

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Petition of Public Knowledge et al. for Declaratory) WC Docket No. 13-306
Ruling Stating that the Sale of Non-Aggregate Call)
Records by Telecommunications Providers without)
Customers' Consent Violates Section 222 of the)
Communications Act)

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

Michael F. Altschul
Senior Vice President and General Counsel

Scott K. Bergmann
Vice President, Regulatory Affairs

Debbie Matties
Vice President, Privacy

Krista Witanowski
Assistant Vice President, Regulatory Affairs

CTIA – The Wireless Association®
1400 16th St NW
Suite 600
Washington, DC 20036
(202) 736-3200

January 17, 2014

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I. INTRODUCTION AND SUMMARY

CTIA – The Wireless Association® (“CTIA”)¹ submits these comments in response to the above-captioned petition filed by Public Knowledge et al. (“Petitioners”).² CTIA members are committed to protecting the privacy of their customers pursuant to Section 222 of the Communications Act of 1934, as amended (the “Act”) and, more generally, under federal and state privacy laws and self-regulatory codes. Petitioners, however, misread Section 222 in

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization includes Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² Petition of Public Knowledge et al. for Declaratory Ruling Stating that the Sale of Non-Aggregate Call Records by Telecommunications Providers Without Customers’ Consent Violates Section 222, WC Docket No. 13-306 (filed Dec. 11, 2013) (“Petition”); Wireline Competition Bureau Seeks Comment on Petition of Public Knowledge for Declaratory Ruling that Section 222 of the Communications Act Prohibits Telecommunications Providers from Selling Non-Aggregate Call Records Without Customers’ Consent, DA 13-2415, *Public Notice* (WCB Dec. 18, 2013).

asserting that anonymized or de-identified call records constitute “individually identifiable” customer proprietary network information (“CPNI”) under Section 222(c)(1).

Congress intended the Commission’s CPNI rules to protect information acquired through the customer-carrier relationship, with particular protections for information that is personal, sensitive, and individually identifiable. Individually identifiable CPNI is sensitive because it “includes information that is extremely personal to customers ... such as to whom, where and when a customer places a call, as well as the types of service offerings to which the customer subscribes and the extent the service is used.”³ In contrast, there is nothing in the statute or FCC rules that suggests customer information stripped of individually identifiable characteristics and identities is subject to the same limitations as information possessing such characteristics.

The Commission should dismiss the Petition for the following reasons:

- Petitioners offer only broad, vague, and speculative claims and fail to provide any facts or legal arguments to warrant a declaratory ruling. The FCC’s existing CPNI rules and enforcement process are sufficient to address any situation in which a carrier unlawfully makes CPNI available to a third party.
- Basic principles of statutory construction and the underlying intent of Section 222 cannot support Petitioners’ desired reading of the law. De-identified CPNI, put simply, is not “individually identifiable” CPNI under Section 222(c)(1), and it is not the type of sensitive, personal data for which Congress intended the protections of that section to apply. Rather, if customer information is not individually identifiable and is not aggregate, it falls into a separate category: non-individually identifiable CPNI, or de-identified CPNI.
- If the Commission nonetheless believes it must classify individual, de-identified customer information into a category identified in the statute, the only permissible conclusion is that it becomes “aggregate customer information” because it involves collective data stripped of sensitive information tied to a specific, individual customer.

³ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8064 (1998).

- Finally, Petitioners’ attempt to expand the definition of CPNI is inconsistent with other federal privacy rules and with the efforts of the White House to promote consensus-driven, self-regulatory processes.

II. CTIA AND ITS MEMBERS PRIORITIZE CONSUMER PRIVACY AND ARE COMMITTED TO PROTECTING CUSTOMERS’ CPNI

CTIA enthusiastically has embraced a leadership role on privacy issues because consumer trust is key for the continued explosive growth of the mobile ecosystem. In particular, CTIA is proud of the mobile industry’s record of industry best practices and guidelines on consumer privacy issues. For example, CTIA has developed, and its members have adopted, a Consumer Code for Wireless Service, which includes practices for the provision of consumer privacy⁴ and folds in CTIA’s Best Practices and Guidelines for Location-Based Services.⁵ In addition, CTIA has been a key industry participant in the multistakeholder process laid out by the White House and convened by the Department of Commerce’s National Telecommunications and Information Administration (“NTIA”).⁶

