

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Lifeline and Link Up Reform and Modernization	)	WC Docket No. 11-42
	)	
Telecommunications Carriers Eligible for Universal Service Support	)	WC Docket No. 09-197
	)	
Connect America Fund	)	WC Docket No. 10-90

**COMMENTS IN SUPPORT OF PETITION FOR PARTIAL RECONSIDERATION**



**I. INTRODUCTION AND SUMMARY**

The American Cable Association (“ACA”) submits these brief Comments in support of the Petition for Reconsideration filed by CTIA – The Wireless Association (“CTIA”) in the above-captioned proceedings. CTIA seeks reconsideration of a narrow, discrete part of the Commission’s Lifeline Order on Reconsideration pertaining to the obligations of telecommunications carriers participating in the Lifeline program under the Communications Act to protect and secure all data obtained while verifying the eligibility of potential Lifeline subscribers, including data beyond the narrow class of “customer proprietary network

information” (“CPNI”) defined by the Act.<sup>1</sup> The type of personal information Lifeline applicants must supply to demonstrate eligibility includes names, addresses, social security numbers, driver’s licenses, and other sensitive information.<sup>2</sup> Specifically, ACA supports reconsideration of the Commission’s declarations that: (i) Section 222(a) imposes a duty of confidentiality upon carriers with respect to customer information beyond CPNI;<sup>3</sup> and that (ii) Section 201(b) imposes a duty upon carriers to implement customer data security measures, on the grounds that the Commission lacks authority over carrier customer data security practices under the Communications Act.<sup>4</sup>

To be clear, ACA supports the aim of the Lifeline program to provide essential communications capabilities to low-income consumers, and has filed comments recommending specific reforms to the program that would encourage greater participation by wireline providers.<sup>5</sup> Many ACA members participate in the Lifeline program for currently-supported voice service and also provide broadband Internet access service over their wireline networks. As

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<sup>1</sup> *Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015) (“Order on Reconsideration”).

<sup>2</sup> See *TerraCom Inc., and YourTel America, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 13325, ¶ 4 (2014) (“TerraCom/YourTel NAL”).

<sup>3</sup> 47 U.S.C. § 222(h)(1). “Customer Proprietary Network Information” as used in Section 222 means “(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of the carrier; except that such term does not include subscriber list information.”

<sup>4</sup> ACA comments, like CTIA’s Petition, are confined to the sole question of regulatory authority and do not address the underlying obligation imposed by the Order on Reconsideration that carriers must retain certain documentation that verifies the eligibility of Lifeline subscribers. See *Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund*, WC Docket No. 11-42, WC Docket No. 09-197, WC Docket No. 10-90, Petition for Partial Reconsideration filed by CTIA – The Wireless Association at 1 (filed Aug. 13, 2015) (“CTIA Petition”).

<sup>5</sup> See *Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund*, WC Docket No. 11-42, WC Docket No. 09-197, WC Docket No. 10-90, Comments of the American Cable Association (filed Aug. 31, 2015).

ACA has previously noted, universal connectivity for all Americans in all areas of the country provides countless, substantial benefits.<sup>6</sup> ACA members take their obligations to protect the security of their customers' data, including the personal data of applicants for Lifeline services, very seriously, and devote considerable resources to protecting their networks and their customers from data security threats and breaches. They are not only required to do so under various state and federal laws, but they recognize that protecting the security of the data on their networks and customer information is necessary to attract and retain customers in the competitive markets in which they operate.

That said, it remains essential that Commission rules and obligations with respect to privacy protections go no further than Congress intended. In enacting Section 222, Congress struck a careful balance between the needs of carriers and interests of customers in the protection of the privacy of their proprietary network information. Nothing in the Act suggests that the Commission has been delegated authority to impose customer data security regulations beyond those associated with the statutorily defined category of CPNI, and neither Section 222(a) nor the more general mandates concerning common carrier practices in Section 201(b) gives the Commission authority to impose customer data security requirements of any kind. For these reasons, ACA supports CTIA's request that the Commission reconsider and vacate the discrete portion of the Order on Reconsideration establishing confidentiality and data security obligations under Sections 222(a) and 201(b) of the Act to the extent that they apply to information broader than CPNI.

## **II. THE COMMISSION'S AUTHORITY UNDER SECTION 222(a) DOES NOT EXTEND TO INFORMATION BEYOND THE CATEGORY OF CPNI**

CTIA has ably demonstrated that the statutory language, structure, purpose and legislative history of Section 222 make clear that CPNI is the only customer data that Section

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<sup>6</sup> *Id.* at 1.

