

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
CTIA Petition for Rulemaking)	WT Docket No. 01-72
)	
Establishing Fair Location Information)	
Practices)	
_____)	

SPRINT PCS REPLY COMMENTS

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Summary

There is considerable agreement in the comments filed in this proceeding, whether they were submitted by privacy organizations, wireless carriers, vendors or applications service providers (“ASPs”). The Center for Democracy and Technology (“CDT”) highlighted the most important point: a “consistent and predictable set of privacy rules is necessary to protect consumers and create a level playing field across all devices and platforms.”

The consumer need for a consistent and predictable set of privacy rules can be met only under two circumstances. First, the rules must be national (if not global) in scope. Disparate state laws are not workable for consumers or service providers, and accordingly, state laws in this area must be preempted.

Second, the same set of privacy rules must apply to all entities that generate or access wireless location information. However, the “express prior authorization” framework set forth in Section 222(f) of the Communications Act currently applies only to a subset of firms that will access location information – namely, wireless carriers and providers of automatic crash notification systems. This statutory requirement does not extend to the hundreds of ASPs that will be accessing location information, or to the new “overlay location providers” that will generate location without the knowledge of the serving wireless carrier (and perhaps even without the knowledge of the customer). As the CDT again notes correctly:

The lack of [a consistent] framework undermines consumer privacy and confidence and poses an unacceptable risk of inappropriately skewing the marketplace and the development of new services.

The question becomes what, if anything, the Commission should do given that its jurisdiction is currently limited to telecommunications carriers only, and does not include

the numerous other entities that will be generating or accessing location information? Again, there is broad consensus on two points: (1) detailed rules applicable to carriers are inappropriate at this time, and they could have the unintended effect of stifling the development of a nascent market, and (2) the Fair Information Practices should govern the disclosure of wireless location information.

The principal area of dispute in the comments is actually quite narrow: should the Commission codify the Fair Information Practices into its rules. Reasonable arguments can be made on each side of this question, although Sprint PCS favors adoption of these Practices into the Commission's rules. Sprint PCS believes that such rules may give consumers a sense of confidence in dealing with carriers and may help point out the real public need to adopt similar rules to all firms that may generate or acquire wireless location information – regardless of their regulatory classification and regardless of their physical location.

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Sprint Spectrum, L.P., d/b/a Sprint PCS (“Sprint PCS”), submits this reply to the comments filed in response to the Cellular Telecommunications & Internet Association (“CTIA”) petition seeking adoption of Fair Information Practices concerning wireless location information.

I. THERE IS BROAD CONSENSUS THAT WIRELESS LOCATION ISSUES SHOULD BE CONSIDERED SEPARATELY FROM THE GENERAL CPNI DOCKET

With one exception, the parties are unanimous that the Commission should consider the subject of wireless location separately from its general CPNI proceeding (Docket No. 96-115). Mr. Hilliard, representing the Wireless Consumers Alliance, asserts that there is “no justification for separate consideration of CPNI rules for wireless carriers.”¹ But as the Center for Democracy and Technology (“CDT”) notes, a “separate rulemaking is appropriate because wireless location information is governed by different statutory language.”² And as the Electronic Privacy Information Center (“EPIC”) adds, location

¹ Wireless Consumers Alliance at 2.

² CDT at 8-9.

issues involve “technologies, players, and policy considerations that are different than those involved in the protection and regulation of traditional forms of CPNI.”³

There are, in short, numerous reasons why the Commission should consider wireless location information separate from its general CPNI docket.

