission construes Mr. Wheatley's
14 complaints as a wireless complaint regarding his call forwarding
15 feature, the Commission still lacks jurisdiction under the United
16 States Supreme Court's interpretation of "rates." See American
17 Tel. and Tel. Co. v. Central Office Telephone, Inc., 524 U.S.
18 214, 223 (1998) ("rates" have meaning only when one knows the
19 services to which they are attached). In considering whether,
20 under the filed rate doctrine, federal law preempted state-law
21 claims regarding a service provider's promises for various
22 service, provisioning, and billing options, the Supreme Court
23 overturned a Ninth Circuit Court of Appeals finding that a
24 federal tariff did not preempt the claims "because this case does
25 not involve rates or ratesetting, but rather involves the
26 provisioning of services and billing." Id. In overruling this

1 determination, the Supreme Court held that the federal tariff did
2 preempt since "any claim for excessive rates can be couched as a
3 claim for inadequate services and **vis versa."⁵ Id.

4 A recent Illinois District Court decision reaffirmed the
5 Supreme Court's interpretation of "rates" and held that the Act
6 completely preempted a customer's state fraud and contract
7 claims. See Gilmore v. Southwestern Bell Mobile Systems, Inc.,
8 156 F.Supp.2d 916, 925. (N.D. Ill. 2001). "[A] complaint that
9 service quality is poor is really an attack on the rates charged
10 for the service and may be treated as a federal case regardless
11 of whether the issue was framed in terms of state law." Id. at
12 921 (quoting Bastien v. AT&T Wireless Services, Inc., 205 F.3d
13 983, 987-88 (7th Cir. 2000)). The Gilmore court reasoned that the
14 customer's claim that he received insufficient services in return
15 for an administrative fee was a challenge to rates. Id. at 922.

16 In its analysis, the district court first looked to the text
17 of the Act. Id. at 920. The Court stated that section
18 332(c)(3)(A) of the Act creates two spheres of responsibility,
19 one exclusively federal with regard to rates and market entry and
20 the other allowing concurrent state and federal regulation as to
21 "other terms and conditions." Id. (citing 47 U.S.C. §
22 332(c)(3)(A)). Relying on the Supreme Court in Central Office
23 Telephone, the court made clear that it only had to look at the
24 clause creating federal regulation as to rates in order to

25 ⁵ Qwest is unaware of any tariff in the State of Arizona regarding wireless
26 rates. Thus, Qwest assumes that federal tariffs preempt state claims in this
matter as well under the filed rate doctrine.

1 resolve the issues of the case, because this consumer complaint,
2 like most, involved both claims as to rates charged by companies
3 and their quality of service. Id. at 921. Thus, the Court in
4 Gilmore held that the customer's claims were completely preempted
5 by the Act, and, as such, the customer would be required to file
6 his complaints as federal claims under the Act if he wished to
7 pursue them. Id. at 925.

8 Similarly, the Seventh Circuit Court of Appeals in Bastien
9 held a complaint centered on an allegedly high rate of dropped
10 calls, and wireless calls that could not be connected or that
11 were cut off in the middle of the call was actually a challenge
12 to rates and, therefore, preempted by federal law. Bastien, 205
13 F.3d at 985. Much like Mr. Wheatley's complaint for credit due
14 to poor service quality, the customer in Bastien complained that
15 AT&T Wireless failed to adequately credit customers for dropped
16 calls. Id. The Seventh Circuit found that "Bastien's complaint
17 would directly alter the federal regulation of tower
18 construction, location and coverage, quality of service and hence
19 rates for service..." Id. at 989 (emphasis added). Thus, the
20 complaint, "although fashioned in terms of state law actions,
21 actually challenges the rates and level of service ... an area
22 specifically reserved to federal regulation." Id. at 990
23 (emphasis added).

24 Under both the Supreme Court's interpretation of the term
25 "rates" and the Gilmore court's affirmation, Mr. Wheatley's
26 complaint is simply a billing or rate complaint. Whether Mr.

1 Wheatley wants to fashion his claim as a wireless service
2 complaint or a wireless rates or billing complaint, it is one and
3 the same.⁶ Fundamentally, Mr. Wheatley refuses to pay the rates
4 charged for his wireless services, and therefore, the Federal
5 Communications Act applies and the Commission is preempted from
6 exercising jurisdiction.

7 C. Mr. Wheatley's Claims Do Not Fall Under the "Other
8 Terms and Conditions" Exception Clause of the
9 Federal Communications Act.