222 protects, and that “[t]he Commission’s reading of Section 222(a) as establishing a broad data security obligation cannot be squared with the clear and more specific provisions of the statute and must be reconsidered.”<sup>7</sup> Rather than establish a separate category of protected “customer proprietary” information, the language of Section 222(a) sets forth a general duty to protect that takes its force and effect only through the specific provisions that follow detailing precisely the type of information to be protected and how it is to be protected. As CTIA observes, “[i]f Section 222(a) imposed a standalone requirement on carriers to protect customers’ information beyond CPNI, other provisions of Section 222 would not make sense.”<sup>8</sup>

When interpreting a statute, the Commission must bear in mind “the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”<sup>9</sup> The legislative history detailed by CTIA settles any doubt on this matter by showing Congress’ intent to apply the strictures of Section 222 only to CPNI as defined in Section 222(h)(1) and not to a broader and undefined category of customer “proprietary information” by eliminating, in conference, “catch-all provisions in the

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<sup>7</sup> CTIA Petition at 3–4. Specifically, CTIA has shown that the failure to include subsection (a) in the list of subsections trumped by the disclosure obligation contained in Section 222(e), is an omission that can be explained only by the fact that “Congress did not reference subsection (a) . . . because Section 222(a) does not impose any such requirement.” *Id.* at 5. Further, CTIA explains that the exceptions to the general prohibition on disclosure set forth in Section 222(d) would not make sense if Section 222(a) were read to impose an independent duty on carriers to protect confidential information other than CPNI. Because the exceptions only apply to disclosures of CPNI to render bills, deter fraud, and assist emergency health, law enforcement and fire personnel, but not to a broader category of customer “proprietary information,” a carrier under the Commission’s reading could disclose CPNI to a first responder, but not any of the personal information that would fall under the broader category of customer information the Commission believes protected under Section 222(a), a result, as CTIA notes, that is simply not rational. *Id.*

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *King v. Burwell*, 576 U.S. \_\_, \_\_ (slip op., at 15) (2015); quoting *Utility Air Regulatory Group v. EPA*, 573 U.S., at \_\_ (slip op., at 15). As CTIA explains, if Section 222(a) imposed a standalone requirement on carriers to protect customers’ information beyond CPNI, for example, it would conflict with Section 222(e), which directs carriers to disclose “subscriber list information” – subscribers names, addresses and phone numbers – to competing providers of phone directories, notwithstanding the specific directives against disclosure of confidential carrier information and CPNI in subsections (b) and (c) or the specific exceptions to the prohibitions listed in subsection (d). CTIA Petition at 4.

House and Senate bills that would have given the Commission broader authority to regulate customer information more generally,” and leaving in the final bill coverage only of information falling within the precise categories listed in Section 222(h)(1).<sup>10</sup>

This interpretation of the scope of Section 222(a) is echoed by the analysis of noted privacy and cybersecurity expert, Peter Swire, Nancy J. and Lawrence P. Huang Professor, Scheller College of Business, Georgia Institute of Technology. Professor Swire participated on a panel discussion entitled “The Application of Section 222 of the Communications Act to Broadband Internet Access Services” during the April 22, 2015 FCC Staff Public Workshop on Broadband Consumer Privacy and was asked by staff to discuss “what effect to give the definition of ‘proprietary information’ in Section 222(a) as contrasted with the definition of ‘customer proprietary network information’ in 222(c).” In written comments in response, Professor Swire diplomatically stated that he “would be cautious about founding any additional regulatory requirements under this proceeding based on that language in 222(a),” explaining his reasoning as follows:<sup>11</sup>

This issue received public attention in connection with the FCC’s enforcement action against TerraCom and YourTel in 2014, when the definition in 222(a) was mentioned as a possible independent basis for enforcement. My read of the statutory language would make me cautious about finding any such independent authority. Based on the research I have been able to do, I am not aware of any legislative history that suggests that telecommunications carriers have independent duties toward customers arising from “proprietary information” as opposed to CPNI. Writing as one law professor who has taught legislation and helped develop regulations, the usual approach is that the specific definition in 222(c) would seem to give content to the umbrella or introductory language in 222(a). In addition, as a matter of grammar, 222(a) would appear to state the general approach (the

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<sup>10</sup> CTIA Petition at 5-6.

<sup>11</sup> Peter Swire, Huang Professor of Law and Ethics, Georgia Tech Scheller College of Business, Comments to the FCC on Broadband Consumer Privacy, at 3 (April 28, 2015) (“Swire Comments”), available at <https://transition.fcc.gov/cgb/outreach/FCC-testimony-CPNI-broadband.pdf>. The proceeding referenced is an outgrowth of the reclassification of broadband Internet access service (“BIAS”) as a telecommunications service under Title II, and the Commission’s determination not to forbear from applying Section 222 to BIAS providers. *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶¶ 461-467 (2015)

section is called “in general”) that there should be the protection of proprietary information of: (i) other telecommunication carriers; (ii) equipment manufacturers; and (iii) customers. Then, section 222(b) gives content to that duty as applied to the confidentiality of carrier information and 222(c) similarly gives content to the duty as applied to the confidentiality of CPNI.<sup>12</sup>