II. WIRELESS LOCATION ISSUES MUST BE ADDRESSED ON A NATIONAL, IF NOT GLOBAL, LEVEL AND THEY CERTAINLY CANNOT BE ADDRESSED ON A STATE LEVEL

One of the central issues in this proceeding is whether national laws governing the disclosure of wireless location information would be sufficient. In this regard, the XNS Public Trust Organization (“XNSORG”), which is generally complimentary of the CTIA petition, notes that the petition is nonetheless “US-centric and does not seek to address the many and varied rule sets adopted throughout the rest of the world.”⁴

XNSORG notes the problems that disparate country laws can pose for global roamers.⁵ It further describes how the privacy laws in one country can often impact other foreign jurisdictions:

Cross-jurisdictional variations in privacy legislations are already causing US companies considerable difficulties as they seek to operate within the European Union. Attempting to extend US CPNI rules would likely further confuse the issue causing greater privacy concerns for carriers, service providers and customers who roam or conduct business between these jurisdictions.⁶

Sprint PCS submits, however, that the problem is larger and even more serious than what XNSORG describes. The Internet does not conform to country boundaries.

³ EPIC at 2.

⁴ XNSORG at 6.

⁵ See XNSORG at 6.

⁶ XNSORG at 6.

Thus, location information concerning U.S. citizens can be accessed (or transferred), used and stored by applications service providers (“ASPs”) located outside the United States. Will U.S. privacy laws reach foreign-based ASPs? Will U.S. regulatory authorities possess the authority and resources to seek sanctions against foreign-based ASPs that misuse the location data of U.S. citizens? What recourse will U.S. citizens have for a breach of their privacy rights? Must they file a lawsuit in the foreign country, effectively insulating the ASP from liability? In sum, the interplay of U.S. and foreign laws and the development of a comprehensive set of core privacy protections, applicable *regardless* of the location of the customer, the customer’s data, or the ASP, is an issue that merits serious and extended investigation.

This much is clear at this time: state laws addressing wireless location information must be preempted, as Sprint PCS and other commenters have demonstrated.⁷ Disparate state laws are already being proposed.⁸ Disparate state laws are not workable given that mobile services, “by their nature, operate without regard to state lines as an integral part

⁷ See, e.g., Sprint PCS at 14-17; Dobson at 4-5; Cingular at 5; Verizon Wireless at 10. Mr. Hilliard again stands alone, asserting that state laws should not be preempted. See Wireless Consumers Alliance at 3. In taking this position, however, Mr. Hilliard does not address such fundamental questions as to whom such state laws would apply (e.g., only people with billing addresses in the state) or how national carriers with regional networks and national customer care systems and operations could possibly comply with disparate state laws.

⁸ Privacy bills were recently introduced in Oregon, Arizona, Tennessee, and Minnesota, all of which propose different regulations. The Oregon bill (H.B. 3345) would completely prohibit the disclosure of location information, with the exception of emergency services, and also would prohibit the transmission of location-based advertising to a handset without prior written consent. The Minnesota bill (SF 565 Amendment), governing personally identifiable information (“PII”), would allow a provider to obtain consent to disclose PII in “a manner consistent with self-regulatory guidelines issued by representatives of the interactive services provider industry or other representatives of the marketing or online industries.” The Arizona bill (H.B. 2135) would establish very specific opt-out and opt-in procedures. State bills also differ on how and when privacy policies and options must be disclosed.

of the national telecommunications infrastructure.”⁹ In the end, disparate state laws present on a more “micro-level” the true challenge for consumers and the protection of their privacy interests: disparate laws between countries.

Congress has already established a federal framework governing wireless location information – “express prior authorization” except under certain enumerated circumstances.¹⁰ A uniform set of practices implementing this framework will develop in this country, if only because wireless carriers have national networks and systems and because mobile customers expect national transparency with their mobile services. Uniformity benefits consumers – reliable and consistent expectations of privacy rules – and benefits industry.

Congress has directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”¹¹ New wireless location services will develop on “a reasonable and timely basis” only if the Commission, in deliberate fashion, determines what national rules are needed to establish the federal framework that Congress has already established. In contrast, wireless location services will never develop on “a reasonable and timely basis” if national practices are instead adopted *ad hoc* by individual state legislatures.¹² The states will act if the Commission does not. The Commission should preempt the states now over the subject of wireless location information.

⁹ H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 260 (1993).