10 Although the Act provides federal agencies and courts
11 primary jurisdiction over wireless rates and market entry, which
12 the Supreme Court has interpreted include services, it reserves
13 some power to states to regulate "other terms and conditions" of
14 wireless services. 47 U.S.C. § 332(c)(3)(A).

15 Some federal courts have applied the "other terms and
16 conditions" exception clause to permit states to require wireless
17 providers to comply with state rules that cover universal service
18 funds and slamming and cramming. See e.g., Cellular
19 Telecommunications Industry Ass'n v. F.C.C., 168 F.3d 1332, 1336
20 (D.C. Cir. 1999) (finding that a Texas Universal Service Fund was
21 not preempted by the Act). Similarly, Commission Staff, as
22 testified to at the June 13, 2002 Wheatley proceeding, has
23 adopted the position that the proposed Slamming and Cramming
24 rules in Docket RT-00000J-99-0034 can be applied to wireless

25 ⁶ It should be noted that Mr. Wheatley has never once complained that he had
26 problems with his wireless service directly. All complaints relate to
contacts with Qwest Corporation representatives about features ordered by him
for his landline service.

1 providers since the rules are consumer protection measures
2 designed to provide customers equal access to wireless services.
3 See Tim Sabo Memorandum of 12/10/01 to the Commission relying on
4 Cellular Telecommunications, 168 F.3d at 1336. A copy of this
5 memorandum is attached as Exhibit A.

6 In Cellular Telecommunications, the court held that a state
7 law which required in-state telecommunications providers to
8 contribute to state-run universal service programs was not
9 preempted by the Act. See 168 F.3d at 1337. The law was enacted
10 as the state's effort to make communication services available to
11 all residents at affordable rates. Id. at 1334. Wireless
12 providers petitioned the F.C.C. for a declaratory ruling that the
13 law was preempted under 47 U.S.C. § 332(c)(3)(A) of the Act
14 because it increased their cost of doing business in the state,
15 and, therefore, impacted the rates charged to customers. Id. at
16 1336. The providers argued that the law constituted the type of
17 rate regulation that was not permitted by the Act. Id. at 1336.

18 The court examined this case in the context of what could be
19 construed as yet another exception to the Act's preemption of
20 rates and entry. The Act also states that "nothing in this
21 subparagraph shall exempt providers of commercial mobile services
22 ... from requirements imposed by a State commission on all
23 providers of telecommunications service at affordable rates." 47
24 U.S.C. § 332(c)(3)(A). The Cellular Telecommunications court
25 agreed with the F.C.C.'s conclusion that this exception to the
26 statute allows a state to promote universal service for consumers

1 by regulating the rates of wireless carriers. Id. at 1335.

2 Although the Cellular Telecommunications decision and the
3 Commission's interpretation of its application to Slamming and
4 Cramming rules rely, in part, on different exceptions to Act's
5 preemptive effect of the Act, both focus on permissible
6 regulations that are unrelated to the rates charged by wireless
7 providers. See Cellular Telecommunications at 1336; Sabo
8 Memorandum at 2.

9 These measures can clearly be distinguished from the claims
10 in Mr. Wheatley's complaint. Mr. Wheatley's complaint stems from
11 his refusal to pay for wireless service after experiencing
12 landline feature problems. His claims focus on his bill or the
13 rates he was charged for services. They have nothing to do with
14 the broad application of state Commission rules that apply to all
15 providers to promote universal service and prevent specific
16 consumer harms, such as slamming and cramming. Mr. Wheatley's
17 complaint does not fall under the "other terms and conditions"
18 exception, but falls squarely within the area of rates and
19 services preempting state law.

20 The Commission cannot assert jurisdiction in the matter of
21 Mr. Wheatley if the Commission construes his complaint as one
22 involving wireless services. The Act clearly grants the F.C.C.
23 jurisdiction to act in matters relating to rates; and Mr.
24 Wheatley's matter relates to rates charged for his wireless
25 services. If Mr. Wheatley pursues his claims regarding wireless
26 charges, he must resort to the F.C.C. for relief and his claims

1 for wireless credit from Qwest should be dismissed.

