

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

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)	
)	
IP-Enabled Services)	WC Docket No. 04-36
_____)	

PETITION FOR CLARIFICATION OR RECONSIDERATION

I. INTRODUCTION

Pursuant to Section 1.429 of the Federal Communications Commission's ("FCC" or "Commission") rules,¹ the United States Telecom Association ("USTelecom") requests that the Commission clarify or reconsider certain provisions in the Commission's recent *Report and Order* on Customer Proprietary Network Information ("CPNI").²

USTelecom and its members take seriously the obligation to protect CPNI and strongly support efforts to limit the ability of pretexters to obtain unauthorized access to such information. However, the *Report and Order* runs afoul of the Administrative Procedure Act ("APA"), which itself is grounded in fundamental notions of due process, departs from the Commission's well-established practice, and contravenes basic principles of fairness to the extent the *Report and*

¹ 47 C.F.R. § 1.429 (2006).

² See *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 07-22, ¶¶ 63-65 (2007) ("*Report and Order*").

Order purports to shift the burden of proof to carriers in enforcement proceedings when a pretexter has obtained access to a customer's CPNI.

Specifically, in the "Enforcement" section of the *Report and Order*, the Commission "put carriers on notice that the Commission henceforth will infer from evidence that a pretexter has obtained unauthorized access to a customer's CPNI that the carrier did not sufficiently protect that customer's CPNI. A carrier then must demonstrate that the steps it has taken to protect CPNI from unauthorized disclosure, including the carrier's policies and procedures, are reasonable in light of the threat posed by pretexting and the sensitivity of the customer information at issue."³ This language could be read to place the burden of proof on carriers to prove their adherence to the CPNI rules in an enforcement proceeding. However, under the APA and Commission precedent, the Commission has the burden of proof in enforcement proceedings. Accordingly, USTelecom requests that the Commission clarify or reconsider the *Report and Order* to the extent necessary to make clear that the Commission, and not a telecommunications carrier, has the burden of proof in enforcement proceedings, including forfeiture actions, alleging violations of the CPNI rules.

II. ARGUMENT

Under Section 556(d) of the APA, federal court decisions interpreting Section 556(d), as well as Commission precedent, the Commission has the burden of proof in enforcement proceedings. Section 556(d) requires that "the proponent of a rule or order has the burden of proof," which, according to the Supreme Court, refers to the "burden of persuasion," rather than the burden of producing evidence.⁴ The seminal case interpreting this provision is *Department*

³ See *Report and Order*, ¶ 63.

⁴ 5 U.S.C. § 556; see *Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 276 (1994).

of Labor v. Greenwich Collieries, which involved the Department of Labor’s “true doubt” rule. The rule allowed a claimant-employee seeking benefits from its employer to recover the benefits unless the employer made a showing that benefits were not justified.⁵ The Court held that the “true doubt” rule was inconsistent with Section 556(d) because it improperly shifted the burden of proof from the party seeking the benefits award to the employer opposing the award. According to the Court, the party that bears the burden of proof loses when the evidence is evenly balanced. Because the “true doubt” rule resulted in the party that was not the proponent losing when the evidence was evenly balanced, the Court held that the rule conflicted with the APA’s burden of proof requirements.⁶

Although *Greenwich Collieries* involved administrative action between two private parties, subsequent judicial decisions have affirmed that Section 556(d) places the burden of proof on agencies that are the proponents of orders they seek to enforce. For example, in *United States v. Menendez*, 48 F.3d 140, 1413-1414 (5th Cir. 1995), the Fifth Circuit held that the National Oceanic and Atmospheric Administration “bears the burden of proof” under Section 556(d) in proceedings seeking to establish a violation of the Endangered Species Act (“ESA”). Specifically, the court reversed the Administrative Law Judge’s (“ALJ”) order that imposed financial penalties on the parties charged with violations of the ESA because the ALJ improperly placed the burden of proof on the alleged violators. The ALJ essentially formulated a rule in which “the government would prevail even when it produces no evidence as long as the charged party did not produce any evidence.” *Id.* at 1414. Similarly, in *Pel-Star Energy Inc. v. United*

⁵ The Department of Labor applied the “true doubt” rule in adjudicating benefits claims under the Black Lung Benefit Act, 83 Stat. 792, as amended, 30 U.S.C. § 901 *et seq.*, and the Longshore and Harbor Workers’ Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901, *et seq.*

⁶ 512 U.S. at 281.

States Dept. of Energy, 890 F. Supp. 532, 545-546 (W.D. La. 1995), the court stated that Section 556(d) placed the burden of proof on the Department of Energy (“DOE”) in the agency’s pursuit of a remedial order to pierce the corporate veil of an oil company accused of violating the DOE’s anti-layering rules. The court rejected a DOE order that pierced the corporate veil of the oil company because the DOE had presented insufficient evidence to justify such a decision, and the DOE was not permitted to “sustain its decision simply by noting that [the alleged violator] failed to introduce evidence.” *Id.*

In sum, the Commission bears the burden of proof in enforcement proceedings and repeatedly has recognized as much. For example, in *Metromedia, Inc.*, 60 FCC 2d 1075, 1085 (1976), the Commission acknowledged that it had the burden of proof in forfeiture proceedings and that this burden was satisfied when the Commission established a violation by “a preponderance of the evidence.” Similarly, in a recent forfeiture proceeding in which the Commission issued a Notice of Apparent Liability and then a Forfeiture Order against a broadcaster for its alleged violation of the Commission’s indecency rules, the Commission, although unclear as to whether the APA applied, clearly acknowledged that the Commission had the burden of proof in any event.⁷ Thus, it is beyond dispute that the Commission bears the burden of proof in enforcement proceedings, including forfeiture actions.⁸

⁷ See *Emmis Radio License Corporation; Licensee of Station WKQX(FM), Chicago, Illinois*, Memorandum Opinion and Order, 17 FCC Rcd 18343, ¶ 6 (2002); see *Emmis Radio License Corporation; Licensee of Station WKQX(FM), Chicago, Illinois*, Memorandum Opinion and Order, 19 FCC Rcd 6452, ¶ 12 (2004).