¹⁰ 47 U.S.C. § 222(f).

¹¹ Section 706(a) of the Telecommunications Act of 1996, *note to* 47 U.S.C. § 157.

¹² The problem is not simply that one state legislature can effectively establish *de facto* national standards. The real problem is that one state may establish one set of rules and then, after carriers

III. THE COMMISSION DOES NOT CURRENTLY HAVE THE TOOLS TO ADDRESS COMPREHENSIVELY THE WIRELESS LOCATION ISSUE

Sprint PCS noted in its comments that “[c]onsumers will expect that their sensitive location information will be subject to a core set of privacy protections *regardless* of the firm (carrier or non-carrier) obtaining access to their information.”¹³ Privacy groups share this view. EPIC states that the “average user is unlikely to know (or care) that a cellular phone is subject to one regulatory regime while a wireless Internet device is subject to another (or none at all).”¹⁴ The CDT echoes this point:

Consumers cannot be expected to distinguish between devices and services that are subject to varying privacy protections based on arbitrary regulatory classifications. Rather, consumers should be confident that, whenever they are using a device that relays location information, its use, disclosure and access will be governed by predictable, easily understandable privacy rules. Technology neutrality is essential given the wide range of devices and means for transmitting location information.¹⁵

As noted, Congress has already established the core framework to govern wireless location information, and the Commission has the jurisdiction to implement this framework. However, the statute that Congress enacted in 1999 applies only to CMRS carriers and providers of automatic crash notification systems.¹⁶ The assumption Congress made in 1999 – that location information would be available only to two categories of service providers (CMRS and On-Star-type providers) – was a reasonable assumption to make at the time. This assumption, however, is no longer valid today.

adjust their practices to those rules, another state adopts a different set of rules for carrier compliance.

¹³ Sprint PCS at 1-2 (emphasis in original).

¹⁴ EPIC at 3.

¹⁵ CDT at 9-10.

¹⁶ See 47 U.S.C. § 222(f).

There will be numerous (perhaps thousands) of applications service providers (“ASPs”) that will have access to mobile consumer location information. These entities, as information services providers, are beyond the Commission’s current jurisdiction.¹⁷ How will consumer privacy interests be protected by such unregulated entities?¹⁸ Carriers such as Sprint PCS can attempt to exercise some control by way of the contracts they enter with such ASPs. But carriers are not in the business of regulating firms with which they do business. And more fundamentally, what rights do consumers have if an ASP misuses their location information?¹⁹

Further, what about entities that can generate location information outside the controls that a carrier installs – which Ericsson appropriately describes as “overlay location providers [that] are not subject to regulation?”²⁰ Sprint PCS raised this matter in its comments, and other commenters made the same point.²¹ For example, XNSORG states:

¹⁷ Not surprisingly, perhaps, some of these unregulated entities propose that the Commission adopt rules “to be followed by wireless carriers,” while they will be subject to “self regulation” only. Wireless Location Industry Association (“WLIA”) at 3 and 5. Privacy groups correctly note that such a disparate regulatory regime will undermine the interests of consumers and distort the competitive marketplace. *See, e.g.*, CDT at 9-10; EPIC at 3.

¹⁸ With other, more established industries, Congress has extended privacy protections to entities beyond the major players in the industry. For example, the Gramm-Leach-Bliley Act limits reuse of protected financial information. Under Section 502(b), a third party that receives protected information from a financial institution may not disclose that information unless the disclosure would be lawful if made by the financial institution. The Health Insurance Portability and Accountability Act contains similar restrictions on business partners of health care providers.

¹⁹ For example, the Health Insurance Portability and Accountability Act requires health care providers to enter into contracts with their business partners limiting reuse of the information. Importantly, this federal statute makes patients beneficiaries to these third party contracts. A similar provision would be appropriate for wireless location information, but as discussed herein, any rules must also apply to *non-carrier* firms that generate location information.

²⁰ Ericsson at 2-3.