2 **II. MR. WHEATLEY'S REMAINING CLAIMS SHOULD BE DISMISSED FOR LACK**
3 **OF PROSECUTION**

4 In addition to the Commission's lack of jurisdiction over
5 Mr. Wheatley's wireless claims, Mr. Wheatley's complaint should
6 be dismissed for failure to prosecute under Rule 41(b) of the
7 Arizona Rules of Civil Procedure. Mr. Wheatley's repeated
8 requests for hearing extensions have resulted in significant
9 delays and demonstrate a lack of diligence in prosecuting his
10 claim.

11 Rule 41(b) of the Arizona Rules of Civil Procedure provides
12 for involuntary dismissal with prejudice "for failure of the
13 plaintiff to prosecute or to comply with these rules or any order
14 of court." Rule 41(b) applies to proceedings before the
15 Commission pursuant to R14-1-101 of Arizona Administrative Code.
16 Therefore, Mr. Wheatley's consistent delays in the hearing
17 schedule subject his claims to dismissal for failure to
18 prosecute.

19 In his continued requests to postpone his hearing, Mr.
20 Wheatley fails to present any valid basis for his delays. In Mr.
21 Wheatley's motion to postpone, argued at the procedural
22 conference held on June 10, 2002, the hearing officer repeatedly
23 requested an explanation of Mr. Wheatley's reason for the delay.
24 After providing several vague answers, Mr. Wheatley finally
25 claimed that he lacked sufficient understanding of the records
26 provided to him by Qwest. See Transcript, June 10, 2002, 16; see

1 also Mr. Wheatley's April 25, 2002 request to postpone May 1,
2 2002 hearing. In Mr. Wheatley's June 5, 2002 request to postpone
3 the June 12 hearing, which Qwest received via facsimile on June
4 7, his stated basis for requesting the extension was to call a
5 witness who was a Qwest employee - NOT that he did not or was
6 unable to review Qwest's records.

7 Regardless, not only had Qwest provided him with copies of
8 those records on February 14, 2002, four months earlier, Qwest
9 had specifically offered Mr. Wheatley an explanation of the
10 records. See Transcript, March 6, 2002, 42-46. Despite Qwest's
11 offer, Mr. Wheatley never contacted Qwest to answer his
12 questions. It was not until the morning of Mr. Wheatley's
13 hearing on June 12, 2002 that he finally requested explanation to
14 records that Qwest had provided him four months prior. See
15 Transcript, June 12, 2002, 29-30.

16 In addition, Mr. Wheatley admittedly waited several months,
17 until just days before the scheduled hearing, to begin reviewing
18 the information provided to him. The following is an excerpt of
19 the conversation during the June 10 proceeding:

20
21 ALJ Rodda: * * *, did you file any other written request for
22 any other written requests for information from
 Qwest that they didn't respond to?

23 Mr. Wheatley: Other than this documentation here?

24 ALJ Rodda: Well, that's your motion. I'm talking about a
 data request.

25 Mr. Wheatley: No, I had not filed a data request. I figured
26 that that was covered right here.

1 ALJ Rodda: When they sent you all of this stack of
2 information you have up here on the table, did you
call and ask any questions about it?

3 Mr. Wheatley: I haven't reviewed it thoroughly yet, and I
4 started to review it thoroughly the other day.
And I'll say I am confused.

5 I'm not sure what the laws are or what Qwest has
6 to do when I ask such a question. But to say this
7 is reasonable or that they provided me the
8 language - or the way I can understand it. I
9 can't understand half the stuff in there. There's
code numbers and all that kind of stuff and never
any key provided, and I brought that up at the
last hearing.

10 ALJ Rodda: And I remember Qwest's attorney telling you that
11 you if you had questions about it that you should
ask them about it.

12 Mr. Wheatley: And I haven't had the time to get to do so.

13 ALJ Rodda: It's your complaint. This is your complaint.
14 It's your responsibility to prosecute your
complaint.

15 Mr. Wheatley: Well, that's what I'm trying to do is I'm trying
16 to prosecute my complaint.

17 See Transcript, June 10, 2002 at 18-19.

18 Mr. Wheatley later said as his excuse that he "did not look
19 forward to going through [the] notes and reading them." Id. at
20 31. Furthermore, when asked about his attempt to call a witness,
21 Mr. Wheatley responded that his reason for requesting the delay
22 was only to avoid the expense associated with the witness. Id. at
23 25. Therefore, Mr. Wheatley's claimed reasons for delaying the
24 proceedings are based only on his failure to prepare and desire
to avoid expenses.⁷

25 ⁷ With respect to Mr. Wheatley's witness, Edna "Midge" McCants, Qwest has
26 stated on the record that her testimony is not relevant since it does not deny
that there was a problem with his call forwarding features and that Ms.

