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FEDERAL COMMUNICATIONS COMMISSION  
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April 24, 2001

HAND DELIVERY

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street SW

Re: In the Matter of Petition of the Cellular Telecommunications & Internet Association for a Rulemaking to Establish Fair Location Information Practices - WT Docket No. 01-72

Dear Ms. Salas:

Attached for filing in the above-captioned proceeding are the Reply Comments of NetCoalition.

Respectfully,

James J. Halpert  
Vincent M. Paladini

Attorneys for  
NetCoalition

/vmp  
Enclosure

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
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OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Petition of the Cellular Telecommunications ) WT Docket No. 01-72  
& Internet Association for a Rulemaking to )  
Establish Fair Location Information Practices )  
 )

**REPLY COMMENTS OF THE NETCOALITION**

**I. INTRODUCTION AND SUMMARY**

The NetCoalition, by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.<sup>1</sup> The NetCoalition is the first public policy organization comprised of members whose primary business is purely Internet-based. Our members, Yahoo!, America Online, Terra-Lycos, Inktomi, Excite@Home, and DoubleClick, include four of the top ten Internet sites. We represent innovators in e-commerce and interactive services, advertising and infrastructure, person-to-person trading, and search and navigation systems who have a critical stake in policy developments affecting the Internet.

Among these issues is the development of privacy rules that will govern Internet applications. NetCoalition participates in this proceeding because it raises an important issue for the future of the Internet—whether rules governing consumer choice with regard to privacy will

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<sup>1</sup> *In the Matter of Petition of the Cellular Telecommunications & Internet Association for a Rulemaking to Establish Fair Location Information Practices*, Notice of Request for Comments, WT Docket No. 01-72 (rel. Mar. 16, 2001)(“Notice”).

further competition in Internet-related services, or instead hinder competition through an onerous regulatory regime that leaves a small number of companies positioned to obtain consumer approval as part of standard service contracts and thereby makes them “gatekeepers” for innovative services.

As Congress determined in amending Section 222, telecommunications carriers’ use of information location raises unusual privacy concerns, and generally requires prior customer approval. However, at the same time, Section 222 is designed to encourage, not thwart competition, and provides for disclosure of customer proprietary network information (“CPNI”) “to any person” upon the request of a customer.<sup>2</sup> Indeed, the Conference Report for the 1996 Act specifically states that Section 222 “strives to balance both competitive and consumer privacy interests with respect to CPNI.”<sup>3</sup> As the Commission implements Section 222 in this context, it should be careful to implement the mandate of § 222(c)(2) in a balanced manner, consistent with its support for innovative wireless Internet services.

The NetCoalition and its members are committed to protecting the privacy of Internet users’ online experiences. We believe that privacy is fundamental to the continued growth of the Internet, and that consumer trust is essential. That is why the NetCoalition’s member companies all have implemented strong privacy protections. For its part, the NetCoalition has engaged in an aggressive public education and web advertising campaign on privacy, and our CEOs wrote the CEOs of the 400 leading online sites to urge them to adopt robust privacy policies addressing notice, choice, access and security.

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<sup>2</sup> 47 U.S.C. § 222(c)(2).

<sup>3</sup> H. Rep. No. 458, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. at 205 (1996).

## II. DISCUSSION

### A. **The Commission Should Interpret the CPNI Statute's Prior Customer Approval Requirement Carefully, to Minimize the Risk Of Anti-Competitive Outcomes that Would Frustrate The Purposes Of § 222.**

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In its *Petition*<sup>4</sup>, CTIA requests that the Commission promulgate rules to ensure that mobile customers of telecommunications carriers: (1) are informed of location information collection and use practices prior to information collection; (2) have a meaningful opportunity to consent to such collection and use; and (3) are assured of the security and integrity of collected location information.<sup>5</sup> A number of wireless carriers have responded by asserting that the Commission's rules must apply to all entities that have access to wireless location information.<sup>6</sup>

CTIA's privacy principles for location information are sound self-regulatory policies. However, the Commission should not extend those principles beyond the statutory command of § 222 to others who are not telecommunications carriers, and who are much less well-positioned to obtain customer approval. There is a risk that rules adopted by the Commission in response to CTIA's *Petition* could have unintended anti-competitive consequences by requiring inflexible forms of consent that work to the competitive advantage of wireless carriers who can include consent provisions in standard form contracts, or by hindering the forwarding of location information to non-carrier companies who have obtained consent. Therefore, NetCoalition urges the Commission to reject requests to regulate entities that are not telecommunications carriers,

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<sup>4</sup> *Petition of the Cellular Telecommunications & Internet Association for a Rulemaking to Establish Fair Location Information Practices*, WT Docket No. 01-72, Nov. 22, 2000 ("*Petition*").

<sup>5</sup> *Id.* at 3.