²¹ *See* Sprint PCS at 17-18. *See, e.g.*, CDT at 4.

We are aware that there are already examples of stand-alone GPS chipsets being fitted into batteries which, when connected to cell phones, require no processing by the carrier in order to reveal their location. In the currently available products the handset GPS receiver calculates its own position and then sends this over the voice channel or the data channel (where available). The carrier knows only that they are handling a circuit switched voice or data call (or packet data session) but does not know about the contents. *The carrier is therefore no longer in control of the release of the subscriber's location information.*²²

One privacy organization recommends that the Commission make legislative recommendations to Congress to address this jurisdictional gap.²³ Sprint PCS does not necessarily disagree, but it questions whether the Commission currently has the facts in its possession to make specific recommendations to Congress. While there may be a need for Congress to intervene, precipitous action by Congress could have the unintended effect of distorting the natural development of the nascent wireless location market.

Ordinarily, Sprint PCS would propose that the Commission issue a new public notice specifically seeking comment on technologies and firms that might generate wireless location information without the knowledge of the consumer or the consumer's serving telecommunications carrier. But CMRS carriers have little direct knowledge of these developments, and the firms that possess such knowledge may have little incentive to participate (since participation could result in new government legislation or regulation). This is a subject that Sprint PCS has no specific recommendation to make to the Commission at this time, but it encourages the Commission to work with

²² XNSORG at 3 (emphasis added). At one time Sprint PCS believed, apparently as other commenters still believe, that the customer's serving carrier could control the release of customer location information to third parties because the carrier will be the only entity to generate location information. *See, e.g.*, TruePosition and Grayson Wireless. Sprint PCS is no longer confident that it will be able to exercise this control.

²³ *See* EPCI at 3.

organizations like the WAP Forum and W3C – as all sectors of the wireless industry are represented there – to develop a report identifying the types of firms generating and receiving location information, and to begin developing a comprehensive privacy solution. Like the global issue discussed in Part II above, extending the same privacy protections to all entities that generate or access location information is one of the most important issues that must be addressed.

IV. THERE IS BROAD CONSENSUS THAT DETAILED FCC RULES ARE INAPPROPRIATE AT THIS TIME

There is broad consensus among the commenters that adoption of detailed FCC rules would be inappropriate at this time. Detailed rules could stifle the development of a nascent market. Moreover, even privacy organizations recognize that detailed rules applicable to CMRS carriers only would distort competition that, in turn, would harm consumers:

Uniform privacy regulations are also necessary to ensure competition in a nascent market. Location based services that are regulated may be disadvantaged by the increased operational costs of conforming to privacy regulations. When a customer is faced with a choice between less expensive applications for similar services, the privacy standards for technologies under regulation will be undermined by arbitrary competitive advantages for unregulated devices. The FCC must create a level-playing field for the various technologies using location information so that the most competitive and innovative products can succeed in the marketplace.²⁴

The position of the one commenter seeking adoption of several detailed rules confirms the impropriety of promulgation of such rules at this point. SiRF Technology asks the Commission to rule that entities must notify consumers if they retain information

²⁴ CDT at 7-8.

longer than “three billing cycles.”²⁵ But there is no basis in the record for the Commission to determine that a three-month period, as opposed to a two- or four-month period (or some other period), is appropriate – or that any other rules on this subject are appropriate.²⁶

This same commenter recommends that the Commission also require carriers to identify (a) whether they use a handset- or network-based location technology and (b) the accuracy of their location technology.²⁷ However, if the Commission were to impose this requirement, Sprint PCS’ customer care advocates would receive millions of calls wherein its advocates would have to attempt to explain the difference between network-based and handset-based location technologies. Many customers will have difficulty understanding these differences. More fundamentally, the Commission needs to ask why consumers should be required to understand such differences.²⁸

Sprint PCS has already announced that it intends to use a GPS-assisted handset location technology, the most accurate location technology available.²⁹ The Commission can be confident that even without regulation, consumers will learn of the advantages of Sprint PCS’ approach.

