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

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

To: The Commission

REQUEST FOR LEAVE TO SUPPLEMENT
PETITION FOR PARTIAL RECONSIDERATION
FILED BY
ENTERPRISE WIRELESS ALLIANCE
AND USMSS, INC.

Enterprise Wireless Alliance, together with USMSS, Inc., an affiliated entity of the Alliance (collectively "EWA" or "Alliance"), in accordance with Section 1.429(d) of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully submits its Request for Leave to Supplement the pending Petition for Partial Reconsideration filed by EWA in the above-entitled proceeding. [1] The Recon Petition has been pending for over six years and is unopposed. While EWA believes the issues raised in it are more than ripe for consideration, the Alliance also believes matters that have arisen in the intervening years may help inform the Commission's decision.

[1] *See* Petition for Reconsideration of Action in Rulemaking Proceeding, *Public Notice*, Report No. 2821, 22 FCC Rcd 21038 (July 20, 2007) ("Recon Petition").

In the Recon Petition, EWA urged that the then newly adopted rules governing Customer Proprietary Network Information ("CPNI") should not apply to licensees that facially met the definition of telecommunications carriers, but whose systems were not interconnected with the public switched network ("PSN") and, thus, whose customers were incapable of using the facilities to make telephone calls.[2] The Alliance explained that these systems are used to provide dispatch-only service to businesses and government entities, not to consumers, and handle primarily group call transmissions between employees and a dispatcher or among groups of employees. EWA's Comments in this proceeding noted that both the Alliance itself and certain of its members had been given conflicting information by FCC staff as to whether non-interconnected commercial dispatch systems were subject to CPNI requirements, creating substantial confusion about the regulatory obligations of this particular class of FCC licensee, the non-interconnected Private Mobile Radio Service ("PMRS") carrier.[3]

This confusion was increased by the FCC's disposition of certain cases included in an omnibus 2009 Notice of Apparent Liability for Forfeiture Order related to alleged violation of the 2007 CPNI filing requirement.[4] A number of PMRS licensees responded to the ONALF by acknowledging that they had seemingly had an obligation to file the certification and had failed to do so, but also noted that they operated dispatch-only systems that were not interconnected with the PSN and, thus, had no confidential customer information of the type intended to be protected by the CPNI legislation and associated FCC rules. Theirs were among the many forfeitures that were canceled by the FCC. The FCC's Order stated, without further explanation,

[2] The Recon Petition also requested that systems providing only ancillary interconnection be exempt from the CPNI requirements. Over the past six years, the growth of cellular service has obviated any need for ancillary interconnection on dispatch systems. Because EWA's members subsequently have dropped even this limited capability as a service offering, that issue is moot, and the Alliance requests no further action on that matter.
[3] *See* Comments of EWA at 6, filed Apr. 28, 2006.
[4] *See* In the Matter of Annual CPNI Certification Omnibus Notice of Apparent Liability for Forfeiture, *Opinion*, 24 FCC Rcd 2299 (EB 2009) ("ONALF").

that no forfeiture should be imposed on these licensees based on a case-by-case determination that "the companies listed in the Appendix were not required to file a CPNI certification for calendar year 2007." [5]

Since the forfeitures were rescinded because the FCC concluded that no CPNI filing was required, rather than, for example, due to a decision that a violation had occurred but did not warrant a forfeiture, the PMRS community was uncertain whether the Commission had determined that all non-interconnected PMRS licensees were not subject to the CPNI requirement and, if so, what further implications such a conclusion might have vis-à-vis the relevance of interconnection to the FCC's interpretation of the term "telecommunications carrier" as used in the FCC's rules and its enabling statute. EWA raised this issue in its Comments in the Regulatory Flexibility Act proceeding that also remains pending.[6] The question arose most recently in the context of the Commission's Accessibility Recordkeeping Compliance requirements[7] and prompted the Alliance to revisit the FCC rules and the Communications Act[8] with regard to this issue. EWA believes that the results of this analysis may assist the FCC in resolving the outstanding question in the Alliance's Recon Petition.