1 Under the Arizona Rules of Civil Procedure, "[m]ere delay
2 can be the basis of dismissal." Cooper v. Odom, 6 Ariz. App. 466,
3 469 433 P.2d 646, 649 (1967). Although most courts allow some
4 delay in proceedings before dismissal, the basis for the delay
5 must be valid. In re Ten Thousand Ninety-Eight Dollars
6 (\$10,098.00), 175 Ariz. 237, 241 854 P.2d 1223, 1227 (App. 1993).
7 Because Mr. Wheatley chose not to prepare for his hearing, he
8 demonstrated a clear lack of diligence in prosecuting his claims.
9 As a result, his complaint is subject to dismissal on the merits.
10 See Price v. Sunfield, 57 Ariz. 142, 147-48 112 P.2d 210, 212
11 (1941).

12 Mr. Wheatley now attempts to further delay the proceedings
13 by claiming that he lacked sufficient time to subpoena his
14 witness. Mr. Wheatley, however, has had since June 10, 2002, to
15 subpoena Ms. McCants and failed to do so. Mr. Wheatley has had
16 since January 2, 2001 when he filed his complaint to subpoena or
17 inquire about calling a Qwest employee as a witness; he also had
18 a April 25, 2002 deadline to identify witnesses and did not
19 identify Ms. McCants; he also had a June 5, 2002 deadline to
20 identify Ms. McCants and did not do so. See Procedural Orders of
21 3/14/02 and 4/29/02. On June 12, 2002, the hearing officer
22 specifically noted that Mr. Wheatley had "plenty of time to
23 subpoena the witness he wants." See June 12 Transcripts at p. 43.
24
25

26 McCants reviewed the problem and fixed it. (Transcripts, June 12, p. 35).

1 Despite the significant delays requested and received by Mr.
2 Wheatley, he again attempts to postpone his hearing on inadequate
3 grounds. Because he has had months to prepare for hearing, Mr.
4 Wheatley's attempts at further postponement can only be seen as
5 further failure to prosecute his claim against Qwest.
6

7 Moreover, these attempts to postpone are made in bad faith
8 in what can only be construed as another effort to continue this
9 matter as long as possible in order to avoid payment of his
10 outstanding charges. In his June 26, 2002 communication to the
11 Commission regarding Ms. McCants, Mr. Wheatley insinuates that
12 Qwest is just now informing him of Ms. McCants' retirement from
13 the company, and, therefore, is somehow obstructing justice.
14 This assertion is unfounded and is made in bad faith. As Qwest
15 stated in its response that same day, Mr. Wheatley is well aware
16 that Ms. McCants was to retire in June. In fact, at our June 10
17 telephonic conference Mr. Wheatley asked for an extension for
18 hearing so that he would not have to pay the expenses for Ms.
19 McCants to testify. He stated on the record that Ms. McCants was
20 retiring on June 11. See June 10, 2002 Transcripts, p. 25.
21
22

23 In addition to Mr. Wheatley's failure to prosecute, he has
24 also failed to comply with the procedural schedule set forth in
25 this proceeding. Under Rule 41(b), a number of cases have held
26 that "dismissal with prejudice is the appropriate remedy for the

1 plaintiff's intentional or willful non-compliance with a court
2 order." Carman v. Hefter, 136 Ariz. 597, 600, 667 P.2d 1312, 1315
3 (1983).

4
5 Aside from appearing at the June 12 hearing scheduled by the
6 Commission on April 29 unprepared to move forward with his case
7 because he "had planned to have a lot more time to prepare my
8 case than [he] had because [he] had to stop everything [he] was
9 doing and deal with the subpoena matter . . ." he has
10 continuously failed to meet the deadlines imposed for identifying
11 that witness.⁸ See Transcript, June 12, p. 6.

12 Qwest asked for a list of witnesses in its first set of data
13 requests to Mr. Wheatley on February 25, 2002. See Transcript,
14 June 12, 2002, 31. Mr. Wheatley responded that he had no
15 witnesses. Id. On June 6, 2002, after two procedural orders, two
16 missed deadlines to identify his witnesses, and the second
17 extended deadline had passed to file a list of witnesses, Mr.
18 Wheatley finally identified a proposed witness. Id. Therefore,
19 Mr. Wheatley's failure to follow this Commission's procedural
20 orders subjects his claims to dismissal.

