



0000083909

JAN 22 2003

REHEARING

BEFORE THE ARIZONA CORPORATION COMMISSION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

2003 JAN -2 P 12: 42
AZ CORP COMMISSION
DOCUMENT CONTROL

Arizona Corporation Commission
DOCKETED
JAN 02 2003

DOCKETED BY

IN THE MATTER OF RULES TO ADDRESS
SLAMMING AND OTHER DECEPTIVE
PRACTICES

Docket No. RT-00000J-99-0034

**APPLICATION FOR REHEARING
OF DECISION NO. 65452**

Pursuant to A.R.S. § 40-253, Alltel Communications, AT&T Wireless, Leap Wireless/Cricket Communications, Nextel Communications, Sprint PCS, Verizon Wireless, T-Mobile (formerly Voicestream), and Western Wireless (collectively the "AZ Wireless Carriers Group") hereby submit this joint Application for Rehearing and Reconsideration of Decision No. 65452 (December 12, 2002) (the "Decision") adopting rules concerning unauthorized carrier changes (R14-2-1901 *et seq.*) (the "slamming rules") and unauthorized carrier charges (R14-2-2000 *et seq.*) (the "cramming rules"). The AZ Wireless Carriers Group respectfully requests that the Arizona Corporation Commission (the "Commission") grant this Application and modify Decision No. 65452 with respect to the cramming rules.

GROUND FOR REHEARING

The Commission lacks jurisdiction to adopt cramming rules that apply to wireless carriers in Arizona. Moreover, implementation of the rules would require significant changes in the business processes of the wireless carriers, with corresponding significant increases in costs of operations. Arizona already has numerous consumer protection laws and the costs and burdens imposed by the new rules are unnecessary. As set forth below, the rules violate federal law, interfere with interstate commerce and the wireless carriers' right to commercial speech and due process.

1
2 **A. The Commission Lacks Authority Under A.R.S. § 44-1572 et seq. to Adopt**
3 **Cramming Rules Applicable to Wireless Carriers.**

4 In Decision No. 65452, the Commission incorrectly found that it had jurisdiction, pursuant
5 to A.R.S. § 44-1572 et seq., to adopt the cramming rules applicable to wireless carriers. [Decision
6 No. 65452 at 8] A.R.S. § 44-1572 et seq. does not convey jurisdiction to the Commission to adopt
7 cramming rules for wireless carriers. To the contrary, this statutory scheme governs only
8 slamming and cramming by both “long-distance telecommunications service providers” and “local
9 telecommunications service providers.” The statute expressly excludes from these definitions “a
10 provider of wireless, cellular, personal communication or commercial radio services” from both
11 definitions. A.R.S. § 44-1571.3, .4. Therefore, to the extent the statutory scheme grants the
12 Commission authority to adopt regulations, the statute limits that authority only for the defined
13 providers. A.R.S. §§ 44-1572.L, 44-1573.K.¹

14 **B. The Commission Lacks Authority Under Any Other Statute to Adopt**
15 **Cramming Rules Applicable to Wireless Carriers.**

16 In Decision No. 65452, the Commission further found that it had jurisdiction, pursuant to
17 A.R.S. §§ 40-202, 40-203, 40-321 and 40-322, as well as A.R.S. Title 40 generally, to adopt the
18 cramming rules. [Decision No. 65452 at 8] Despite the limitations in A.R.S. § 44-1572 et seq., as
19 discussed above, the Commission determined that the statutory scheme does not prohibit the
20 Commission from imposing cramming and slamming rules on wireless carriers because the
21 Commission retains jurisdiction pursuant to its general authority over public service corporations
22 (*i.e.*, the other statutes cited in the Decision) to apply such rules to wireless carriers. This is

23
24 ¹ As a general matter, the statute also does not provide authority for the Commission to adopt
25 cramming rules. Both A.R.S. § 44-1572.L and A.R.S. § 44-1573.K grant authority to adopt rules only with
26 respect to service provider *changes*. By including provisions in the cramming rules that dictate customer
27 notices, require the submission of scripts, and other burdensome requirements, the Commission has
overstepped its statutory authority and direction from the Legislature. *See* A.R.S. § 44-1572.L (“The
Commission may adopt rules for making a change in long-distance telecommunications service provider
that are not inconsistent with federal law and regulations . . .”); A.R.S. § 44-1573.K (“The Commission may
adopt rules for making a change in local telecommunications service provider that are not inconsistent with
federal law and regulations . . .”).