For this reason, EWA requests leave to supplement its Recon Petition with recently developed information that speaks directly to the matters raised therein and asks that the Commission consider the information provided in the attached Supplement.

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[5] Annual CPNI Certification Apparent Liability for Forfeiture, *Order*, 25 FCC Rcd 16946 (EB 2010).
[6] *See* FCC Seeks Comment Regarding Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act, 5 U.S.C. 610, *Public Notice*, CB Docket No. 09-102, 24 FCC Rcd 7975 (rel. June 24, 2009); EWA Comments filed Sept. 8, 2009.
[7] *See* 47 C.F.R. Part 6 (§§ 6.1-6.23), Part 7 (§§ 7.1-7.23), Part 14 (§§ 14.1-14.52).
[8] 47 U.S.C. §§ 151, *et seq*.

Respectfully submitted,

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Before the
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Enterprise Wireless Alliance, together with USMSS, Inc., an affiliated entity of the Alliance (collectively "EWA" or "Alliance"), in accordance with Section 1.429(d) of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully submits its Supplement[1] to the pending Petition for Partial Reconsideration filed by EWA in the above-entitled proceeding involving Customer Proprietary Network Information ("CPNI") obligations.[2] The Recon Petition has been pending for over six years and is unopposed. EWA believes the issues raised in it are more than ripe for consideration.

[1] A pleading requesting leave to submit this Supplement for consideration by the Commission was filed under separate cover as required by Section 1.429(d). A copy is attached hereto.
[2] *See* Petition for Reconsideration of Action in Rulemaking Proceeding, *Public Notice*, Report No. 2821, 22 FCC Rcd 21038 (July 20, 2007) ("Recon Petition").

Moreover, Commission actions since the Recon Petition was filed have created uncertainty about the FCC's position on the issue at the heart of that filing: whether the FCC classifies non-interconnected Private Mobile Radio Service ("PMRS") carriers[3] as telecommunications carriers under the Communications Act, including for purposes of compliance with CPNI requirements. If, as suggested by the intervening FCC action, the FCC does not so classify PMRS carriers, action on the Recon Petition would resolve this issue not only vis-à-vis CPNI but with regard to telecommunications carrier obligations generally. EWA believes the Act is unambiguous in this respect, as detailed below, but seeks a definitive resolution of this issue so that the obligations of this category of Commission licensee are clearly defined.

I CPNI OBLIGATIONS

A. THE RECON PETITION

The Telecommunications Act of 1996[4] amended the Communications Act to add provisions prohibiting the misuse of CPNI by telecommunications carriers:

> Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.[5]

The term "telecommunications service" is defined in the Act as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively

[3] As discussed, *infra*, PMRS and the corollary term, Commercial Mobile Radio Service ("CMRS"), are used by the Commission in lieu of the terms Private Mobile Service ("PMS") and Commercial Mobile Service ("CMS") as codified in 47 U.S.C. §332(c). Pursuant to the statute, only non-interconnected systems are classified as PMS/PMRS while commercial systems interconnected with the PSN are labeled as CMS/CMRS. The more commonly used FCC terms, PMRS/CMRS, are used in this filing.
[4] 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.
[5] 47 U.S.C. § 222 (a).

available directly to the public, regardless of the facilities used."[6] In proposing rules to implement the statutory CPNI requirements, the Commission did not distinguish between telecommunications service providers whose facilities were interconnected with the public switched network ("PSN") and those whose facilities were not.