CTIA’s members firmly recognize the need to protect their customers’ privacy and to comply with applicable federal and state privacy laws and self-regulatory codes, as well as the

⁴ CTIA’s Consumer Code for Wireless Service (2011), http://files.ctia.org/pdf/The_Code.pdf, includes a provision for each signatory carrier to abide by a specific set of practices for the protection of customer privacy, including complying with applicable federal and state law, and making available to the public its privacy policy regarding information collected online. *Id.* at Provision 10. The FCC has recognized the Consumer Code by incorporating compliance with its requirements as a predicate for wireless carriers seeking designation as Eligible Telecommunications Carriers under the Universal Service Fund.

⁵ The CTIA Best Practices for Location-Based Services (Mar. 23, 2010), http://files.ctia.org/pdf/CTIA_LBS_Best_Practices_Adopted_03_10.pdf, are applicable to all LBS providers (application developers, equipment providers, as well as wireless carriers), are technology-neutral, implement the notice and consent structure utilized by the FTC in its Fair Information Practice Principles, and include other safeguards. Examples of LBS provider policies that demonstrate these Best Practices are posted on the CTIA website.

⁶ *See, e.g.*, Letter from Michael F. Altschul, Senior Vice President and General Counsel, CTIA, to NTIA, Multistakeholder Process to Develop Consumer Data Privacy Codes of Conduct, Docket No. 120214135-2135-01 (Apr. 2, 2012).

subset of information for which Congress gave the Commission authority under Section 222.⁷ CTIA and its members share the Commission’s interest in protecting personalized customer information consistent with Section 222.

III. THE COMMISSION SHOULD DISMISS THE PETITION AND RELY ON ENFORCEMENT OF EXISTING CPNI RULES IF A CARRIER VIOLATES SECTION 222

The Petition does not provide a sufficient basis for Commission action and should be dismissed. Under its rules, the Commission may issue a declaratory ruling where doing so would “terminat[e] a controversy or remov[e] uncertainty.”⁸ However, the agency “will do so only when critical facts are explicitly stated.”⁹ Here, Petitioners offer only broad, vague, and speculative allegations involving CPNI. They state, for example, only that “carriers’ methods of ‘anonymization,’ as reported in the media *may be* vulnerable to ‘re-identification.”¹⁰ The Petition thus fails to demonstrate an adequate level of specificity or actual harm to warrant Commission action.

In any event, the Petition does not present any legal question in need of resolution. Historically, the Commission has seen no reason to clarify or modify its CPNI rules when the plain meaning of Section 222 is clear, the requirements are well-defined, and any violations can be subject to enforcement. For example, in 2002, the Commission declined to launch a

⁷ As the Commission has recognized, “if the information ... does not meet the statutory definition, then Section 222 will not apply; only ... information that meets the definition of CPNI is subject to Section 222.” *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Declaratory Ruling, 28 FCC Rcd 9609, 9617 (2013) (“*2013 CPNI Mobile Device Declaratory Ruling*”).

⁸ 47 C.F.R. § 1.2.

⁹ *Rocking M Radio, Inc.*, 25 FCC Rcd 1322, 1332 (MB Audio Div. 2010), citing *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (1973).

¹⁰ Petition at 3, 6-8.

rulemaking requested by CTIA when the industry itself sought specificity in rules governing location-based services.¹¹ The Commission said there:

Because the statute imposes clear legal obligations and protections for consumers and because we do not wish to artificially constrain the still-developing market for location-based services, we determine that the better course is to vigorously enforce the law as written, without further clarification of the statutory provisions by rule. We will continue to monitor these important issues and initiate a rulemaking proceeding only when the need to do so has been clearly demonstrated.¹²

Similarly, in this case, the plain language of Section 222 identifies the scope of information subject to protection, the requirements (such as those in Section 222(c)(1)) are clear, and Petitioners fail to provide any factual or legal claim sufficient to warrant a Commission proceeding. In the event a carrier violates Section 222, the FCC may rely on enforcement of existing CPNI rules.

