Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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In the Matter of	)	
	)	
FCC Seeks Comment Regarding Possible	)	CB Docket No. 09-102
Revision or Elimination of Rules	)	
Under the Regulatory Flexibility	)	
Act, 5 U.S.C. 610	)	

To: The Commission

COMMENTS OF THE
ENTERPRISE WIRELESS ALLIANCE

The Enterprise Wireless Alliance ("EWA" or the "Alliance") submits these comments in response to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") seeking review of rules adopted by the Commission in 1998 which have, or might have, a significant economic impact on a substantial number of small entities.[1] One set of rules under consideration in the Public Notice are those contained in Part 64, Subpart U, governing the proper use of and the duty of telecommunications carriers to protect the confidentiality of Customer Proprietary Network Information ("CPNI").

As described in the Public Notice, the purpose of the FCC review process is "to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of section 610 of the R[egulatory] F[lexibility] A[ct] ("RFA"), to minimize any significant economic impact of such rules upon a substantial number of small entities."[2] The Alliance believes that the current regulatory provisions governing CPNI have the type of adverse impact on certain small telecommunications carriers

[1] Public Notice, FCC Seeks Comment Regarding Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act, 5 U.S.C., 24 FCC Rcd 7975 (rel. June 24, 2009) ("Public Notice").
[2] *Id*. at 1.

that the RFA is intended to prevent. EWA recommends that the FCC's rules be revisited to address that impact, consistent with the CPNI obligations imposed by statute.[3]

I. INTRODUCTION

EWA represents a broad alliance of business enterprise users, communications service providers, radio dealers and technology manufacturers, all of which use or provide wireless telecommunications products or services. Many of the Alliance's members operate private radio systems used for internal communications. Such systems are not subject to the CPNI rules. However, a number of EWA's members operate small commercial systems serving primarily the dispatch market, although some have limited interconnection capability as well. Since all such members are classified as telecommunications carriers[4] pursuant to the Communications Act, this matter is of significant interest to the Alliance.

II. EWA HAS RECOMMENDED A MORE TAILORED APPROACH TO IMPLEMENTING STATUTORY CPNI REQUIREMENTS

The Alliance participated in the recent rulemaking proceeding in which the FCC sought to enhance the protection of CPNI through a re-evaluation of its rules governing carrier obligations.[5] In that proceeding, EWA urged the FCC to exempt from the CPNI obligations at least those telecommunications carriers whose systems are not interconnected with the Public Switched Network ("PSN") and who, therefore, do not have access to the type of calling

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[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 *et seq.)*, 47 U.S.C. § 222.

[4] Both the Communications Act and the corresponding Commission rules governing CPNI specify that the regulations apply to "telecommunications carriers." The term "telecommunications carrier" is defined in the Communications Act as any provider that offers telecommunications services for a fee directly to the public or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. The term has been interpreted by the FCC to include carriers that are not interconnected with the telephone network and even entities that hold no FCC licenses, but simply operate the telecommunications facilities for which users hold the licenses.

[5] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 21 FCC Rcd 1782 (2006).

information the statute seeks to protect. It also recommended that the FCC apply the "covered carrier" definition to distinguish between telecommunications service providers with and without CPNI obligations.[6] This definition has been used to differentiate consumer-oriented, two-way wireless services like cellular and PCS from the exclusively or primarily dispatch systems that serve very small numbers of business, industrial and governmental customers and that, even when interconnected with the PSN, do not assign individual telephone numbers to different customers, much less to individual customer radios. The Alliance also cautioned the FCC that operators of these types of systems had received inconsistent information from different members of the FCC's staff about the applicability of CPNI obligations to their systems, which placed these licensees at risk of non-compliance and confirmed that clarification of the rules was necessary.

The Report and Order adopted by the FCC acknowledged EWA's comments briefly in a footnote, but seemingly misconstrued the Alliance's position.[7] The R&O stated that the FCC disagreed with EWA and other commenters regarding the CPNI filing requirements, explaining that the Commission is concerned about the privacy of customers of small and regional carriers, not just large carriers, and asserting that the benefits of customer privacy protection significantly outweigh a carrier's costs to implement CPNI rules.[8]

In fact, the distinction EWA had drawn was based on the type of service provided, the customer base to which it was provided and the type of communications transmitted. It typically is small carriers that operate these systems, but it was the characteristics of the systems, not their

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[6] *Telephone Number Portability*, Second Memorandum Opinion & Order on Reconsideration, CC Docket No. 95-116, 13 FCC Rcd 21204, 21229 (1998).
[7] *Implementation of the Telecommunications Act of 1996: 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, 22 FCC Rcd 6928 (2007) ("R&O").
[8] R&O at n.167.

size, that EWA considered determinative. Because the Alliance believed that the FCC had failed to understand EWA's position and, therefore, had not provided a meaningful response, the Alliance filed a Petition for Partial Reconsideration of the R&O on July 9, 2007.[9] The Commission has not yet acted on that Petition.