EWA's Comments and Reply Comments in the proceeding explained that PMRS systems are not interconnected with the PSN and should not be subject to CPNI rules.[7] The Report and Order did not address that distinction between PMRS and CMRS systems.[8] Instead, in a brief footnote, the FCC mischaracterized the Alliance's argument as seeking an exemption for small carriers rather than for those that had no interconnection capability and declined to grant relief on that basis.[9]

In the Recon Petition, EWA again urged that the CPNI rules not be applied to licensees whose operations facially meet the definition of a telecommunications carrier but whose systems are not interconnected with the PSN and, thus, whose customers are incapable of using the facilities to make telephone calls.[10] The Alliance reiterated that these systems are used to provide dispatch-only service to businesses and government entities, not to consumers, and handle primarily group call transmissions between employees and a dispatcher or among groups of employees. It stated that these systems do not have access to the type of proprietary call detail information or enter into the joint marketing arrangements with third parties that prompted Congress to adopt the CPNI requirements. EWA's Comments in the proceeding noted that both

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[6] 47 U.S.C. § 153(53).
[7] *See* EWA Comments filed Apr. 28, 2006 and Reply Comments filed June 2, 2006.
[8] *See 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).
[9] *Id*. at n. 167.
[10] The Recon Petition also requested that systems providing only ancillary interconnection be exempt from the CPNI requirements. Over the past six years, the growth of cellular service has obviated any need for ancillary interconnection on dispatch systems. Because EWA's members subsequently have dropped even this limited capability as a service offering, that issue is moot, and the Alliance requests no further action on that matter.

the Alliance itself and certain of its members had been given conflicting information by FCC staff as to whether non-interconnected commercial dispatch systems, by statutory definition PMRS systems, were subject to CPNI requirements, creating substantial confusion about the regulatory obligations of these PMRS carriers.[11] No party opposed the Recon Petition.

B. THE CPNI FORFEITURE PROCEEDING

Almost two years after the Recon Petition was filed, the FCC's Enforcement Bureau issued a Notice of Apparent Liability for Forfeiture proposing to impose $20,000 fines on several hundred companies that the FCC stated were liable "for violating Section 222 of the Act, §64.2009(e) of the rules, and the EPIC CPNI Order by failing to submit, by March 1, 2008, the annual customer proprietary network information compliance certificate for the 2007 calendar year."[12] The ONALF did not allege violations of the substantive CPNI requirements, but said that "[e]ach of the Companies failed to submit satisfactory evidence of their timely filing of their annual CPNI certification."[13]

Subsequently, after reviewing their responses to the ONALF, the FCC canceled the forfeitures for a number of licensees stating that "Upon review of the record, and based upon additional information provided by the companies, we agree that each of the companies listed in the Appendix **were not required to file a CPNI certification for calendar year 2007**."[14] The Order did not explain why the FCC reached that conclusion.

While there may be different reasons for the Commission's decision based on its case-by-case review of the responses, EWA is familiar with the responses filed by a number of PMRS

[11] See Comments of EWA at 6, filed Apr. 28, 2006.
[12] *In the Matter of Annual CPNI Certification*, Omnibus Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 2299 (EB 2009) ("ONALF").
[13] *Id.*
[14] Annual CPNI Certification Apparent Liability for Forfeiture, *Order*, 25 FCC Rcd 16946 (EB 2010) ("CPNI Forfeiture Order")(emphasis added).

licensees whose forfeitures were canceled. Companies such as ComProducts, Inc., Texas License Consultants, Davis Electronics Company, Inc., and J&K Communications, LLC all acknowledged that they were engaged in providing commercial service to the public for a fee in 2007 and did not claim that they were exempt from the CPNI requirement. Indeed, each stated that it had filed both previous and subsequent CPNI certifications, but had failed to timely file the 2007 certification in 2008. Additionally, however, each also noted that it operated a non-interconnected PMRS system and did not have the type of information intended to be protected by the CPNI rules.