1 contrary to well-settled principles of law.

2 It is axiomatic that a general grant of statutory authority cannot supercede a specific grant
3 of statutory authority addressing the matter, *i.e.*, a statutory provision that deals with the “narrow,
4 precise, and specific subject” in question and limits the authority as to that matter. *See*
5 Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976). The U.S. Supreme Court has held
6 that “[t]he reason and philosophy of the rule is that, when the mind of the legislator has been turned
7 to the details of a subject, and he has acted upon it,” a general provision “shall not be considered as
8 intended to affect the more particular or positive” provision. *Id.* at 153 (citing T. Sedgewick, The
9 Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874)); *see also*
10 Pima County v. Heinfeld, 134 Ariz. 133 (1982) (when two statutes deal with the same subject, the
11 more specific statute controls). Because the Legislature has specifically and expressly exempted
12 wireless carriers from the statutory scheme, the Commission cannot look to other, more general
13 statutory authority to avoid or circumvent that prohibition.

14 **C. The Commission Has No Authority to Adopt Cramming Rules for Wireless**
15 **Carriers Under Its Constitutional Ratemaking Authority.**

16 Just as it has no legislative authority to adopt the cramming rules for wireless carriers, the
17 Commission does not have constitutional authority to adopt such rules. In Decision No. 65452, the
18 Commission found that it had jurisdiction, pursuant to Article XV of the Arizona Constitution, to
19 adopt the cramming rules. [Decision No. 65452 at 8] Article XV section 3 of the Arizona
20 Constitution provides the Commission with power to “prescribe just and reasonable classifications
21 to be used and just and reasonable rates to be made and collected, by public service corporations
22 with the state for service rendered therein” The Commission cannot rely on this provision for
23 authority to impose the cramming rules on wireless carriers for two reasons. First, the cramming
24 rules do not relate to ratemaking as authorized by the Arizona Constitution. The cramming rules
25 require customer authorization for services, notice to customers, restrictions on marketing,
26 submissions regarding marketing materials, and procedures for rectifying charges for services the
27 customer has not requested. Arizona courts have held that rules pertaining to billing requirements

1 and customer service do not “relate at all to ratemaking or classification” under the Arizona
2 Constitution. *See* US West Communications, Inc. v. Ariz. Corp. Comm’n, 197 Ariz. 16, 25, 3 P.2d
3 936, 945 (Ct. App. 1999). Therefore, the Commission’s constitutional ratemaking authority under
4 Article XV cannot provide the Commission authority to adopt the cramming rules.

5 Second, assuming arguendo that certain cramming rules relate to ratemaking authorized by
6 the Commission’s constitutional ratemaking power, 47 U.S.C. § 332(c)(3)(A), preempts that
7 authority by providing that “no state or local government shall have any authority to regulate the
8 entry of or *rates charged* by any commercial mobile service” (emphasis added). When it adopted
9 Decision No. 65452, the Commission expressly recognized that it does not have authority to
10 regulate the rates of wireless carriers. [*See* Appendix B to Decision No. 65452, p. 31] To the
11 extent the Commission relied on its ratemaking authority under Article XV to adopt the cramming
12 rules, federal law preempts such authority.

13 **D. Cramming Rules Impermissibly Regulate Entry by and Rates of Wireless**
14 **Carriers.**

15 As noted above, Section 332 of the Communications Act preempts state regulation of
16 wireless carriers in two respects: (i) entry by a wireless carrier into the state; and (ii) rates charged
17 by a wireless carrier in that state. 47 U.S.C. § 332(c)(3)(A). The cramming rules impermissibly
18 regulate both.