Professor Swire concluded by stating that “[t]his careful delineation of what is covered in a privacy regime, in my view, is sound policy.”<sup>13</sup>

Moreover, as CTIA has demonstrated, there are many instances in which Congress has drafted statutory provisions to protect the type of “personal information” or “personally identifiable information” at issue here,<sup>14</sup> but used the term “proprietary information” in Section 222 to serve a different and more limited purpose – preventing incumbent carriers from leveraging CPNI already in their possession to control CPNI derived “in one market to

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<sup>12</sup> Swire Comments at 3. In addition, Professor Swire explained that his experience “with other major U.S. privacy regimes also gives reason for caution about reading these provisions as imposing independent legal obligations under two different definitions of what information is covered,” citing HIPPA and Gramm-Leach-Bliley as examples where Congress used a broad term for describing general statutory purposes concerning information subject to privacy protections, but applied privacy and security obligations only to a far more narrowly defined scope of information. He noted that in each case, “the presence of two terms potentially creating different scope was resolved in practice by having one term that sets forth the legal obligations.” *Id.*

<sup>13</sup> *Id.* Professor Swire stated that the “[d]efinition of what data is covered is a consequential regulatory decision” for companies handling data today “in numerous, complex and rapidly-changing ways,” and because of that, it is “sound policy” to carefully delineate what is covered in a privacy regime. *Id.* He explained that:

For professionals learning and then administering privacy rules, a fundamental first step is to define the scope of what is covered. Once information is covered by a regulation, numerous additional steps are typically required, such as rules for customer consent, access, audits, training, and so on. Vagueness in the scope of what is covered thus causes particular compliance challenges. *Having two overlapping potential scopes of coverage, such as for “proprietary information” and also CPNI, would thus complicate and make more difficult the role of privacy professionals seeking to do their jobs properly. It would be harder for the privacy professionals to communicate to the rest of the organization what actions must be taken, with a consequent risk to the achievement of effective compliance.*

*Id.* at 3-4 (emphasis added).

<sup>14</sup> CTIA Petition at 6-7. Provisions in the Communications Act include Section 631, protecting the privacy of cable subscribers’ “personally identifiable information,” 47 U.S.C. § 551 and a similar provision, Section 338(i), protecting the privacy of satellite subscribers’ “personally identifiable information,” 47 U.S.C. § 338(i).

perpetuate their dominance as they enter other service markets.”<sup>15</sup> The *Order on Reconsideration* impermissibly ignores Congress’ choice of terminology, incorrectly conflating “proprietary information” as used in Section 222(a) with “personally identifiable information.” Although the Commission’s motives in seeking to protect the privacy of consumers applying to participate in Lifeline programs are admirable, Congress simply has not tasked the Commission with this particular mandate under Section 222. As a matter of law, the Commission’s interpretation to the contrary must be reconsidered.<sup>16</sup>

### **III. SECTION 201(b) PROVIDES NO BASIS FOR COMMISSION AUTHORITY OVER CARRIERS’ DATA SECURITY PRACTICES IN THE FACE OF THE MORE SPECIFIC COMMANDS OF SECTION 222**

The *Order on Reconsideration*, similar to the *TerraCom/YourTel NAL*, declares that the “just and reasonable” practices obligation under Section 201(b) also “imposes a duty on [carriers] related to document retention security practices.”<sup>17</sup> ACA agrees with CTIA, however, that “Section 201(b) neither imposes such requirement nor gives the Commission authority to impose such a requirement.”<sup>18</sup> Had Congress granted the Commission authority under Section 201(b) broad enough to reach the data security practices of common carriers, it would not have needed to subsequently enact the very detailed set of prescriptions over this same subject matter in Section 222. The fact that it did so alone suggests the Commission overreaches in

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<sup>15</sup> CTIA Petition at 7–8, citing *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8064 ¶ 2 (1998) (“1998 CPNI Order”).

<sup>16</sup> In its Petition, CTIA also notes that the *Order on Reconsideration* “favorably cites the *TerraCom/YourTel NAL*,” and argues that “to the extent that this ‘tentative’ Commission conclusion found a substantive obligation under Section 222(a), it too was erroneous.” CTIA Petition at 8. ACA agrees. The Commission’s analysis in the *TerraCom/YourTel NAL* was cursory and failed, as CTIA has explained, to grapple seriously with the statutory text, structure, purpose and legislative history, relying instead on a combinations of declarations and cites to section headings, which are not considered authoritative by the courts when interpreting the plain meaning of a statute. See CTIA Petition at 8-10.

<sup>17</sup> Order on Reconsideration, ¶ 235.