Since telecommunications carriers are obligated to file CPNI certification and since these entities acknowledged that they had been providing service to the public for a fee during the period in question, the FCC's conclusion that they "were not required to file a CPNI certification for calendar year 2007" understandably was read by these entities and other PMRS licensees as evidence that PMRS does not constitute the provision of a telecommunications service because the systems are not interconnected with the PSN. While EWA agrees with that interpretation as discussed, *infra*, it previously had been advised by FCC staff that even non-interconnected PMRS systems were subject to the requirement, the same advice given to some, but not all, Alliance members who contacted the FCC directly. Thus, the CPNI Forfeiture Order, while welcomed by the licensees whose forfeitures were canceled, caused substantial confusion in the PMRS community, confusion that continues since the Recon Petition remains pending.[15]

[15] EWA reminded the Commission of this ongoing confusion in the Alliance's comments in the Regulatory Flexibility Act proceeding and again asked that the CPNI rules be revisited to address this specific issue. *See* FCC Seeks Comment Regarding Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act, 5 U.S.C. 610, *Public Notice*, CB Docket No. 09-102, 24 FCC Rcd 7975 (rel. June 24, 2009); EWA Comments filed Sept. 8, 2009.

II SECTION 332(C)

CPNI is not the only obligation imposed on providers of telecommunications service. This classification has implications as varied as compliance with Accessibility Recordkeeping Compliance requirements[16] and the need to submit the Form 499, Telecommunications Reporting Worksheet. In light of the significance of these requirements and the number of PMRS carriers affected, the Alliance respectfully requests the Commission to address this broader issue in response to the Alliance's Recon Petition or in a separate Declaratory Ruling and to do so based on the PMRS license classification rather than individualized showings. As detailed below, because the regulatory treatment of PMRS and CMRS systems is governed by Section 332(c) of the Communications Act,[17] and because PMRS systems, by definition, are not interconnected with the PSN, it is EWA's opinion that they are not subject to any obligation imposed on entities that provide telecommunications service.

As noted above, the term telecommunications service is defined in the Communications Act as the "offering of telecommunications 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."[18] The FCC has stated repeatedly that the term encompasses <u>only</u> service provided on a common carriage basis.[19]

PMRS carriers do offer service for a fee and the FCC generally has interpreted the term "the public" broadly, despite regulatory and practical limitations on the class of users they can be

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[16] 47 C.F.R. Part 6 (§§ 6.1-6.23), Part 7 (§§ 7.1-7.23), Part 14 (§§ 14.1-14.52).
[17] 47 U.S.C. § 332(c).
[18] *See* n. 5 *supra*.
[19] *See, e.g., Federal-State Joint Board on Universal Serv*., CC Docket No. 96-45, Order on Remand. 16 FCC Rcd 571 at ¶ 2 (2000) ("ICN Order") (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, 13 FCC Rcd 5318 (1997)). *See also* 47 C.F.R. § 1.907: *Wireless Telecommunications Services*. Wireless Radio Services, whether fixed or mobile, that meet the definition of "telecommunications service" as defined by 47 U.S.C. 153, as amended**, and are therefore subject to regulation on a common carrier basis** (emphasis added)**.**

served.[20] However, this facial conformance with the telecommunications service definition, in EWA's opinion, is not determinative. Section 332(c) defines the permissible regulatory treatment of all mobile services. It establishes a bright line demarcation between those that may be treated as common carriers – and, therefore, as telecommunications service providers – for regulatory purposes under Title II of the Act and those that may not.

Specifically, Congress determined that only persons engaged in the provision of a CMRS may be treated as common carriers.[21] CMRS is defined as any mobile service "that is provided for profit **and makes interconnected service available** (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission."[22] Thus, it expands the traditional definition of common carriage to add a criterion for mobile operations that the service also must be interconnected. The Act goes on to define the term "interconnected service" as that which "is interconnected with the public switched network…."[23]

Conversely, the Act states that a person engaged in providing PMRS "shall not…be treated as a common carrier **for any purpose** under this Act."[24] PMRS is defined as service that "is not a commercial mobile service or the functional equivalent of a commercial mobile service…."[25] Because the Act prohibits the FCC from regulating PMRS as a common carrier offering, and because the FCC has determined that the provision of telecommunications service constitutes common carriage, the Act exempts PMRS providers, those providing non-

[20] *See, e.g.*, ICN Order.
[21] *See* 47 U.S.C. § 332(c)(1)(A).
[22] *Id*. § 332(d)(1) (emphasis added).
[23] *Id*. § 332(d)(2).
[24] *Id*. § 332(c)(2) (emphasis added).
[25] *Id*. § 332(d)(3).

interconnected, for-profit mobile service, from obligations associated with the provision of telecommunications service.