III. RECENT ACTIONS SUPPORT THE ALLIANCE'S REQUEST THAT THE CPNI REQUIREMENTS BE MODIFIED OR, AT A MINIMUM, CLARIFIED

EWA still believes that the CPNI obligations weigh heavily on carriers that offer exclusively or primarily dispatch service, all of which are small entities under the FRA. The Alliance again recommends that the FCC consider a less burdensome approach that is better tailored to the business realities of different categories of service providers. The Small Entity Compliance Guide to CPNI issued by the FCC on June 6, 2008 is 17 pages long and describes the complicated processes telecommunications carriers must follow to remain compliant with those rules, thereby demonstrating that meeting this obligation places a significant burden on those small entities.[10]

But if it does nothing else, the Alliance urges the Commission to issue a Public Notice that removes any doubt about whether telecommunications carriers that are <u>not</u> interconnected with the PSN at all and that do <u>not</u> have access to any type of customer calling records nonetheless are subject to the full panoply of CPNI obligations. EWA would hope that the Public Notice would exempt such carriers from the CPNI requirements. However, it at least would resolve the troubling problem that licensees have received diametrically different advice from FCC staff on this question, with some saying that the rules do not apply and others advising that they do.

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[9] Public Notice, Petition for Reconsideration of Action in Rulemaking Proceeding, Report No. 2821 (rel. July 20, 2007).

[10] Small Entity Compliance Guide – Customer Proprietary Network Information (CPNI), DA 08-1321 (rel. June 6, 2008).

That there is continued confusion about this issue is confirmed by the forfeiture order released by the FCC in February 2009 in which the Commission issued $20,000 forfeitures to hundreds of FCC licensees that the Commission believed had failed to timely file their 2007 CPNI certifications.[11] A substantial number of those licensees are dispatch operators providing non-interconnected two-way radio service to business, industrial and governmental customers using Part 90 spectrum. A number of them contacted EWA after receiving the Forfeiture Notice to explain either that they had no idea that they could be subject to CPNI rules since their systems were not interconnected or, in a not insignificant number of cases, that they had contacted the FCC, often through its Help Desk, and had been specifically advised that the CPNI rules did not apply to systems that did not provide access to the PSN.

There is no question that the Forfeiture Order had a significant economic impact on a substantial number of small entities. A fine of $20,000 for companies of this size would be a significant burden at any time. It is devastating in this economic climate. EWA is aware that a number of affected licensees incurred the cost of filing Petitions for Reconsideration of the Forfeiture Order, often requiring the assistance of FCC counsel to do so. In response to those filings, in some number of instances, the FCC has concluded that the carrier's certification had been timely filed and has canceled the forfeiture.[12] In other cases, the Commission has acknowledged that the entity had no CPNI obligations and has canceled the forfeiture accordingly.[13] The Alliance also has noted a number of recent Consent Decrees between the

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[11] *In the Matter of Annual CPNI Certification*, Omnibus Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 2299 (2009) ("Forfeiture Notice"). This very substantial forfeiture was assessed based entirely on an alleged failure to submit a CPNI certification by the FCC deadline and not on any finding that the parties had actually failed to protect CPNI.

[12] *See, e.g, Allendale Telephone Company d/b/a Allendale Communications Company,* Order, DA 09-1931 (rel. Aug. 31, 2009).

[13] *See, e.g., Visionary Communications, Inc*., Order, DA 09-1889 (rel. Sept. 1, 2009).

FCC and entities subject to the Forfeiture Order in which the fines were reduced very significantly.[14]

The Alliance knows nothing about the particular facts of those situations, although it certainly is appropriate that the fines were canceled upon a demonstration that the CPNI filing had been properly and timely submitted or was not required at all. EWA also does not question whether a Consent Decree was an appropriate vehicle for resolving this issue in other instances. However, the process, whether filing to seek reversal of the FCC's forfeiture assessments or pursuing the negotiation and implementation of a Consent Decree, involves not insignificant costs for the affected entities, the great majority of which appear to be small entities as classified by the RFA, and consumes FCC resources as well.

Any regulatory obligation that produces a scale of non-compliance such as first was suggested by the number of entities involved in the Forfeiture Order demands closer scrutiny. In EWA's opinion, the CPNI rules should be re-examined and modified to exempt at least those telecommunications carriers whose systems are not interconnected with the PSN and, preferably, those whose systems do not assign individual telephone numbers to customers with ancillary interconnect capability. At a minimum, the Commission should issue a Public Notice clarifying the issue of non-interconnected carriers and their CPNI obligations and thereby eliminate any future confusion about the status of such systems *vis-à-vis* the CPNI rules.

[14] *See, e.g., Ligtel Communications, Inc.*, Order, DA 09-1606 (rel. Aug. 3, 2009).

Respectfully submitted,
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