<sup>6</sup> See Comments of Cingular Wireless at 5; Comments of Sprint PCS at 1, Comments of Verizon Wireless at 10.

and remain mindful of the effects that its CPNI regulations may have on unregulated Internet-based businesses and information service providers.

**1. The CPNI Statute Applies Only To Telecommunications Carriers, Not To Information Services Such as Portals and ISPs.**

Section 222 of the Act establishes a general duty for telecommunications carriers to protect the confidentiality of CPNI.<sup>7</sup> This duty applies only to telecommunications carriers.<sup>8</sup> Through the use of this phrase, Congress has expressly limited application of the CPNI rules to telecommunications carriers, thereby exempting information services providers from Section 222's restrictions.

As the Commission has consistently maintained, only telecommunications carriers may be subject to common carrier regulation. Information services are provided *via* telecommunications, but information service providers do not provide "telecommunications services," and are not, nor should be, regulated as telecommunications carriers.<sup>9</sup> It is clear from the plain language of Section 222 that Congress intended Section 222 to apply *only* to telecommunications carriers, and an extension of the Commission's CPNI restrictions, directly or

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<sup>7</sup> 47 U.S.C. § 222(a). *See also In the Matter of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 95-115; *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, Order on Reconsideration and Petitions for Forbearance, FCC 98-27, 13 FCC Rcd 8061 at para. 92 (1998) ("Second CPNI Order").

<sup>8</sup> The Act defines a "telecommunications carrier" as "any provider of telecommunications services" 47 U.S.C. § 3(44). The Act defines "telecommunications services" as "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 3(46).

<sup>9</sup> *See In Re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 431-32, para. 123 (1980) (refusing "to subject enhanced services to a

(footnote continued to next page)

by practical effect, to information service providers or other Internet businesses would be contrary to Congress's clearly expressed intent.

Moreover, the Commission's prior CPNI rules expressly exempted CPNI obtained through the provision of information services. Specifically, the Commission has previously stated that "Section 222(c)(1) prohibits the use of CPNI only when it is derived from the provision of a telecommunications service."<sup>10</sup> Section 222(f)(1)(B) defines CPNI as "information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of the carrier."<sup>11</sup> Following the Commission's consistent distinction between telecommunications and information services, location information collected or derived through a customer's interaction with an information service should not be subject to CPNI rules.<sup>12</sup>

Section 222 gives the Commission authority *only* to regulate CPNI in the possession of telecommunications carriers. A statute whose scope is expressly limited to telecommunications carriers should not be extended to impose regulatory burdens on the unregulated competitors of wireless carriers. The Commission should stay the course set in its prior CPNI orders and resist

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*(footnote continued from previous page)*

common carrier scheme of regulation"); Federal Communications Commission Report to Congress (1998).

<sup>10</sup> *Order on Reconsideration*, 14 FCC Rcd at 14492, para 159.

<sup>11</sup> 47 U.S.C. § 222(f)(1)(B).

<sup>12</sup> Note that under the Act, information services are assumed to incorporate an underlying telecommunications component, but do not constitute telecommunications services. See 47 U.S.C. §3(20). See also *Comment Requested in Connection with Court Remand of Non-Accounting Safeguards Order*, Public Notice, CC Docket No. 96-149, DA 00-2530 (2000) (discussing the nature and relationship of information and telecommunications services).

any temptation to regulate the Internet by blurring the fundamental statutory distinction between information services and telecommunications services.

## **2. The Commission Should Provide for Flexibility in Obtaining Customer Approval**

In its *Petition*, CTIA recommends that service providers should inform the consumer about location information collection and use before such information is disclosed or used. CTIA acknowledges a number of means by which consumers may receive such information. CTIA also advocates “express authorization” prior to location information collection, except in relation to the specific exceptions provided for in Sections 222.<sup>13</sup> CTIA allows that there are “a myriad of ways” by which a service provider may satisfy this consent requirement, such as signed service agreements, web site subscriptions, “clickwrap” agreements, and user signaling via a handset or PDA.<sup>14</sup>

NetCoalition supports this flexible approach to customer consent, and believes that it is essential to fulfilling the pro-competitive goals of Section 222. In addition, customer approval for use of CPNI should be permissible through a variety of other means, including oral consent. The Commission has already expressed its desire not to “micro-manage” the methods by which carriers obtain customer consent<sup>15</sup>, and has specifically recognized the validity of consumer

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<sup>13</sup> 47 U.S.C. § 222.

<sup>14</sup> *Petition* at 9-10.