The Alliance sought guidance on this issue for its non-interconnected carrier members in a letter dated Jan. 31, 2011 to Austin C. Schlick, General Counsel, FCC. The Commission's Feb. 28, 2011 response stated that the obligation to comply with the CPNI rules turns on a case-by-case assessment whether a particular EWA member is a telecommunications carrier. EWA respectfully disagrees. Section 332(c) does not require individualized determinations, but classifies all mobile service providers as PMRS or CMRS depending on whether their systems are interconnected with the PSN. It is their regulatory classification, one that turns on the single factor of interconnection, that determines whether they may be regulated as common carriers/telecommunications service providers. No further analysis or factual investigation is required.

This interpretation is consistent with prior FCC decisions in this area. Thus, the FCC concluded that the Iowa Communications Network ("ICN"), which operated a state-owned fiber optic telecommunications network, was a telecommunications carrier despite ICN's argument that legal restrictions limited the entities eligible to be served on the network, a characteristic shared with most PMRS licensees because of FCC eligibility rules.[26] The FCC concluded that, "…restrictions on eligibility to use a carrier's services do not necessarily preclude common carrier status."[27] However, because ICN was not providing a mobile service, its regulatory treatment was not governed by Section 332(c) of the Act, and the FCC was not required to consider whether the system was interconnected with the telephone network.

[26] ICN Order at ¶ 8; *see, e.g.*, 47 C.F.R. § 90.179(a).
[27] ICN Order at ¶ 8.

By contrast, interconnection was the determinative criterion in the FCC's denial of a request from Maritime Communications/Land Mobile, LLC ("Maritime") on behalf of Waterway Communication System, LLC and Mobex Network Services, LLC in which Maritime argued that it was not required to make Universal Service Fund ("USF") contributions.[28] The FCC disagreed with Maritime's claim that it was not a mandatory contributor to USF and, specifically, that the limited universe of users to which it was permitted to provide mobile service dictated that it did not serve "the public" and should not be classified as a telecommunications carrier.[29] In denying the request, the FCC relied on the fact that the Automated Maritime Telecommunications Service that Maritime was authorized to provide was required to be interconnected with the PSN. Because it was an interconnected mobile service, it was classified by the FCC as CMRS and properly could be categorized as a telecommunications service and regulated as a common carrier offering.[30]

The FCC's decision in the Maritime case stands for the proposition, in the case of mobile service providers, that the issue of whether they are subject to requirements imposed on common carriers/telecommunications service providers is determined by whether the mobile service involved is interconnected. If it is not, then Sectiom 332(c) of the Act requires that the service provider not be treated as a common carrier/telecommunications service provider and made subject to requirements applicable to them. This reading of the Act is consistent with the conclusion reached by the Commission in the CPNI Forfeiture Order whereby non-interconnected PMRS systems were determined not to be required to submit CPNI certifications.

[28] *Universal Service Contribution Methodology Request for Review by Waterway Communications System, LLC and Mobex Network Services, LLC*, WC Docket No. 06-122, *Order*, 23 FCC Rcd 12836 (2008).
[29] *Id*. at ¶ 10.
[30] *Id*.

III CONCLUSION

The applicability of telecommunications service provider obligations including, but not limited to CPNI requirements, to commercial PMRS systems is an issue that warrants resolution. EWA urges the FCC to address this issue definitively and in accordance with the analysis provided herein by responding to the Recon Petition and, if necessary, by issuing a Declaratory Ruling at the earliest opportunity.

Respectfully submitted,

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