<sup>18</sup> CTIA Petition at 10.

attempting to broadly regulate customer privacy under Section 201(b). But, as CTIA explains, not only did Congress recognize that the Commission lacked authority under Section 201(b) over privacy and data security when it enacted Section 222 in 1996, it again confirmed this lack of broad authority when it later added “location” to the definition of CPNI, explaining that had it not done so, “there [would have been] no protection for a customer’s location information.”<sup>19</sup>

It is utterly inconsistent with this legislative history and the structure of the Communications Act as a whole to read the Commission’s authority over common carrier “practices, classifications, and regulations for and in connection with such communication service” under Section 201(b) to overcome the later and more specific limitations on its authority over the particular subject matter of the confidentiality of “proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, and customers” delineated in Section 222.<sup>20</sup> Such a limitless view of the Commission’s authority over common carriers in Section 201(b) would render much of the rest of Title II, with its minutely detailed rules, exceptions and exemptions, largely if not completely superfluous.<sup>21</sup> Congress could not have intended such a result, and the Commission cites no legislative history suggesting that it did.

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<sup>19</sup> CTIA Petition at 11, quoting from a floor statement concerning the Wireless Communications and Public Safety Act of 1999, 145 Cong. Rec. H. 9858 (Oct. 12, 1999) (statement of Rep. John Shimkus).

<sup>20</sup> Indeed, research disclosed not a single instance prior to the *TerraCom/YourTel NAL* where the Commission relied upon Section 201(b) to mandate data security practices for carriers. Rather, there are several cases in which the Commission held that carriers have no affirmative duty under 201(b) to warn customers about certain security-related risks (e.g., unauthorized long-distance calling) or steps to protect against those incidents. *Gerri Murphy Realty, Inc., Complainant, v. AT&T Corp. Defendant*, Memorandum Opinion and Order, 16 FCC Rcd 19134, ¶ 14 (2001) (“We find that GMRI’s allegation that AT&T had a duty to warn its customers of the risk of toll fraud, or to inform its customers of other services it provides to reduce liability in such circumstances, is not supported by Commission precedent”); *Directel, Inc., Complainant, v. American Telephone and Telegraph Co., Defendant*, Memorandum Opinion and Order, 11 FCC Rcd 7554, ¶ 19 (1996) (“[A]s was the case in *Chartways*, Directel has failed to cite any authority or provide any persuasive argument to support a finding that AT&T had any affirmative duty to warn Directel about toll-fraud risks, nor has it alleged specific facts that might indicate that AT&T acted unreasonably in its communications with Directel at the time the fraudulent calls occurred”) (citing *Chartways Technologies, Inc., Complainant, v. AT&T Communications, Defendant*, Memorandum Opinion and Order, 8 FCC Rcd 5601 (1993)).

<sup>21</sup> It is axiomatic that statutes should be construed “so as to avoid rendering superfluous” any statutory language. See, e.g., *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

In this case, the basic tenets of statutory construction require that the specific delegation of statutory authority over proprietary information trump the general authority over the practices of common carriers. The Supreme Court has made clear that “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals”<sup>22</sup> by interpreting a statute to create a regulatory system “unrecognizable to the Congress that designed” it.<sup>23</sup> The Commission should return to its earlier and undoubtedly correct understanding that in enacting Section 222, “Congress established a comprehensive new framework in Section 222, which balances principles of privacy and competition in connection with the use and disclosure of CPNI and other customer information [*i.e.*, subscriber list information and aggregate customer information].”<sup>24</sup> Those protections for CPNI and other categories of information described in Section 222 did not extend more broadly, as other provisions in the Act do, to encompass “personally identifiable information,” and the Commission’s declarations to the contrary must be reconsidered and vacated.

#### **IV. CONCLUSION**

ACA members understand the importance of protecting the security of their customers’ personal information, expend substantial resources to implement practices and programs to protect customers’ data security, and appreciate the Commission’s concerns and good intentions in this area. Good intentions, however, do not automatically translate into regulatory authority in the absence of any indication from Congress that the Commission is empowered to regulate carriers’ practices with regard to customer data beyond that falling within the category of CPNI. The Commission has overstepped the bounds of its statutory authority insofar as it has interpreted Section 222(a) and 201(b) to require and/or give the Commission the ability to

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<sup>22</sup> *Util. Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2445 (2014).

<sup>23</sup> *Id.* at 2444 (citing Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 FR 31514, 31555 (June 3, 2010)).

<sup>24</sup> 1998 CPNI Order, 13 FCC Rcd at 8073-74, ¶ 14.

subject carriers' data security practices to Commission oversight and regulation. The Commission should reconsider the statements to this effect in the Order on Reconsideration, and return to its prior understanding of the extent of its statutory authority over the confidentially of customer proprietary information obtained by carriers in the course of providing the service.

Respectfully submitted,

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