

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

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| In the Matter of |) | |
| |) | |
| Implementation of the Telecommunications Act of 1996: |) | CC Docket No. 96-115 |
| |) | |
| Telecommunications Carriers' Use of Customer Proprietary network Information and other Customer Information; |) | |
| |) | |
| Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information |) | RM-11277 |
| |) | |

REPLY COMMENTS OF COMPTTEL

The record that has been developed thus far in this proceeding brings the Commission no closer to identifying exactly how it is that data brokers have been able to illegally obtain access to customer proprietary network information (“CPNI”) than it was when it issued the Notice of Proposed Rulemaking.¹ Without evidence of the precise methods data brokers use to obtain CPNI,² the Commission is in no position to promulgate regulations applicable to carriers that will be effective in combating the data brokers’ malfeseance. Imposition of additional costly regulations on carriers based on a

¹ See *Notice of Proposed Rulemaking* at ¶10 (“EPIC does not claim it knows specifically how these on-line data brokers and private investigators are obtaining unauthorized access to CPNI.”)

² EPIC speculates that data brokers may be obtaining unauthorized access to CPNI through pretexting, hacking into customers’ online accounts; and/or dishonest employees at the telephone companies. *Id.*

mere assumption that there must be a failure in the existing CPNI regulations is not an appropriate means of either eliminating unauthorized access to CPNI or reducing the likelihood that it will occur in the future.

A more effective way to redress the illegal conduct of the data brokers is to prosecute the wrongdoers for violations of the existing law, a process already being pursued on both the state and federal levels.³ Such an approach is far more likely to succeed in safeguarding consumer CPNI by demonstrating that data brokers who engage in fraud to obtain and sell CPNI will be punished and their ill-gotten gains recovered than the Commission's proposed shot in the dark approach of adopting regulatory "remedies" that may or may not cure an illness whose cause is unknown. In other proceedings, the Commission has declined to adopt regulations that would prohibit certain carrier behavior in the absence of sufficient evidence in the record that carriers were engaging in the targeted behavior.⁴ For the same reason, the Commission should decline to adopt additional CPNI regulations in the absence of evidence that carriers are engaging in the behavior that the regulations seek to correct.

That being said, there are at least two things that the Commission can and should do to ensure that carriers comply with both the letter and the spirit of the law as it exists today. First, the Commission should make clear to carriers that they cannot escape

³ See Comments of the Oklahoma Carriers describing lawsuits brought by the Federal Trade Commission and state attorneys general to halt the illegal practices of data brokers selling CPNI. If evidence is developed in these proceedings that demonstrates the methods data brokers use to obtain access to CPNI, the Commission should solicit additional comment on what, if any, further action it might take to curtail such access.

⁴ See, e.g., *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150, at ¶96 (released September 23, 2005) (where there was insufficient evidence of interference by facilities-based Internet access providers, the Commission refused to adopt regulations that would prohibit them from blocking or otherwise denying access to any lawful Internet content, application or service a consumer wants to access).

liability for violations of Section 222 of the Communications Act and the Commission's related CPNI rules by attempting to shift liability to their wholesale customers or any other third party through indemnification agreements. Second, the Commission should not forbear from the application of Title II regulation to incumbent local exchange carriers ("ILECs").

Carriers That Violate Section 222 Must Be Held Responsible

The press has reported over the last three weeks that the National Security Agency ("NSA"), with the cooperation of AT&T, Verizon and BellSouth,⁵ has established "a vast database of calling records, without warrants, to increase its surveillance capabilities" since the September 11, 2001 terrorist attacks.⁶ "The agency's goal is 'to create a database of every call ever made' within the nation's borders."⁷ The call records allegedly being provided to the NSA by AT&T and the other carriers constitute highly personal CPNI that is theoretically protected from dissemination without prior customer approval by Section 222 of the Communications Act and the Commission's regulations. In this proceeding, the Commission has reaffirmed that CPNI "includes information such as the phone numbers called by a consumer" and "the frequency, duration and timing of such calls."⁸

⁵ BellSouth has denied cooperating with the NSA. Jim Drinkard, *BellSouth calls for a retraction of report it cooperated with NSA*, USA Today, May 19, 2006.

⁶ John Markoff, *Questions Raised For Phone Giants In Spy Data Furor*, New York Times, May 13, 2006, at 1.

⁷ Leslie Cauley, *NSA has massive database of Americans' phone calls*, USA Today, May 11, 2006 at 1.

⁸ *Notice of Proposed Rulemaking*, at ¶ 3. Section 222(h)(1)(A) of the Act defines CPNI as:

It remains to be determined whether AT&T or other carriers are violating Section 222 or any other federal law in turning the call records of millions of Americans over to the NSA without warrants or other legal process. Qwest has publicly stated that it refused NSA's request to turn over CPNI without a court order or approval from the FISA court.⁹ Significantly, there has been no suggestion that the government has initiated any legal action against Qwest or other non-cooperating carriers to force compliance with NSA's request for CPNI.

COMPTEL showed in its comments that the Local Wholesale Complete¹⁰ agreements between AT&T and numerous competitive local exchange carriers ("CLECs") on file with the Commission require the CLECs to indemnify AT&T from any liability arising out of the conduct of AT&T and/or its employees in providing message data or usage data, including customer specific information, associated with the telephone numbers of the CLECs' end users, to third parties.¹¹ This appears to be the very type of CPNI that AT&T is

information that relates to the quantity, technical, configuration, type, destination, and amount of use of a 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.

⁹ Leslie Cauley, *NSA has massive database of Americans' phone calls*, USA Today, May 11, 2006. FISA is the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801, *et seq.*

¹⁰ Local Wholesale Complete is the AT&T UNE-P replacement product.