19 **1. Impermissible Regulation of Entry.**

20 Section 332 preempts States from regulating the “entry of” any wireless service. This
21 prohibits States not only from directly prohibiting a wireless carrier from entering a given market,
22 but also from adopting regulations that have the effect of preventing entry, even if they do not have
23 the express purpose of prohibiting entry. Section 332 “explicitly preempts state regulation that
24 effectively *precludes* CMRS entry.” *See* In the Matter of Developing a Unified Intercarrier
25 Compensation Regime, FCC 01-132, 2001 WL 455872 (April 27, 2001) 80 (emphasis added). The
26 cramming rules taken as a whole amount to impermissible entry regulation. The cramming rules
27 regulate almost all conduct by wireless carriers with respect to its customers, including how the

1 wireless carriers advertise to the customer, how the wireless carriers obtain customers, how the
2 wireless carriers manage their accounts with the customers, how to change terms and conditions of
3 the customers' service, including how to bill services, thus implicating entry by wireless carriers.
4 Overall, the cramming rules require significant changes that are unique to Arizona in a myriad of
5 business processes. Those requirements will significantly increase the cost of doing business in
6 Arizona and will significantly interfere with a wireless carriers' ability to conduct business in
7 Arizona.

8 Several of the cramming rules individually also amount to entry regulation. For example,
9 Rule 2005 sets forth authorization requirements and other actions concerning requests for service,
10 such as certain disclosures to customers requesting a product or service in languages specified by
11 the rule. Rule 2009 impermissibly authorizes the Commission to place broad limitations on
12 wireless carriers' abilities to solicit customers, including an express prohibition on the solicitation
13 of new customers for a specified period of time.

14 2. Impermissible Regulation of Rates.

15 Even if the Commission has authority under Arizona law to adopt the cramming rules, it is
16 precluded by federal law from adopting any rule that implicates the rates of wireless carriers, either
17 directly or indirectly. The cramming rules, both taken as a whole and through certain individual
18 rules, constitute rate regulation prohibited under Section 332. Section 332 of the federal
19 Communications Act, as amended, prohibits not only direct regulation of prices, but also
20 requirements that wireless carriers provide service at a particular level of quality established by the
21 State. *See AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998) ("Rates, however, do not
22 exist in isolation. They have meaning only when one knows the services to which they are
23 attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice
24 versa."); *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 988 (7th Cir. 2000) ("As the
25 Supreme Court recognized in *Central Office Telephone*, a complaint that service quality is poor is
26 really an attack on the rates charged for the service."). Based on no substantial evidence in the
27 record regarding customer complaints or other documentation, the Commission seeks to impose a

1 myriad of regulatory requirements based on an incorrect assumption that wireless carrier services
2 are inadequate.

3 Several of the cramming rules individually also amount to rate regulation that is prohibited
4 by Section 332. For example, Rule 2004 addresses customer authorizations. Rule 2005 addresses
5 customer notice requirements. Rule 2006 addresses refunds, interest and other issues concerning
6 alleged unauthorized charges. Rule 2007 addresses communications concerning refunds, interest
7 and other issues concerning unauthorized charges. The Commission apparently adopted these
8 requirements because it believes that wireless carriers today do not provide adequate customer
9 authorization procedures, customer notice or adequate refunds and interest to subscribers. Section
10 332 preempts this type of regulation.

11 **E. Certain Cramming Rules Interfere with Interstate Commerce In Violation of**
12 **the Commerce Clause.**

13 Because the U.S. Constitution exclusively reserves to Congress the power to regulate
14 interstate commerce, a state regulation that purports directly to regulate interstate commerce or that
15 unduly burdens such commerce is unconstitutional and invalid. *See Healy v. The Beer Institute,*
16 *491 U.S. 324, 335-337 & n.14 (1989).* The Commission cannot adopt rules that are overbroad and
17 may inadvertently act to regulate commerce that takes place wholly outside of Arizona or that will
18 place a burden on interstate commerce that outweighs the legitimate local interests that the
19 regulation seeks to promote. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.,*
20 *476 U.S. 573, 579 (1986).* In assessing the burden created by state regulation, the Supreme Court
21 has cautioned that the prospect of inconsistent regulation among the different states must be
22 considered. *See Healy,* 491 U.S. at 337 (court must consider “how the challenged statute may
23 interact with the legitimate regulatory regimes of other States.”). Thus, in one case, the U.S.
24 Supreme Court held that an Illinois regulation that required trucks to have curved mud flaps when
25 straight mud flaps were legal in at least 45 other States constituted an undue burden on interstate
26 commerce. *See Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).* In another case, the court
27 found an undue burden where an Arizona regulation required that trains inside the state would be

1 limited to a length of not more than 14 cars for passenger trains and not more than 70 cars for
2 freight trains. *See* Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). In these cases, truckers and
3 railroads could conduct their operation one way in the rest of the country but had to modify their
4 nationwide mode of operation at the border of Illinois or Arizona in order to comply with state
5 regulation.

