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July 23, 2003

Arizona Corporation Commission

Commissioner Marc Spitzer
Chairman, Arizona Corporation Commission
1300 West Washington
Phoenix, Arizona 85007

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Dear Chairman Spitzer:

Our office has reviewed the Corporation Commission's proposed rules R14-4-1901 to 1914 and R14-4-2001 to 2012, Arizona Administrative Code, (the "Slamming and Cramming Rules") dealing with unauthorized changes to telecommunications companies (slamming) and unauthorized charges by telecommunications companies (cramming). We share the Commission's interests in protecting Arizona consumers. Unfortunately, as discussed below, we are unable to approve the rules as they are neither within the Corporation Commission's power to make nor within enacted legislative standards.

The proposed rules are drafted specifically to apply to all telecommunications companies, including those that are expressly excluded by the enabling legislation. The Commission's authority to make the Slamming and Cramming Rules is derived from A.R.S. § 44-1571 to 1574, which apply to local and long-distance telecommunications service providers as defined in A.R.S. § 44-1571(3) and (4), respectively. While both of these paragraphs include a broad range of entities that provide local or long-distance service, they expressly exclude providers "of wireless, cellular, personal communication or commercial radio services."

Despite these statutory exclusions, the Commission's proposed Slamming and Cramming Rules apply, at least conditionally, to all telecommunications companies. R14-4-1903, dealing with slamming, states: "These rules apply to each Telecommunications Company. These rules do not apply to providers of wireless, cellular, personal communication or commercial mobile radio services, until those Telecommunications Companies are mandated by law to provide equal access." R14-4-2003, dealing with cramming, states: "This article applies to each Telecommunications Company." In correspondence with this Office, the Commission has emphasized its intent that the rules apply to wireless providers.

A.R.S. §§ 44-1572 and 1573 focus on prohibitions against slamming and cramming, and these statutes provide specific authority for the Corporation Commission to make rules with respect to the conduct prohibited by those statutes. A.R.S. § 44-1572 deals with unauthorized changes to long-distance carriers (slamming). A.R.S. § 44-1573 prohibits unauthorized changes to local carriers (slamming) and unauthorized charges by local carriers (cramming).

The Commission, through its staff, has taken the position that the exclusion of wireless and other carriers from A.R.S. §§ 44-1571-1574 does not limit the Commission's authority to make slamming and cramming rules applicable to all telecommunications carriers. The Commission relies on general authority in A.R.S. §§ 40-202, 321, and 322. These statutes do not focus on telecommunications carriers or on slamming or cramming problems. The Commission's reliance on general statutes is inconsistent with the well-settled principle of statutory construction that a more specific statute governs over a general statute when they both address the same subject matter. *See, e.g. Pima County v. Heinfeld*, 134 Ariz. 133,134, 654 P.2d 281,282(1982); *Mercy Healthcare Arizona, Inc. v. Arizona Health Care Cost Containment System*, 1281, Ariz. 95100, 887 P.2d 625, 630 (Ct. App. 1994).

In addition, the Legislature has mandated that reliance on general rule making authority in this situation is inappropriate. A.R.S. § 41-1030(C). That section provides that an agency shall not:

1. Make a rule under a specific grant of rule making authority that exceeds the the subject matter areas listed in the specific statute authorizing the rule.
2. Make a rule under a general grant of rule making authority to supplement a more specific grant of rule making authority.

The Commission has also argued that it does not need statutory authority, relying on Art. 15, §3 of the Arizona Constitution. That section provides:

The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations

Despite the apparent broad language of this provision, the Arizona Supreme Court has held that the rule making authority in Art. 15, §3 is limited to rate making. *Corporation Commission v. Pacific Greyhound Lines*, 54 Ariz. 159, 168, 94 P.2d 443, 447(1939); *see also Corporation Commission v. State ex rel. Woods*, 171 Ariz. 286,293, 830 P.2d 807,814 (1992). The Commission notes that the Arizona Supreme Court in *Woods* questioned the correctness of the *Pacific Greyhound* holding, and Commission staff has urged that this office has the authority to treat *Pacific Greyhound* as no longer controlling precedent. However, the *Woods* court did not overrule *Pacific Greyhound*, and this office is bound to follow its holding.

Commissioner Marc Spitzer

July 23, 2003

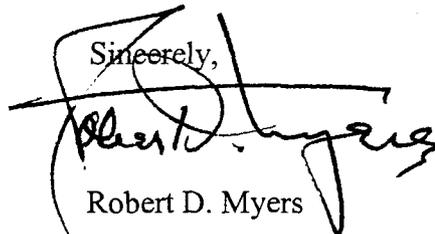
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While the Supreme Court may ultimately reconsider and reverse its holding in *Pacific Greyhound*, it is presently the law in Arizona. A.R.S. § 41-1044 mandates that the Attorney General's Office shall only endorse proposed rules, if the rules are within the power of the agency to make and within the enacted legislative standards. Contrary to the Commission's request, the Attorney General's Office cannot endorse rules on a legal basis contrary to the holding of *Pacific Greyhound*.

Moreover, as *Woods* pointed out, even prior to the *Pacific Greyhound* case, the court did not consider the Commission's authority to make rules that are not part of rate making to be exclusive, but only concurrent with the Legislature's authority. *Woods*, 171 Ariz. at 293, 830 P.2d at 814. Thus, even if the Commission had general constitutional or inherent power to make rules for slamming and cramming, those rules would nevertheless be in conflict with the specific legislative intent established by A.R.S. § 44-1571-74.

In summary, the Attorney General cannot approve the Commission's proposed Slamming and Cramming Rules because they are neither within the Commission's power to make nor within the enacted legislative standards, and I am therefore returning the proposed Rules to the Commission. As you are aware, our office has strongly supported efforts to curb slamming and cramming, including the filing of consumer fraud lawsuits for such wrongful conduct. We would certainly support Commission legislative efforts to protect consumers in the areas of slamming and cramming.

Sincerely,



Robert D. Myers