IV. PETITIONERS MISCONSTRUE SECTION 222 BY CLAIMING THAT CPNI IS EITHER “INDIVIDUALLY IDENTIFIABLE CPNI” UNDER SECTION 222(C)(1) OR “AGGREGATE CUSTOMER INFORMATION” UNDER SECTION 222(C)(3)

Petitioners incorrectly assert that Section 222 establishes that “all CPNI is either aggregate or individually identifiable” and thus must fall into one of these two buckets.¹³ To the contrary, a category of customer information exists that is neither “individually identifiable” CPNI nor “aggregate customer information,” and such information is not the type of personal, sensitive information that must be protected under Section 222(c)(1).

¹¹ See *Request by Cellular Telecommunications and Internet Association to Commence Rulemaking to Establish Fair Location Information Practices*, Order, 17 FCC Rcd 14832 (2002).

¹² *Id.* at 14832. In contrast, in its 2013 ruling governing CPNI on mobile devices, the Commission stated that it was acting to “avoid a potential gap in consumers’ privacy protections.” *2013 CPNI Mobile Device Declaratory Ruling*, 28 FCC Rcd at 9623. No such gap has been demonstrated here.

¹³ Petition at 4.

A. Section 222 Creates Distinctions Among Types of Customer Information that Involve Differing Levels of Sensitivity

As an initial matter, the Petition fails to acknowledge that Congress intended to protect *only* the most sensitive customer usage information and distinguished accordingly among various types of customer information. As the Commission has recognized, Congress “calibrate[d] the protection of [customer] information from disclosure based on the sensitivity of the information. Thus, Section 222 places fewer restrictions on the dissemination of information that is not highly sensitive ... than on the dissemination of more sensitive information the carrier has gathered about particular customers.”¹⁴ Most relevant to this discussion are three distinct types of customer information, although there may be other types as well. These three types are: (i) “individually identifiable” CPNI; (ii) “de-identified” or “anonymized” customer information; and (iii) “aggregate customer information.” We focus more narrowly here on “call records,” the subject of the Petition, which represent a subset of CPNI.

To illustrate with examples:

Type of Customer Information	Example
<i>“Individually identifiable” CPNI</i>	Mary Jones saved \$10/month by switching to the “Super Value” rate plan
<i>“Individually identifiable” call record</i>	Mary Jones called Lubbock, Tex., on January 17, at 2:42 p.m.
<i>“De-identified”/“anonymized”</i>	Customer XYZ saved \$10/month by switching to the “Super Value” rate plan Customer ABC saved only \$5/month by switching to the “Super Value” rate plan
<i>“De-identified” call record</i>	Customer XYZ called Lubbock, Tex., on January 17, at 2:42 p.m.

¹⁴ *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, 22 FCC Rcd 6927, 6930 (2007).

“Aggregate Customer Information”	80% of carrier customers saved at least \$10/month by switching to the “Super Value” rate plan
“Aggregate” call record	221 customers called Lubbock, Tex., on January 17, at 2:42 p.m.

These are three distinct types of customer information that are used for different purposes. While individually identifiable CPNI might be used to answer questions from Mary Jones about her phone bill, de-identified CPNI might be used by a carrier’s business consultants or third-party economist to analyze why some customers save less than others, whether calling patterns have any bearing on that, or for other types of analysis that utilize unique data elements.

Of these three types of customer information (and, again, there may be others), Section 222(c)(1) restricts use or disclosure only of “individually identifiable” CPNI, whereas CPNI that is not individually identifiable may be used or disclosed more freely. As the Commission explained as recently as last summer, “Congress . . . requires communications providers to protect consumers’ *sensitive personal* information to which they have access as a result of their unique position as network operators.”¹⁵ In contrast, because non-individually identifiable CPNI is stripped of sensitive or personal information or characteristics, Congress permitted a carrier to use or disclose it without customer consent.¹⁶

¹⁵ *2013 CPNI Mobile Device Declaratory Ruling*, 28 FCC Rcd at 9611 (emphasis added).

¹⁶ See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, 14865 (2002) (“Aggregate customer information and subscriber list information, in contrast, do not involve personal, individually identifiable information”) and (“[A]ggregate customer information . . . by definition has been stripped of individually identifiable information”).

B. Basic Canons of Statutory Construction Dictate that a Category of CPNI Exists that is Not “Individually Identifiable CPNI” and Need Not be Formulated into “Aggregate Customer Information”

Contrary to Petitioners’ view, it is clear on the face of the statute and through the application of basic principles of statutory construction that customer information does not necessarily fall into either the “individually identifiable” CPNI or the “aggregate customer information” category. The structure of Section 222 reveals that at least one additional category of customer information exists: non-individually identifiable CPNI.

