

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

**REPLY COMMENTS OF T-MOBILE USA, INC.
ON PETITIONS FOR RECONSIDERATION**

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I. INTRODUCTION AND SUMMARY.

T-Mobile USA, Inc. ("T-Mobile") hereby submits its reply comments in support of the petitions for reconsideration filed by CTIA – The Wireless Association ("CTIA Petition")¹ and the United States Telecom Association ("USTelecom Petition")² of the Report and Order released in the above-captioned proceeding on April 2, 2007 ("*CPNI Order*").³ The CTIA

¹ CTIA – The Wireless Association, Petition for Reconsideration, CC Docket No. 96-115 (July 9, 2007).

² United States Telecom Association, Petition for Reconsideration, CC Docket No. 96-115 (July 9, 2007).

³ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Report & Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007). All comments and reply comments cited herein refer to comments filed in this proceeding on July 9, 2007, unless otherwise stated.

Petition and the USTelecom Petition are unopposed—the only responsive filing made urges the Commission to grant the petitions.⁴ T-Mobile strongly supports the goal of protecting the privacy and integrity of customer information. However, T-Mobile agrees with CTIA and USTelecom that certain aspects of the new rules adopted in the *CPNI Order* should be reconsidered or clarified.

II. THE COMMISSION SHOULD ELIMINATE THE ENFORCEMENT PRESUMPTION.

In the *CPNI Order*, the Commission adopted a presumption that it “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” pursuant to Section 222 of the Communications Act (the “Act”).⁵ A carrier then bears the burden of demonstrating that all of its policies and procedures are “reasonable” in light of the importance of protecting this information. T-Mobile agrees with CTIA and USTelecom that the Commission should eliminate this presumption because it violates the Administrative Procedure Act (“APA”) and raises significant due process issues.

A. The New Enforcement Presumption Violates the Administrative Procedure Act.

As CTIA and USTelecom demonstrate in their petitions, the new enforcement presumption as adopted in the *CPNI Order* is inconsistent with the APA.⁶ The enforcement presumption violates basic principles of administrative law because it is unjustifiably contrary to the approach the Commission has taken in other enforcement contexts. In addition, because the

⁴ See Comments of Sprint Nextel Corporation on Petitions for Reconsideration, CC Docket No. 96-115 (Aug. 22, 2007).

⁵ *CPNI Order* ¶ 63. See 47 U.S.C. § 222 (imposing a duty on carriers to protect CPNI).

⁶ See CTIA Petition at 6-10; USTelecom Petition at 2-4.

Commission’s notice of proposed rulemaking that led to the *CPNI Order* (the “*Initial NPRM*”)⁷ did not raise the issue of a heightened enforcement presumption, the new presumption is not a logical outgrowth of the initial rulemaking. For all of these reasons, the Commission should eliminate the enforcement presumption from its CPNI regulations.

1. The Enforcement Presumption Is Contrary to the Commission’s Approach in Other Enforcement Contexts Without Justification.

The usual burden of proof in Commission enforcement proceedings is that the Commission has the obligation to demonstrate that a carrier is in violation of a rule.⁸ As CTIA and USTelecom argue, the Commission’s new enforcement presumption runs counter to this well-established and fundamentally fair enforcement approach.⁹ The *CPNI Order* does not explain why the Commission shifted the burden of proof in this particular setting. Moreover, it does not explain how carriers may successfully sustain the new burden that the Commission has created. The Commission stated that it “fully expect[s] carriers to take *every* reasonable precaution” to protect CPNI.¹⁰ This includes not only compliance with the Commission’s “specific minimum requirements set forth” in the new rules;¹¹ it also requires unspecified and

⁷ *Implementation of the Telecommunications Act of 1996; 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*, Notice of Proposed Rulemaking, 21 FCC Rcd 1782 (2006).

⁸ *See, e.g.*, 47 U.S.C. § 312(d) (establishing that the FCC bears the burden of proceeding with the introduction of evidence and the burden of proof in administrative sanctions hearings).

⁹ *See* CTIA Petition at 14-17; USTelecom Petition at 4. *See also* Comments of Sprint Nextel Corporation on Petitions for Reconsideration (Aug. 22, 2007) at 8-10 (arguing the FCC exceeded its statutory authority by imposing the enforcement presumption, because Section 222 of the Act does not create an affirmative duty for carriers to prevent every possible criminal act that might arise as a result of unauthorized access to CPNI).

¹⁰ *CPNI Order* ¶ 64 (emphasis added).

¹¹ *Id.*

unknowable additional steps on the part of each carrier based upon the Commission's *post hoc* assessment of what is "feasible" for that carrier.¹² The Commission failed to explain its departure in the CPNI context from its well-established approach to burdens of proof in enforcement proceedings. Accordingly, the Commission should reconsider and eliminate this enforcement presumption.