21 III. CONCLUSION

22 This Commission should dismiss Mr. Wheatley's complaints
23 relating to his wireless service for lack of jurisdiction.
24 Further, the Commission should dismiss Mr. Wheatley's remaining

25 ⁸ It should also be noted that Mr. Wheatley knew of Ms. McCants and had
26 provided the Commission copies of his own hand written notes in his complaint
relating to his conversations with Ms. McCants.

1 complaints for lack of prosecution. Qwest answered Mr.
2 Wheatley's numerous questions, emails and phone calls in an
3 attempt to explain not only Mr. Wheatley's questions regarding
4 his service but questions to further his ability to prosecute his
5 own case. Mr. Wheatley has continuously failed to meet deadline
6 and has asked for two extensions for his hearing without any
7 basis other than he is unprepared to move forward. The result of
8 Mr. Wheatley's failures to comply with Commission rules and
9 procedures has prejudiced Qwest and will continue to do so until
10 and unless these complaints are dismissed.

11 DATED this 3rd day of July, 2002.

12 FENNEMORE CRAIG

13 BY 

14 Timothy Berg
15 Theresa Dwyer
16 Darcy Renfro
17 3003 North Central Avenue, Ste 2600
18 Attorneys for QWEST CORPORATION

19 ORIGINAL +10 copies filed this
20 3rd day of July, 2002 with:

21 Docket Control
22 ARIZONA CORPORATION COMMISSION
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25 COPY delivered this 3rd day of July, 2002:

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7 COPY to be delivered July 5, 2002 to:

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11 COPY of the foregoing mailed this
3rd day of July, 2002, to:

12 John T. Wheatley
13 5201 North Davis Avenue
Tucson, AZ 85705
14 Complainant

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MEMORANDUM

TO: Chairman William A. Mundell
Commissioner Jim Irvin
Commissioner Marc Spitzer

FROM: Tim Sabo
Attorney, Legal Division

THRU: Christopher C. Kempley
Chief Counsel

DATE: December 10, 2001

RE: Commission Jurisdiction over wireless slamming and cramming
Docket RT-00000J-99-0034

I. Summary

The Commission's proposed slamming rules, A.A.C. R14-2-1901 *et seq.*, apply to wireless carriers only when federal law requires wireless carriers to provide equal access. See Proposed A.A.C. R14-2-1903. However, the Commission's proposed cramming rules, A.A.C. R14-2-2001 *et seq.*, are fully applicable to wireless carriers. See Proposed A.A.C. R14-2-2003. On November 20, 2001, Verizon Wireless filed a letter in this docket restating its claim that the Commission does not have jurisdiction to apply the proposed slamming and cramming rules to wireless carriers. Verizon asserts that the Commission does not have jurisdiction because Arizona's slamming and cramming statute, A.R.S. § 44-1571 *et seq.*, does not apply to wireless carriers. The Commission should reject this interpretation of Arizona's slamming and cramming statute because (1) the statute does not prohibit the Commission from applying slamming and cramming rules to wireless carriers, and the Commission already has the power to apply slamming and cramming rules to wireless carriers under the Commission's existing powers under

Title 40; (2) the statute should not be read as an implied repeal of the Commission's existing powers under Title 40; and (3) if the statute is read in the manner suggested by Verizon Wireless, it would raise a substantial question about the constitutionality of the statute, and statutes should be read to avoid constitutional problems. This memorandum will also address the scope of federal preemption of the Commission's jurisdiction over wireless carriers.

II. Federal law does not preempt Commission jurisdiction over wireless slamming and cramming.

Federal law provides that states are preempted from regulating wireless rates or market entry. 47 U.S.C. § 332 (c)(3). In areas that are not rates or market entry, states remain free to regulate wireless carriers. See Cellular Telecommunications Industry Assoc. v. Federal Communications Comm'n, 168 F.3d 1332, 1336 (D.C. Cir. 1999).

Indeed, consumer protection is one of the areas that Congress expressly did not want to preempt. Id. Because consumer protection measures, including slamming and cramming rules, are not rates or market entry, the Commission's authority over slamming and cramming is not preempted.

III. The canons of statutory construction suggest that the Commission should reject the interpretation suggested by Verizon Wireless.

A. Arizona's slamming and cramming statute does not prohibit the Commission from applying slamming and cramming rules against wireless carriers.

