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 OF THE

UNITED STATES TELECOM ASSOCIATION

On August 13, 2015 CTIA – The Wireless Association filed a Petition[1] seeking reconsideration of a narrow, discrete aspect of the Order on Reconsideration in the above-captioned proceeding pertaining to data security obligations under the Communications Act of 1934, as amended (hereinafter, "the Act").[2] In its Petition CTIA specifically requests that the Commission reconsider its declarations that (1) Section 222(a) imposes a duty of confidentiality upon carriers, other than with respect to Customer Proprietary Network Information ("CPNI"), and (2) Section 201(b) imposes a duty upon carriers to implement data security measures solely

[1] *See* CTIA – The Wireless Association Petition for Reconsideration In the Matter of Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund, WC Docket Nos. 11-42, 09-197 and 10-90 (Aug. 13, 2015) (CTIA Petition).

[2] *In the Matter of 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) ("Lifeline Order on Reconsideration").

because those declarations inaccurately reflect the scope of the Commission's authority under those two subsections of the Act.[3]

USTelecom and its member companies are committed to meet their obligations to protect the security of their customers' data not just as a legal requirement, but as part of the already high standard they set for business practices. USTelecom members have devoted substantial resources towards creating data security systems that prevent and detect potential data security threats. That said, USTelecom supports CTIA's efforts to ensure that the Commission's data security requirements are rooted in, and conform to, the applicable statutory provisions enacted by Congress and 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; 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 provisions of Communications Act.

Section 222(a) is not a standalone requirement that provides the Commission with the necessary legal authority over how a carrier manages security of data beyond CPNI. Rather, Section 222(a) is a general statement identifying the three categories of information to which that section of the statute applies.[4] As noted by CTIA in its Petition, Section 222(a) "is nothing more than a general principle that has force and effect – with respect to customer information – only as specified in Section 222(c)."[5] Section 222(c) in turn, expressly limits the type of customer

[3] *See* CTIA Petition at 1-2, citing, Lifeline Order on Reconsideration at 7895-96 ¶¶ 234-35.

[4] These three categories of information are proprietary information relating to (1) carriers, (2) equipment manufacturers, and (3) customers. 47 U.S.C.§§ 222(a)

[5] *See* CTIA Petition at 4.

information to which the statute applies to CPNI, which Section 222(h) defines to mean only information related to seven discrete categories.[6]

USTelecom agrees with the American Cable Association ("ACA") that, "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, 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 perpetuate their dominance as they enter other service markets."[7] That salient point, as CTIA correctly points out, is that "personal information" and "personally identifiable information" are terms of art in privacy statutes, and are meant to mean information that identifies an individual or that, when linked to other information, can be used to identify an individual, such as Social Security Numbers, financial information, and other identifiable or identifying information which is not the same as "proprietary information."[8] The Lifeline Order on Reconsideration fails to consider Congress' precise word choice, and does not properly distinguish between "proprietary information" as used in Section 222(a) and "personally identifiable information." In failing to make that distinction, the Commission has read in a non-existent mandate under Section 222.

Similarly, Section 201(b) does not provide the Commission with authority over carriers' data security practices. The Commission asserts that Section 201(b)'s requirement that practices

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[6] Those seven categories of information are the (1) quantity; (2) technical configuration; (3) type; (4) destination; (5) location; (6) amount of use of a telecommunications service; and (7) information contained in bills pertaining to telephone exchange service or telephone toll service.

[7] *See* ACA Comments at 6-7 WC Docket Nos. 11-42, 09-197, 10-90 (Oct. 8, 2015), citing, 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").

[8] *See* CTIA Petition at 6-7, fn 14.

be "just and reasonable' provides it with the necessary authority to place requirements on carriers related to document retention security practices.[9] However, Section 201(b) does not impose such a requirement, nor does it give the Commission the necessary legal authority to impose such a requirement. The fact that Congress acted separately in enacting Section 222 to define the Commission's authority over customer information is evidence that 201(b) cannot be read so broadly and the Commission's attempt to do so is simply overreaching.[10]