2. The Enforcement Presumption is Not a Logical Outgrowth of the *Initial NPRM*.

T-Mobile agrees with CTIA's assessment that the Commission imposed the enforcement presumption without raising the issue in the *Initial NPRM* and providing an opportunity for parties to respond, in violation of the APA.¹³ Section 553 of the APA establishes notice-and-comment rulemaking procedures, which requires, among other things, that the public be afforded a meaningful opportunity to comment on the proposed rules.¹⁴ In interpreting this provision, courts have held that final rules adopted by an agency that are not a "logical outgrowth" of the agency's proposed rules violate this APA requirement.¹⁵

Rather than raising the issue of a heightened enforcement presumption, the *Initial NPRM* that led to the *CPNI Order* asked if compliance with a minimum set of requirements should

¹² *Id.*

¹³ *See* CTIA Petition at 11. *See also* Sprint Nextel Comments on Petitions for Reconsideration at 6-7.

¹⁴ 5 U.S.C. § 553(c).

¹⁵ *See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 546-549 (D.C. Cir. 1983) ("Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making").

constitute a *safe harbor* from enforcement.¹⁶ The *Initial NPRM* also asked, along similar lines, if failure to comply with some minimum set of requirements should provide the basis for finding a violation,¹⁷ but in no way did it indicate an intention or even the potential for the Commission to shift the burden of proof for enforcement even in the case of a clear breach of specific rules – much less for an alleged breach of unspecified rules.

The vagueness of the presumption compounds this lack of notice. Although, after discussing numerous specific issues, the Commission also asked broadly in the *Initial NPRM* if there were “other enforcement measures” it should take, this general query in no way provided notice to interested parties that the Commission was considering a sweeping enforcement presumption that would constitute a dramatic shift in the burden of proof for carriers to bear in demonstrating compliance with Section 222 of the Act. Accordingly, the Commission’s final rule regarding the operation of the enforcement presumption was not a “logical outgrowth” of the *Initial NPRM*.

B. The Enforcement Presumption Is Inconsistent With Due Process.

Constitutional due process requires fair notice of what conduct is prohibited before a sanction can be imposed.¹⁸ As CTIA and USTelecom explain, the enforcement presumption created in the *CPNI Order* violates basic due process principles because it is impermissibly vague.¹⁹ “A statute or regulation is considered unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments if it ‘forbids or requires the doing of an act in

¹⁶ See *Initial NPRM* ¶ 26.

¹⁷ See *id.*

¹⁸ See *Stillwater Mining Co. v. Federal Mine Safety & Health Review Comm’n*, 142 F.3d 1179, 1182 (9th Cir. 1998).

¹⁹ See CTIA Petition at 6-7; USTelecom Petition at 6-7.

terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.”²⁰

The Commission’s enforcement presumption and the vague burden of proof placed upon carriers – requiring *every* reasonable precaution and additional unspecified steps that the Commission might find feasible after the fact – fail to meet this established standard. Carriers cannot, based on this standard, determine the actions that they are required to take to avoid an enforcement action. Accordingly, the Commission should, as CTIA and USTelecom request, reconsider and eliminate the enforcement presumption as contrary to carriers’ due process rights.

III. THE COMMISSION SHOULD CLARIFY THE TIMING ASPECT OF THE NEXT ANNUAL CERTIFICATION.

T-Mobile agrees with CTIA that the Commission should make a one-time administrative clarification regarding the annual certification. As CTIA explains, the *CPNI Order* amended the existing requirement in Section 64.2009(e) (“existing section 64.2009(e)”) that carriers file an annual CPNI certification with the Commission, essentially creating a new, expanded certification requirement (“amended section 64.2009(e)”).²¹ Under amended section 64.2009(e), the expanded certification filing is to be due on March 1 of each year for data pertaining to the previous calendar year.²² The Commission’s new CPNI rules are scheduled to become effective

²⁰ *Vencor, Inc. v. Shalala*, 988 F. Supp. 1467, 1472 (N.D. Ga. 1997) (quoting *Georgia Pacific Corp. v. OSHRC*, 25 F.3d 999, 1005 (11th Cir. 1994), quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Conversely, there is no due process violation if a regulated party acting in good faith is “able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform,” which the enforcement presumption does not permit carriers to do. See *ICO Global Communs. (Holdings) Ltd. v. FCC*, 428 F.3d 264, 268 (D.C. Cir. 2005) (quoting *Trinity Broadcasting v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000)).

²¹ *CPNI Order* ¶ 51.

²² *Id.* ¶ 53.

on either December 8, 2007, or upon Office of Management and Budget (“OMB”) approval of the new rules, whichever is later.