6 Based on no substantial evidence in the record regarding customer complaints or other
7 documentation, the Commission seeks to impose a myriad of regulatory requirements that interfere
8 with interstate commerce. The Commission has not expressly determined that the benefits of the
9 rules outweigh the burdens placed on interstate commerce, particularly with respect to the burdens
10 placed on wireless carriers that operate nationally but that now must implement extensive unique
11 procedures for Arizona. Indeed, the cramming rules run afoul of these limitations on state
12 authority imposed by the Commerce Clause. For example, Rule 2004 sets forth Arizona-specific
13 requirements for billing agents that may handle billing for numerous states; Rule 2005, sets forth
14 Arizona-specific requirements for authorization of service and for customer communications,
15 including extensive unique disclosure requirements; Rule 2007 requires the wireless carriers to
16 display Arizona-specific notice requirements on the wireless carriers' websites; and Rule 2012
17 requires Arizona-specific submissions regarding marketing scripts that may be used nationwide.

18 **F. Certain Cramming Rules Violate the First Amendment Protection for**
19 **Commercial Speech.**

20 The cramming rules impermissibly restrict what wireless carriers can and cannot
21 communicate to customers and potential customers in violation of the First Amendment to the U.S.
22 Constitution. The Commission must demonstrate that each restriction on speech supports a
23 specifically articulated, considered and "substantial" government interest, that the proposed
24 restriction "directly advances" that interest, and that it "is not more extensive than is necessary to
25 serve that interest." *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557,
26 566 (1980).

27 The cramming rules fail these tests. For example, Rule 2005 limits certain information that

1 can be provided during each sales transaction and establishes other requirements for communica-
2 tions with customers. Rule 2007 places requirements on the timing and content of communications
3 to customers regarding subscriber rights; and Rule 2012 requires submission of marketing scripts
4 to the Commission for review. The Commission has not articulated a “substantial” government
5 interest in dictating carrier speech in this manner and has rejected less restrictive requirements. For
6 example, the AZ Wireless Carriers proposed to provide certain information with the first bill, not at
7 the point of sale (which would require Arizona-specific packaging for cell phones.) They also
8 proposed submitting scripts only in connection with an actual complaint, not on a wholesale basis
9 as provided by the rules.

10 **G. The Cramming Rules Impermissibly Regulate Interstate Service.**

11 The cramming rules do not limit their applicability to intrastate services and even if they
12 did provide such a limitation, that statement would be wholly inaccurate. In fact, given their
13 breadth, the rules would necessarily apply to interstate services because it would be impossible to
14 segregate the intrastate and interstate services and charges to which the cramming rules apply. For
15 example, many wireless carriers today charge customers for “buckets” of minutes that include
16 intrastate and interstate calling. Customers can use these bundled plans for either type of calling.
17 Because wireless carriers cannot predict how a customer will use those minutes, wireless carriers
18 would have to comply with the Arizona cramming rules for all services.

19 “The FCC has exclusive jurisdiction to regulate interstate common carrier services
20 including the setting of rates.” Crockett Tel. Co. v. FCC, 963 F.2d 1564, 1566 (D.C. Cir. 1992).
21 The Commission lacks authority to adopt rules that regulate interstate service. Because the
22 cramming rules are not expressly limited to intrastate service and could implicate interstate service,
23 the Commission has overstepped its authority to the extent the rules regulate interstate service.

24 **H. Certain Cramming Rules Violate Due Process.**

25 The rules addressing complaints and compliance and enforcement (Rules 2008 and 2009)
26 contain provisions that deny carriers due process. Rule 2008.B.4 provides that a failure to provide
27 adequate documentation – and not simply a good faith response if the documentation is not readily

1 available – of an alleged unauthorized charge within ten days of notification by staff shall result in
2 a presumption that an unauthorized charge has occurred. Rule 2008.B.6 provides that a failure to
3 provide documentation or a good faith response regarding an alleged unauthorized charge with
4 fifteen days of notification by staff shall be deemed an admission of an authorized charge and the
5 carrier shall be deemed to have violated the cramming rules. Under Rule 2009.B, the carrier will
6 be subject to penalties as a result of that “admission.” The rules do not provide for any opportunity
7 to rebut the presumption or admission, even if there are legitimate reasons for the failure to meet
8 the deadlines – such as inadequate or misdirected notice, an unavoidable inability to obtain
9 documentation from third parties or a myriad of other possibilities that affected the response time.
10 The imposition of violation and penalty without an opportunity to be heard violates due process.