¹¹ COMPTEL Comments at 6-8. The agreements contain the following language:

CARRIER also agrees to release, defend, indemnify and hold harmless SBC-13 STATE from any claim, demand or suit that asserts any infringement or *invasion of privacy or confidentiality of any person(s), caused or claimed to be caused, directly or indirectly, by SBC-13 STATE employees and equipment associated with provision of any message data or other usage data* as part of or in conjunction with LWC. *This includes, but is not limited to lawsuits and complaints arising from disclosure of any customer specific information associated with either the originating or terminating telephone numbers or calls to a LWCAL or LWC Number.*

Exhibit 1 to COMPTEL's Comments (emphasis added).

allegedly making available routinely to the NSA and explains perhaps why AT&T has insisted that CLECs indemnify it for providing access to such information. Because AT&T is able to provide confidential and proprietary call detail and usage records relating to the CLECs' end users to third parties without the CLECs' knowledge, COMPTEL submits that such indemnification provisions in AT&T's commercial agreements unconscionably not only strip CLECs of any ability to meaningfully protect their customers from the misuse or improper disclosure of their call records, but also require the CLECs to defend and hold AT&T harmless from misusing or improperly disclosing customer CPNI.

If the Commission is serious about strengthening the privacy protections afforded to CPNI collected and held by telecommunications carriers, it must ensure that any carrier that improperly discloses CPNI is held responsible and is precluded from shifting liability for its misconduct onto its innocent wholesale customers as a condition of doing business. Unless the Commission prohibits ILECs, such as AT&T, from including language in their interconnection and commercial agreements that requires CLECs to defend and hold them harmless from violations of Section 222 and the rules promulgated thereunder, the ILECs will have no incentive to protect the CPNI of the customers of their CLEC customers to which they have ready access. Because such provisions allow AT&T to violate the CPNI rights of CLEC customers with impunity, the Commission must declare such provisions unenforceable and void as against public policy. A failure to declare such indemnification provisions unenforceable would greatly undermine any deterrent purpose of the statute.

**The Commission Should Refrain From
Relieving ILECs of Title II Regulation**

The Commission has affirmatively excused ILECs from protecting the privacy of the account and usage information of their broadband Internet access service customers by reclassifying broadband Internet access services as information services, rather than

telecommunications services.¹² In addition, the Commission has afforded Verizon, one of the nation's largest, if not the largest, telecommunications carrier,¹³ forbearance from enforcement of Title II obligations for broadband services that were preserved in the *Wireline Broadband Order*, including Section 222 of the Act and the Commission's CPNI rules.¹⁴ Because the Commission failed to act within the statutory time frame on Verizon's request for forbearance from Title II regulation and allowed the request to be deemed granted by operation of law, there is no written decision explaining how enforcement of Section 222 of the Act and the Commission's CPNI rules is not necessary for the protection of Verizon's broadband customers or how forbearance from applying Section 222 and the CPNI rules to Verizon's broadband services is consistent with the public interest.¹⁵

¹² *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150 (released September 23, 2005), *appeal pending sub. nom., Time Warner Telecom v. Federal Communications Commission*, Nos. 05-4769, *et al.* (3rd Cir.) ("*Wireline Broadband Order*"). Information services are not subject to Title II regulation.

¹³ Verizon's wireline telephone operations serve a territory consisting of 48.8 million access lines in 28 states and the District of Columbia and Verizon Wireless services 51.3 million subscribers nationwide. Verizon Communications, Inc., Annual Report Form 10-K for year ending December 31, 2005, at 1, 11. Verizon also "owns and operates one of the most expansive end-to-end global Internet Protocol (IP) networks which includes over 270,000 domestic and 360,000 international route miles of fiber optic cable. *Id.* At 1.

¹⁴ See "Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law," Press Release, WCB Docket No. 04-440, issued Mar. 20, 2006.

¹⁵ Section 10(a) of the Communications Act authorizes the Commission to grant forbearance from any provision of the Act or any Commission regulation where it determines that enforcement of such provision or regulation is not necessary for the protection of consumers and forbearance from applying such provision or regulation is consistent with the public interest. Section 10(c) provides that a forbearance petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements of Section 10(a) within one year, or within one year and ninety days if the Commission extends the time.

The Commission asks whether the existing regulatory safeguards are adequate to protect the privacy of CPNI.¹⁶ COMPTTEL submits that the existing regulatory safeguards are adequate, but only to the extent that they are applicable and enforced. By excusing Verizon from compliance with the statutory CPNI protections, however, the Commission has unilaterally determined that the safeguards put in place by Congress are not necessary to protect the privacy of Verizon broadband customers' CPNI. Similarly, the Commission determined that the statutory CPNI protections are not necessary to protect the CPNI of any ILEC broadband Internet access customers when it reclassified such services as unregulated information services that are not subject to Section 222. Regulatory safeguards that the Commission declines to apply and refuses to enforce clearly are not adequate to protect the privacy of CPNI. Rather than adopt new rules applicable to all but the largest carriers, the Commission should apply the ones that are already on the books uniformly to all carriers.

The Commission has also asked whether there are any steps it should take to enhance its ability to enforce the requirements of Section 222 and the Commission's regulations relating to CPNI.¹⁷ The most significant step the Commission can take is to recapture its enforcement authority by reinstating the applicability of Section 222 and the Commission's CPNI rules to ILEC broadband Internet access services and all of the Verizon broadband services freed from regulation by the Commission's failure to act on

¹⁶ *Notice of Proposed Rulemaking*, at ¶13.

¹⁷ *Notice of Proposed Rulemaking*, at ¶26.

Verizon's forbearance petition. Moreover, the Commission should decline to grant any additional ILEC requests for forbearance from the application of Title II CPNI regulation.

Respectfully submitted,

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June 2, 2006