Because two separate sets of rules could be in effect during different parts of calendar year 2007, the annual certification requirement for this first year could, if read literally, effectively require two separate certifications: one under existing section 64.2009(e), which will have been in effect for more than eleven months of 2007, and one under amended section 64.2009(e), which will have been in effect for only about the last three weeks of 2007. These separate certifications, in turn, would require two internal processes for certifying compliance to cover the different time periods and the different sets of rules in effect during different periods. Because the new rules in the *CPNI Order*, including amended section 64.2009(e), would be effective for such a short period in 2007 – approximately three weeks – the burden of a dual process would far outweigh its benefits.

Accordingly, in light of the potential for the effective date of the new rules to fall so close to the end of 2007, T-Mobile joins with CTIA in urging the Commission to clarify that the certification filing to be submitted on March 1, 2008, shall cover the period from January 1, 2007, through December 7, 2007 (or until the effective date of the new rules occurs, if it is later in 2007 due to OMB timing) and shall be prepared pursuant to existing section 64.2009(e). The Commission should clarify further that the certification filing due on March 1, 2009, shall cover the period from December 8, 2007, through December 31, 2008, and shall otherwise be prepared pursuant to amended section 64.2009(e).²³ This measured administrative shift of three weeks in the coverage periods will allow carriers more efficiently to survey and certify their compliance,

²³ CTIA Petition at 22.

while still addressing their compliance with the Commission’s CPNI rules continuously as the new rules take effect.

IV. THE COMMISSION SHOULD PROVIDE FURTHER GUIDANCE ON “REASONABLE MEASURES” THAT CARRIERS MUST TAKE TO PROTECT CPNI.

T-Mobile supports CTIA’s proposal that the Commission should clarify the additional steps that carriers are required to take under the new rules to protect CPNI.²⁴ The Commission’s “reasonable measures” standard in the new CPNI rules requires carriers to take “additional steps” to protect CPNI “to the extent such additional measures are feasible for a particular carrier.”²⁵ As discussed above, the new enforcement presumption does not provide clear guidance on what carriers must do to comply with the new rules. T-Mobile agrees with CTIA that security guidelines similar to those that the Federal Trade Commission (“FTC”) adopted for the financial industry²⁶ would have the benefit of requiring each carrier to adopt a comprehensive program to avoid unauthorized disclosure of CPNI in a way that is appropriate to its specific circumstances.

As CTIA explains, an FTC-like approach would require carriers to “maintain a comprehensive information security program” with CPNI safeguards tailored to individual companies’ sizes as well as the scope and sensitivity of the customer information at issue.²⁷ Along with the comprehensive information security program tailored to each carrier, the FTC approach imposes five systemic requirements: a designated employee to coordinate the program; identification of internal and external risks; design of safeguards to control these risks, together

²⁴ *Id.* at 17-19.

²⁵ *CPNI Order* ¶ 64.

²⁶ *See* 16 C.F.R. § 314.3(a).

²⁷ CTIA Petition at 18.

with regular testing and monitoring; oversight of service providers; and evaluation and adjustment of this program in light of testing and monitoring.²⁸ T-Mobile agrees with CTIA’s suggestion that the good-faith efforts of a carrier to implement such a program should be relevant to any Commission inquiry into compliance with the new rules, in the case of a breach or otherwise.²⁹

V. THE DEFINITION OF “ADDRESS OF RECORD” IN THE NEW RULES SHOULD BE MODIFIED.

The new CPNI rules require carriers immediately to notify their customers of account changes, such as whenever a password is changed, and permits such notification by “mail to the address of record” or “carrier-originated voicemail or text message to the telephone number of record.”³⁰ The rules specify, however, that “address of record” be an address associated with the customer’s account for at least 30 days, which may not be possible for new customers.³¹

T-Mobile supports CTIA’s proposal to make a change in the definition of “address of record” in order to permit carriers to notify new customers of account changes and other events by “mail to the address of record” within the first 30 days of service.³² Thus, for the first 30 days following account establishment, the “address of record” would be the address associated with the customer’s account upon activation of service. As CTIA explains, this change would

²⁸ *Id.* at 18-19.

²⁹ *Id.* at 19.

³⁰ *CPNI Order* ¶ 24.

³¹ *Id.* ¶ 13 n.46.

³² CTIA Petition at 20.

permit T-Mobile and other carriers to provide a high level of service to their newest customers without compromising protections against pretexters.³³

VI. CONCLUSION.

T-Mobile supports the unopposed petitions for reconsideration and clarification of certain aspects of the new CPNI rules. The CTIA Petition and USTelecom Petition are unopposed, and the only party to comment on the petitions in the “opposition” round supported them. While T-Mobile strongly supports the goal of protecting the privacy and integrity of customer information, the Commission’s CPNI rules in their current form should be adjusted as CTIA and USTelecom generally propose. The revisions to the new CPNI rules supported herein will make

³³

Id.

carriers' compliance obligations more straightforward and simpler to follow, and ultimately will enable the provision of the best possible service to customers.

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2007, a copy of the foregoing COMMENTS was served by U.S. Mail, postage prepaid, upon the following:

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