⁸ See *Radio One Licenses, Inc., Licensee of Station WBOT(FM), Brockton, Massachusetts*, Memorandum Opinion and Order, 17 FCC Rcd. 1724, ¶ 6 (2002) (“The Commission has concluded that the burden of proof in forfeiture proceedings is that of a preponderance of the evidence Contrary to Radio One’s assertion, the Bureau has met its burden of proof by a preponderance of the evidence”); *4M of Richmond, Inc., Licensee of WLEE, 4M Communications, Inc., Owner of Antenna Structure # 1231421, Richmond, Virginia*, Forfeiture Order, 19 FCC Rcd 15447, n. 14 (2004).

Despite the language of Section 556(d), the case law interpreting this provision, and the Commission's own precedent, the *Report and Order* could be read to create a new enforcement regime by which the burden of proof is shifted from the Commission to a telecommunications carrier solely by virtue of a pretexter's obtaining the CPNI of that carrier's customer. Under the CPNI rules, telecommunications carriers are required to "take reasonable measures *to discover and protect against attempts to gain unauthorized access to CPNI.*" 47 C.F.R. § 64.2010(a) (emphasis added). After reasonably determining that a person has intentionally gained access to, used, or disclosed CPNI without proper authorization, a carrier must notify law enforcement, its customers, and the Commission in accordance with specified procedures. 47 C.F.R. § 64.2011. This notice includes an annual CPNI certification filing with the Enforcement Bureau, which requires telecommunications carriers to "report on any information that they have with respect to the processes pretexters are using to attempt to access CPNI, and what steps carriers are taking to protect CPNI." See *Report and Order*, ¶¶ 51-53, n.164.

The *Report and Order* suggests that, based solely on evidence that a pretexter has obtained unauthorized access to its customer's CPNI, the Commission "will infer" from such evidence "that the carrier did not sufficiently protect that customer's CPNI." *Report and Order*, ¶ 63. In other words, a carrier could be held in violation of the Commission's rules whenever pretexting has occurred. In fact, the *Report and Order* appears to suggest that a carrier will be held in violation of the Commission's rules under such circumstances unless it demonstrates that "it has taken [steps] to protect CPNI from unauthorized disclosure" and that its "policies and procedures, are reasonable in light of the threat posed by pretexting and the sensitivity of the customer information at issue." *Id.*

Inferring a violation of the Commission’s CPNI rules – and imposing sanctions as a result – based on evidence of pretexting would be tantamount to shifting the burden of proof from the Commission to the telecommunications carrier involved. This enforcement regime would improperly place the burden on a carrier to prove its compliance with the Commission’s CPNI rules, rather than placing the burden on the Commission to prove a carrier’s noncompliance. As a result, it violates Section 556(d) and the Commission’s own precedent.

In addition, basic fairness dictates that the Commission hold the burden of proof in enforcement actions involving pretexting. In the course of the CPNI rulemaking, Congress criminalized the practice of pretexting and, in so doing, properly focused law enforcement attention on the source of the problem – the illegal activities of the pretexters themselves.⁹ It would be patently unfair to presume that a telecommunications carrier victimized by the perpetrator of a federal crime could have prevented the pretexting by employing different processes and procedures, absent the Commission proving that they were required under the Commission’s rules and reasonably could be achieved. Like Congress, the Commission should direct more aggressive enforcement measures at the data thieves themselves.

Furthermore, before a regulated entity may be subject to fines or other enforcement actions, the entity must be “able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform”¹⁰ Under the new CPNI rules, however, a carrier would not be able to identify “with ascertainable certainty” the standards for protecting CPNI from pretexters because those standards are vague and, as the Commission has recognized,

⁹ Telephone Records and Privacy Protection Act of 2006, Pub. Law No. 109-476 (2007).

¹⁰ *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. 2000) (quoting *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)).

the methods of pretexters continue to evolve.¹¹ Thus, a carrier could have in place appropriate defense mechanisms, detection systems, and reporting procedures that are consistent with the specific requirements of the Commission's rules, but a pretexter might nonetheless be able to access a customer's CPNI. Under the circumstances and consistent with *Trinity Broadcasting* and the APA, the Commission should be required to prove that a carrier's policies and procedures were inadequate and violated the Commission's CPNI rules rather than merely inferring a violation simply by virtue of a pretexter's obtaining access to CPNI. Accordingly, the Commission should clarify or reconsider the *Report and Order* to the extent necessary to make clear that the Commission, and not a telecommunications carrier, has the burden of proof in enforcement proceedings, including forfeiture actions, alleging a violation of the CPNI rules.

III. CONCLUSION

USTelecom condemns the actions of pretexters and supports efforts to curtail their activities. However, the requirements of the APA and fundamental fairness should not be sacrificed in the Commission's efforts to address pretexting, and, thus, the Commission should clarify or reconsider the *Report and Order* to make clear that it does not place the burden of proof on carriers in enforcement proceedings in which it is alleged that CPNI has been obtained through pretexting.

¹¹ See *Report and Order*, ¶ 34 (allowing "carriers to determine what specific measures will be enable them to ensure compliance ...") & ¶ 65 (acknowledging that the methods of pretexters "evolve" over time).

Respectfully submitted,



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