Furthermore, even if the Commission had authority under Section 222(a) or 201(b) to impose obligations regarding consumer information beyond CPNI, the Commission's Lifeline Order on Reconsideration violated the APA because the Commission's interpretations of Sections 222(a) and 201(b) depart from longstanding precedent without a reasoned explanation and imposes substantive obligations without the proper APA notice and opportunity to comment. As CTIA correctly points out, the Commission has long recognized that Section 222 of the Act covers limited types of customer information, when in multiple Commission orders the Commission asserts that Section 222 covers just three categories of "customer information": (1) individually identifiable CPNI; (2) aggregate customer information; and (3) subscriber list information.[11] Prior to the adoption of its Lifeline Order on Reconsideration, the Commission's citations to Section 222 only referred to the protection of CPNI, not other customer information. It was not until the recent TerraCom , Inc. and YourTel America, Inc. Notice of Apparent

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[9] *See* Lifeline Order on Reconsideration at 7896, ¶ 235.

[10] *See* 139 Cong. Rec. E 2745 (Nov. 3, 1993) (statement of Congressman Markey) ("The legislation I am introducing today will ensure that the fundamental privacy rights of each American will be protected even as this new era of communications becomes ever more sophisticated and ubiquitously deployed.")

[11] *See, e.g.*,1998 CPNI Order, 13 FCC Rcd at 8064 ¶ 2; *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, 14864 ¶6 (2002); *see also U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1228 n.1 (10th Cir. 1999).

Liability for Forfeiture that the Commission cited the 2007 CPNI Order's reference to Section 222(a) for the proposition that it "expect[s] carriers to take every reasonable precaution to protect the confidentiality of proprietary or personal customer information[12] and asserted that 201(b) gave it authority to regulate data security.[13]

The Commission also violated the APA by failing to provide adequate notice and the opportunity to comment on the expanded requirements in its Lifeline Order on Reconsideration because the Commission not only articulates a new duty under Sections 222(a) and 201(b), but it also lays out specific data security safeguards that it requires carriers to adopt and implement.[14] In order to adopt and impose such obligations on carriers, the APA requires agencies to follow notice-and-comment procedures when they adopt "legislative rules" that have the "force and effect of law."[15] Instead of proposing these specific, substantive data security requirements for carriers as part of a regular rulemaking proceeding, the Commission impermissibly, imposed them on carriers absent the necessary notice and comment.

There is simply no basis for opponents to say that "CTIA's Petition rests on the remarkable contention that applicants for and participants in the Lifeline program are entitled to no protection whatsoever when it comes to carriers' handling of personal information."[16] Such

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[12] See TerraCom , Inc. and YourTel America, Inc. Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 13325,13330 ¶13, fn. 30 (2014). ("*TerraCom/YourTel NAL*")

[13] *See TerraCom/YourTel NAL*, 29 FCC Rcd at 13339 ¶ 38 fn.83, citing, Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers, 15 FCC Rcd 8654, 8654 ¶ 4.

[14] *See* Lifeline Order on Reconsideration at 7896 ¶ 235.

[15] *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (quoting, *INS v. Chadha*, 462 U.S. 919, 986 n.19 (1983)); *see also* 5 U.S.C. § 553 (setting forth three-step procedure for notice-and-comment rulemaking).

[16] *See* Appalshop, Center for Democracy & Technology, Center for Digital Democracy, Center for Rural Strategies, Consumer Action, Consumer Federation of America, Consumer Watchdog, Free Press, New America's Open Technology Institute, Public Knowledge, United Church of Christ, OC, Inc., and World Privacy Forum (collectively, "Privacy PIOs") Opposition to Petition for Partial Reconsideration In the Matter of Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund at 3-4, WC Docket Nos. 11-42, 09-197 and 10-90.

statements represent a complete misreading of the Petition. There is simply no dispute whatsoever that personal information should be protected and privacy obligations remain a top priority of all carriers.

Rather, USTelecom and CTIA simply disagree with the assertion of authority under Sections 222(a) and 201(b) as the legal basis for the Commission's decision. 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. Neither Section 222(a) nor the more general mandates concerning common carrier practices in Section 201(b) gives the Commission the necessary legal authority to impose these customer data security requirements. In fact, USTelecom filed a Petition for Review[17] on these points in the D.C. Circuit Court.

[17] *See United States Telecom Association v. Federal Communications Commission*, Petition for Review, No. 15-1322 (D.C. Cir. 2015).

For these reasons, USTelecom 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.

Respectfully submitted,

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