<sup>15</sup> *In the Matter of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 95-115; *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, Order on Reconsideration and Petitions for Forbearance, FCC 99-223, 14 FCC Rcd. 14,409, at 14464, para. 109 (rel. Sep. 3, 1999) (“*Order on Reconsideration*”).

approval through oral, as well as written and electronic means.<sup>16</sup> The Commission should adopt a similarly flexible approach to customer approval of location information, and should be careful not to adopt over-broad regulations that could inadvertently invalidate customer consent acquired by non-carrier Internet companies. Otherwise, carriers who have ongoing direct relationships with consumers could be made the default “gatekeepers” of location information – regardless of the customer’s express wishes.

**3. The Commission Should Require Disclosure of Wireless CPNI Upon Written, Electronic or Oral Request of a Consumer.**

If the Commission decides to proceed with a rulemaking, it should request comment on whether the customer-requested CPNI disclosure requirement should be adapted to the Internet environment by allowing electronic and oral requests for disclosure. Section 222(c)(2), developed before the advent of wireless applications, requires disclosure of CPNI “upon affirmative written request by the customer, to any person designated by the customer.” *Id.*

However, in the context of Internet-related wireless services, written notice is a cumbersome format that consumers are unlikely to use. It would most likely have the effect of discouraging customers from using competitive services, and effectively requiring competitors to partner with a wireless carrier in order to provide service.

Giving legal recognition to electronic consumer requests for disclosure of CPNI is mandated by the Electronic Signatures in Global and National Commerce Act (“E-SIGN”), 15

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<sup>16</sup> 47 C.F.R. § 64.2007(b). In addition, the Commission should clarify its statement in the *Order on Reconsideration* that if “the customer has been clearly notified of his or her right to refuse consent before the CPNI is used and that the notification clearly informs the customer of the consequences of giving or refusing consent, have been complied with, the consent will be effective.” *Id.* at 14464, para. 109.

U.S.C. § 7001, *et seq.*, which requires that electronic records and electronic signatures be given the same legal weight as written signatures and records in all but a few situations not relevant here. *See* §§ 7001(a); 7003(a) and (b). Thus, giving legal validity to electronic requests is not only pro-competitive, it is legally required.

Moreover, the Commission has discretion in interpreting § 222(c)(2) to require disclosure based upon an oral request from a consumer. This too would advance the pro-competitive purpose behind § 222(c)(2), and would be consistent with the Commission’s recognition that customer “approval” of use or disclosure of CPNI may be given orally under § 222(c)(1).<sup>17</sup>

**B. The Commission Should Not Institute A Separate Rulemaking Proceeding.**

CTIA and several commenters contend that the Commission should immediately institute a separate rulemaking solely devoted to the issue of location information CPNI. This would be a very odd result.

The NetCoalition agrees with a variety of other commenters<sup>18</sup> that given the nascent status of location-based services, it may well be premature to regulate location information under the CPNI rules, and there is insufficient reason to move forward quickly with a special location information rulemaking. Moreover, location information is just one of a long list of data covered by Section 222’s definition of CPNI, and remains far less likely than the other data to be used or disclosed for non-service-related purposes.

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<sup>17</sup> The Commission’s rules provide that “[a] telecommunications carrier may obtain approval through written, oral or electronic methods.” 47 C.F.R. § 2007(b).

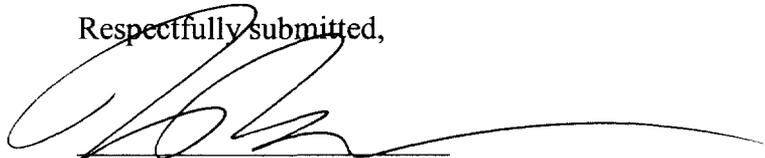
<sup>18</sup> *See* Comments of Sprint PCS at 7-10; Comments of Verizon Wireless at 6-8; Comments of the Wireless Advertising Association at 2.

To the extent that the Commission intends to regulate location information, it should do so as part of a general rulemaking. Regulating location information in a separate proceeding *before* regulating other forms of CPNI would be inconsistent with Congress' decision to place all forms of CPNI in the same statutory definition, and would be an inefficient use of Commission resources.

### III. CONCLUSION

For the foregoing reasons, the NetCoalition requests that in implementing CPNI regulation of location information, the Commission: (1) take care to avoid onerous regulations that operate to the advantage of incumbent carriers; (2) adhere to the plain language of the statute and limit the reach of its regulations to telecommunications carriers; (3) adopt flexible rules governing the means by which consumers may consent to use of location information; (4) provide that consumers may request the transfer of location information to an information service through written, electronic or oral means; and (5) address location information in the same rulemaking proceeding as other forms of CPNI instead of instituting a rulemaking solely devoted to this issue.

Respectfully submitted,



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April 24, 2001

**CERTIFICATE OF SERVICE**

I, Mary W. Malone, hereby certify on that on this 24<sup>th</sup> day of April, 2001, I served a copy of the foregoing Reply Comments of NetCoalition by U.S. first-class mail, or by hand delivery as indicated with an \*, to the following persons:

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