Arizona's slamming and cramming statute does not apply to wireless carriers.

A.R.S. § 44-1571(3), (4). However, this statute does not prohibit the Commission from applying slamming and cramming rules to wireless carriers. As Verizon Wireless points out, the provisions in Title 44 do not contain a grant of authority to the Commission over

wireless slamming and cramming. Wireless carriers provide “public... telephone service” and are thus public service corporations. Ariz. Const. art. XV § 2. Therefore, the Commission already had the power to enact slamming and cramming rules before the legislature added the new provisions to Title 44. See A.R.S. §§ 40-202 (power to “supervise and regulate every public service corporation”); 40-203 (power to prohibit unjust “practices or contracts”); 40-321 (service quality); 40-322 (power to determine and require just and reasonable service). Because the Commission already had the power to apply slamming and cramming rules against public service corporations, including wireless carriers, the Commission did not need additional authorization in Title 44; and because Title 44 does not contain a prohibition, the Commission is free to require wireless carriers to follow the proposed slamming and cramming rules.

B. Arizona’s slamming and cramming statute should not be read as an implied repeal of the Commission’s existing authority.

As already noted, Arizona’s slamming and cramming statute does not apply to wireless carriers, but the Commission has the power to enact the proposed rules under its Title 40 authority. The law strongly disfavors construing a statute as repealing an earlier one by implication; rather, whenever possible, the Arizona courts interpret two apparently conflicting statutes in a way that harmonizes them and gives rational meaning to both. See State v. Tarango, 185 Ariz. 208, 210; 914 P.2d 1300, 1302 (1996); Walters v. Maricopa County, 195 Ariz. 476, 481; 990 P. 2d 677, 682 (App. 1999). An implied repeal will only be found if the language of the newer statute clearly shows that the legislature intended the newer statute to override the older statute. Curtis v. Morris, 184 Ariz. 393, 397; 909 P.2d 460, 464 (App. 1995) decision approved 186 Ariz. 534, 535, 925 P.2d 259 (1996). There is nothing in the language of Arizona’s slamming and

cramming statute indicating legislative intent to repeal the Commission's authority over public service corporations, including wireless carriers. Instead, Arizona's slamming and cramming statute should be read as a prompt for the Commission to act under its existing authority. In this way, the statutes can be read so that they harmonize with each other. Because the statutes can be read consistently, the Commission should reject a reading of Arizona's slamming and cramming statute that would amount to an implied repeal of the Commission's authority under Title 40.

Moreover, the legislature intended to protect consumers from unjust practices in telecommunications services. Statutes should be "liberally construed to effect their objects and to promote justice." A.R.S. § 1-211.B. Because applying the proposed slamming and cramming rules to wireless furthers the goal of the statute, the Commission should not adopt a reading of the statute that thwarts the ultimate goal of the statute, protection of consumers.

C. Interpreting Arizona's slamming and cramming statute in the manner suggested by Verizon Wireless would raise a substantial Constitutional question, and the Commission should therefore avoid such a construction.

The Arizona Supreme Court has found that the Commission's powers under Article 15 § 3 are limited to ratemaking. Corp. Comm'n v. Pacific Greyhound Lines, 54 Ariz. 159, 94 P.2d 443 (1939). However, the Arizona Constitution vests in the Commission the power to "make and enforce reasonable rules, regulations, and orders for the convenience [and] comfort" of the customers of public service corporations. Ariz. Const. Art. 15 § 3. Recognizing the tension between this language and Pacific Greyhound, the Arizona Supreme Court has noted that Pacific Greyhound "undercut the framers' vision of the Commission's role as set forth in the text of the constitution, as

described by the framers, and in earlier case law.” Arizona Corp. Comm’n v. State ex rel. Woods, 171 Ariz. 286, 293, 830 P.2d 807, 814 (1992). This language calls into doubt Pacific Greyhound and indicates that there are still substantial unresolved questions regarding the scope of the Commission’s § 3 authority. Legislation should be read, if at all possible, in a way that is consistent with the constitution. Arizona Corp. Comm’n v. Superior Court, 105 Ariz. 56, 62, 459 P. 2d 489, 495 (1969); Stillman v. Marston, 107 Ariz. 208, 209, 484 P.2d 628 (1971). Because reading Arizona’s slamming and cramming statute as a prohibition on Commission regulation of wireless carriers would raise a significant question of whether the statute, so construed, conflicts with § 3, the Commission should not read the statute as a prohibition.