Section 222 delineates the following:

- In Section 222(h)(1), “CPNI,” an umbrella category of information:

The term “customer proprietary network information” means—(A) information that relates to the quantity, technical configuration, type, destination, location, 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; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.¹⁷
- In Section 222(c)(1), “individually identifiable” CPNI, a sub-category of CPNI which is then qualified for protection from disclosure:

Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains [CPNI] by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to *individually identifiable* [CPNI] in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.¹⁸

¹⁷ 47 U.S.C. § 222(h)(1).

¹⁸ *Id.* § 222(c)(1).

- In Section 222(h)(2), transformed, de-identified CPNI that, when aggregated, forms “aggregate customer information” that may be used or disclosed without customer approval under Section 222(c)(3):

The term “aggregate customer information” means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed.¹⁹

- And, in Section 222(h)(3), a published version of customer information, “subscriber list information”:

The term “subscriber list information” means any information—(A) identifying the listed names of subscribers of a carrier and such subscribers’ telephone numbers, addresses, or primary advertising classifications ...; and (B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.²⁰

Given these terms, Petitioners’ claim fails on several fronts. First, whereas Congress defined the general category of CPNI in Section 222(h), it used the qualifier “individually identifiable” only in Section 222(c)(1). Use of the qualifier necessarily dictates that another category of CPNI must also exist, a category of CPNI that is not individually identifiable. “When Congress includes a specific term in one section of a statute but omits it in another section of the same Act, it should not be implied where it is excluded.”²¹ Indeed, the *very same sentence* in Section 222(c)(1) includes the general term “customer proprietary network information” and the qualified term “individually identifiable customer proprietary network information,” indicating that Congress intended the second, qualified reference to refer only to a subset of the first:

¹⁹ *Id.* § 222(h)(2).

²⁰ *Id.* § 222(h)(3).

²¹ *Arizona Elec. Power Co-op., Inc. v. U.S.*, 816 F.2d 1366, 1375 (9th Cir. 1987).

Except ... with the approval of the customer, a telecommunications carrier that receives or obtains *customer proprietary network information* by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to *individually identifiable customer proprietary network information*²²

Had Congress intended for the protections of 222(c)(1) to apply to *all* CPNI, it could have said “CPNI” or “such CPNI” in the second instance.

Second, canons of statutory construction also recognize a distinction between general and specific terms; general provisions do not qualify specific ones (*generalia specialibus non derogant*).²³ Thus, where Congress has specified how “individually identifiable” CPNI should be treated, that provision governs individually identifiable CPNI, and only individually identifiable CPNI.

Finally, Petitioners are wrong in claiming that the only alternative category for de-identified customer information is “aggregate customer information.”²⁴ Although aggregate customer information is information “from which individual customer identities and characteristics have been removed,” such information must also be “collective data that relates to a group or category of services or customers.”²⁵ Customer information need not meet the definition of “aggregate customer information,” however, in order to be excluded from the category of “individually identifiable” CPNI. A more logical reading of the statute is that an individual data point of de-identified or anonymous customer information is not “aggregate customer information,” although “collective data” of such information may be.

²² 47 U.S.C. § 222(c)(1) (emphasis added).

²³ See, e.g., *Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 300 (2d Cir. 2002) (explaining the applicability of the canon known as *generalia specialibus non derogant*—general provisions do not qualify specific ones).

²⁴ Petition at 3-4.

²⁵ 47 U.S.C. § 222(h)(2).

C. Congress’ Treatment of “Aggregate Customer Information” in Section 222(c)(3) Underscores It Was Not Concerned about the Privacy of Customer Information that is Not Individually Identifiable

Congress’ decision to allow “aggregate customer information” to be used, disclosed, and otherwise accessed without customer consent is further evidence of its interest in protecting only personal, sensitive information and not information that has been stripped of its sensitive nature.²⁶ The statute provides that once “individual customer identities and characteristics have been removed,”²⁷ this type of customer information no longer warrants the protections of Section 222(c)(1).