11 Additionally, the very short response times set forth throughout the rules are insufficient to
12 allow carriers to provide the proper documentation or other information, particularly where the
13 information is held by third parties. For many carriers, if the charge occurred a couple of months
14 ago, they must obtain old records from archives (or from third party archives) which can take a
15 considerable amount of time. The failure to meet those deadlines can result in serious
16 consequences, such as those set forth above regarding complaints or other violations of the
17 cramming rules. The lack of reasonable response periods also violates a carrier’s due process
18 rights.

19 **RELIEF REQUESTED**

20 The AZ Wireless Carriers Group urges the Commission to rehear and reconsider the
21 cramming rules and exempt the wireless carriers from those rules.
22
23
24
25
26
27

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

1 RESPECTFULLY SUBMITTED January 2, 2003.

2 **ARIZONA WIRELESS CARRIERS GROUP**

3
4 By Michael W. Patten (RSH)

5 Michael W. Patten
6 ROSHKA HEYMAN & DEWULF PLC
7 One Arizona Center
8 400 East Van Buren Street, Suite 800
9 Phoenix, Arizona 85004
10 (602) 256-6100

11 **ORIGINAL and 19 COPIES** of the
12 foregoing filed January 2, 2003, with

13 Docket Control
14 ARIZONA CORPORATION COMMISSION
15 1200 West Washington Street
16 Phoenix, Arizona 85007

17 **COPIES** of the foregoing hand-delivered
18 January 2, 2003, to:

19 Teena I. Wolfe, Esq.
20 ALJ, Hearing Division
21 ARIZONA CORPORATION COMMISSION
22 1200 West Washington Street
23 Phoenix, Arizona 85007

24 Christopher C. Kempsey, Esq.
25 Timothy Sabo, Esq,
26 Legal Division
27 ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

Ernest G. Johnson, Esq.
Director, Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

ROSHKA HEYMAN & DEWULF, PLC

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

COPIES of the foregoing mailed
January 2, 2003, to:

1
2 Thomas H. Campbell, Esq.
3 LEWIS AND ROCA LLP
4 40 North Central Avenue
Phoenix, Arizona 85007

5 Thomas F. Dixon
6 WORLD COM
7 707 17th Street, Suite 3900
Denver, Colorado 80202

8 Teresa Tan
9 WorldCom, Inc.
201 Spear Street, Dept 9976
10 San Francisco, California 94105

11 Mary B. Tribby
12 Richard S. Wolters
AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.
13 1875 Lawrence Street, Suite 1575
Denver, Colorado 80202

14 Joan S. Burke, Esq.
15 OSBORN MALEDON, P.A.
2929 North Central Avenue, Suite 2100
16 Phoenix, Arizona 85012-2794

17 Cindy Manheim, Esq.
18 AT&T WIRELESS
7277 164th Avenue N.E.
19 Redmond, Washington 98052

20 Eric S. Heath, Esq.
SPRINT COMMUNICATIONS COMPANY L.P.
21 100 Spear Street, Suite 930
San Francisco, California 94105

22 Timothy Berg, Esq.
23 Theresa Dwyer, Esq.
FENNEMORE CRAIG, PC
24 3003 North Central Avenue, Suite 2600
25 Phoenix, Arizona 85012-2913

26
27

ROSHKA HEYMAN & DEWULF, PLC

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

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27

Daniel Pozefsky, Esq.
Residential Utility Consumer Office
2828 North Central Avenue, Suite 1200
Phoenix, Arizona 85004

Laura Holloway, Esq.
Nextel Communications
2001 Edmund Halley Drive
Reston, VA 20191

Jonathan Kilburn, Esq.
Nextel Communications
4643 South Ulster Street, Ste. 500
Denver, CO 80207