²⁵ SiRF at 2. Completely unreasonable is SiRF’s suggestion that carriers should take unspecified steps in an attempt to distinguish between their customers and other persons that may use the customer handset. *See id.* at 8-9.

²⁶ These are the kinds of matters that states often legislate, and it is these kinds of matters that national carriers find so difficult to implement.

²⁷ *See id.* at 3-4 and 6.

²⁸ Sprint PCS is currently grappling with how to explain E911 precision to its customers, given that most customers have little understanding of cell sites, much less cell sectors and GPS technology.

²⁹ *See* Sprint PCS Phase II Implementation Report, CC Docket No. 94-102 (Nov. 9, 2000).

There is, in summary, no factual basis for the Commission to adopt detailed rules at this time. As Chairman Powell noted only last month, “[t]he FCC must be skeptical of regulatory intervention absent evidence of persistent trends or clear abuse, but we will be vigilant in monitoring the evolution of these nascent markets.”³⁰

**V. THE CENTRAL QUESTION FACING THE COMMISSION:
WHAT SHOULD IT DO AT THIS TIME?**

There is broad consensus that the Commission should not adopt at this time, detailed rules governing wireless location information, as discussed above. The commenters are also unanimous in their support of the Fair Information Practices. Where the commenters diverge is whether the Commission should adopt rules incorporating the Fair Information Practices, or do nothing at this time.

There are numerous, legitimate reasons warranting Commission caution. As one privacy group correctly notes, the requirements of Section 222 are “self-executing, and normally a statute like this might not require further FCC action.”³¹ Moreover, Sprint PCS agrees with Verizon Wireless that “CMRS providers have a powerful incentive to adhere to a privacy-oriented, consumer-friendly approach to the use of information. The wireless marketplace is extraordinarily competitive, and carriers that fail to maintain the trust of their customers will suffer severe consequences.”³² Sprint PCS also agrees with the CDT that the adoption even of high level rules applicable to CMRS carriers only would not be technology neutral:

³⁰ Hon. Chairman Michael K Powell, “Agenda and Plans for Reform of the FCC,” Opening Statement before the House Subcommittee on Telecommunications and Internet, at 2 (March 29, 2001).

³¹ CDT at 6.

³² Verizon Wireless at 8.

If one provider were subject to regulations while another is not, the unregulated provider could gain an unfair competitive advantage. The market should select the best location-based services free of any disparity imposed by inconsistent regulation.³³

Nevertheless, Sprint PCS supports Commission adoption of the Fair Information Practices. Although the FCC rules would apply only to a small subset of location information handlers, the resulting discrimination would be caused not by the rules, but by the limited scope of Section 222(f) of the Communications Act. Sprint PCS supports implementation of the Fair Information Practices, whether or not the Commission specifically adopts them in its rules, and the Commission's codification of these Practices may help spur their use by other industry segments. Importantly, simple FCC rules incorporating the Fair Information Practices may give consumers a sense of confidence in dealing with carriers, and may help point out the real public need to adopt similar rules to all firms that may generate or acquire wireless location information.

VI. CONCLUSION

Sprint PCS agrees with the Center for Democracy and Technology that a “consistent and predictable set of privacy rules is necessary to protect consumers and create a level playing field across all devices and platforms,” and that the “lack of such framework undermines consumer privacy and confidence and poses an unacceptable risk of inappropriately skewing the marketplace and the development of new services.”³⁴ A means must be found to provide the consistency that consumers will rightfully demand. State laws certainly are not the answer. Indeed, even national laws, which may be the

³³ CDT at 10.

³⁴ CDT at 1.

only way to obtain regulatory parity and avoid an unworkable patchwork of state law, may not prove to be sufficient because of the global implications of this matter.

For the foregoing reasons, Sprint PCS respectfully requests that the Commission take actions consistent with the positions discussed above and those contained in its opening comments.

Respectfully submitted,

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April 24, 2001

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