Indeed, Congress did not enact the “aggregate customer information” provision with an eye toward privacy at all. As the Conference Report to the Telecommunications Act of 1996 explains, Section 222 “strives to balance both competitive and consumer privacy interests with respect to CPNI,”²⁸ and Congress enacted Section 222(c)(3) based on competitive reasons, not privacy concerns. Specifically, Congress determined that aggregate data comprised of non-individually identifiable customer information could have competitive value, and required a subset of carriers—local exchange carriers—that use or disclose such data sets to provide them to others on a reasonable and non-discriminatory basis upon request.²⁹ Section 222(c)(3) expressly allows carriers to “use, disclose, or permit access to” aggregate customer information without any required customer consent. Thus, the “aggregate customer information” provision clearly was not adopted to serve as a “yang” to the “individually identifiable” “yin,” but for a different purpose altogether.

²⁶ *Id.* § 222(c)(3).

²⁷ *Id.* § 222(h)(2).

²⁸ Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, at 113, 205 (1996) (Conf. Rep.).

²⁹ 47 U.S.C. § 222(c)(3).

The existence of Section 222(c)(3) thus demonstrates that Congress did not have privacy concerns regarding customer information that is not individually identifiable. It further underscores there exists a separate category of CPNI, non-individually identifiable CPNI.

V. DE-IDENTIFIED CUSTOMER INFORMATION, BY DEFINITION, IS NOT “INDIVIDUALLY IDENTIFIABLE CPNI” SUBJECT TO SECTION 222(C)(1)

Petitioners argue, with no support, that “[i]ndividually identifiable records need only pertain to a single person, and that person’s identity need not be actually known.”³⁰ They claim a “signal from Congress that records that reference a single [customer] account are protected, even if the owner or user of the account is not personally identified.”³¹ But they cannot overcome the plain meaning of “individually identifiable”—information that must identify a particular person. Their interpretation defies logic and does not meet the overall intent of Section 222 to protect sensitive, individually identifiable information.

In contrast, as the examples in Section IV.A. above illustrate, “individually identifiable” does not cover information connected to any individual who is not identified. By the plain meaning of the words, the term “individually identifiable” must mean CPNI that identifies a particular, named individual. This is consistent with the dictionary definition of “identifiable”: “to recognize or establish as being *a particular* person or thing; *verify the identity of*: to identify handwriting; to identify the bearer of a check.”³² In contrast, Petitioners’ interpretation reads the word “identifiable” right out of the statute; under their theory, “individually identifiable” does

³⁰ Petition at 5 n.16.

³¹ *Id.*

³² Definition of Identifiable, Dictionary.com, <http://dictionary.reference.com/browse/identifiable?s=t> (last visited Jan. 17, 2014) (emphasis added); *see also* Definition of Identifiable, Merriam-Webster Dictionary (“to know and say who someone is or what something is,” “to establish the identity of”), <http://www.merriam-webster.com/dictionary/identify> (last visited Jan. 17, 2014).

not require that the information actually identify a customer. But this is not a permissible reading of the statute. Otherwise, the term “individually identifiable” in 222(c)(1) would be superfluous, a result inconsistent with the canon that all words of a statute should be given effect, where possible.³³ For these reasons, “individually identifiable” thus must mean only information that identifies a particular person. This interpretation is fully consistent with the concept that individually identifiable CPNI is information that is personal or sensitive to a particular individual.

VI. IF THE COMMISSION NONETHELESS SEEKS TO PLACE NON-INDIVIDUALLY IDENTIFIABLE CUSTOMER INFORMATION IN AN ARTICULATED STATUTORY CATEGORY, IT IS NECESSARILY “AGGREGATE CUSTOMER INFORMATION”

If the Commission believes it must classify the de-identified information in one of the categories expressly identified in the statute, the only permissible choice is to conclude that it becomes “aggregate customer information.” “Aggregate customer information” is defined in Section 222(h)(2) as “*collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed.*”³⁴ For example, it may include a list of collective data regarding multiple customers, stripped of sensitive information tied to any specific, individual customer. So long as the information in such list is not associated with the identity or characteristics of a specific person (*i.e.*, “individual customer identities and characteristics have been removed”), the collective list of data would be “aggregate customer information” under the law.

³³ *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955) (a law must be read “to give effect, if possible, to every clause and word of a statute”); *Bausch & Lomb, Inc. v. U.S.*, 148 F.3d 1363, 1367 (Fed. Cir. 1998) (“[W]e should construe the statute, if at all possible, to give effect and meaning to all terms.”)

³⁴ 47 U.S.C. § 222(h)(2) (emphasis added).

The Commission lacks authority under Section 222 to apply the protections of 222(c)(1) to any CPNI beyond individually identifiable CPNI. Such expansive action has no textual support in Congress' limited delegation to the Commission of authority over privacy and would amount to impermissible "enlargement" of Section 222.³⁵ Thus, if the Commission determines that de-identified customer information must be either "individually identifiable" CPNI or "aggregate customer information," it can only permissibly classify it as "aggregate customer information."

VII. PETITIONERS' ATTEMPT TO EXPAND THE DEFINITION OF CPNI IS INCONSISTENT WITH OTHER FEDERAL PRIVACY RULES AND THE ADMINISTRATION'S CONSENSUS-DRIVEN PRIVACY INITIATIVE

Any Commission action regarding CPNI must take into account the broader context of federal privacy laws and ongoing NTIA-led multi-stakeholder talks devoted to industry-wide privacy practices in an Internet era.³⁶ The Commission has been clear that it welcomes other government and industry initiatives that complement the statutorily-mandated CPNI rules.³⁷ While the Commission alone is vested with authority to implement Section 222, it can best meet its Congressional mandate by viewing CPNI in the context of consumer privacy policy writ large.

Other federal actions can provide useful context. For example, in implementing the privacy provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the Department of Health and Human Services ("HHS") was faced with a similar

³⁵ *Iselin v. U.S.*, 270 U.S. 245, 250-51 (1926); *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (courts should not add an "absent word" to a statute).

³⁶ *See Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* at 22-27 (rel. Feb. 23, 2012) ("White House Privacy Blueprint"), available at <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

³⁷ *2013 CPNI Mobile Device Declaratory Ruling*, 28 FCC Rcd at 9622.

statutory term involving “individually identifiable” information. Although health information is among the most personal, sensitive information for any individual, HHS purposely chose not to define the term “individually identifiable” in a manner that completely eliminated a covered entity’s ability to share information tied to a random individual. The agency concluded that it should not adopt a rigid definition that would “require covered entities to comply with the terms of this regulation with respect to information for which the probability of identification of the subject is very low.”³⁸ Rather, it would be better to “encourage covered entities and others to remove obvious identifiers or encrypt them whenever possible[, and] use of the absolute definition of ‘identifiable’ would not promote this salutary result.”³⁹ Similarly, the Commission should recognize the imbalanced approach sought by the Petition and reject it.

As the White House Privacy Blueprint recognized, a voluntary, multistakeholder approach can best respond to the consumer privacy needs of a changing technological environment.⁴⁰ The NTIA process is intended to allow for deliberation, adoption, and evolution through consensus.⁴¹ If the Commission attempts to paint with too broad a CPNI brush, it risks interfering with a process the White House has said is flexible, efficient, and beneficial to consumers. For example, CPNI that has been de-identified likely would no longer be considered personally identifiable information (“PII”) under general privacy law. Yet Petitioners would have the FCC, in a vacuum, apply a unique, more onerous CPNI-based standard to such information simply because it is acquired by a carrier and the theoretical possibility exists that

³⁸ *Standards for Privacy of Individually Identifiable Health Information*, 64 Fed. Reg. 59918, 59936 (Nov. 3, 1999), *adopted in Standards for Privacy of Individually Identifiable Health Information*, Final Rule, 65 Fed. Reg. 82462 (Dec. 28, 2000).

³⁹ *Id.*

⁴⁰ White House Privacy Blueprint at 23.

⁴¹ *Id.* at 25-27.

de-identified information might be combined with third party data. Such a result would unfairly disadvantage carriers and could disrupt the consensus approach the White House has promoted.

VIII. CONCLUSION

For the reasons outlined above, the Commission should dismiss or deny the Petition and continue to enforce any unlawful carrier disclosure of individually identifiable CPNI under its existing rules and policies.

Respectfully submitted,

CTIA-THE WIRELESS ASSOCIATION

By: /s/ Krista Witanowski

Krista Witanowski
Assistant Vice President, Regulatory
Affairs

Michael F. Altschul
Senior Vice President and General
Counsel

Scott K. Bergmann
Vice President, Regulatory Affairs

Debbie Matties
Vice President, Privacy

CTIA – The Wireless Association®
1400 16th St NW
Suite 600
Washington, DC 20036
(202) 736-3200

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