

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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

COMMENTS OF VERIZON AND VERIZON WIRELESS¹

The request by Public Knowledge to extend statutory restrictions on the use of certain personally identifiable customer information to apply broadly to information that is *not* personally identifiable is misplaced and should be denied.

By its terms, Section 222 of the Communications Act expressly restricts the use or disclosure of certain “individually identifiable” information that telecommunications carriers may obtain about a customer’s use of their services. That focus on individually identifiable information makes sense given the interest in protecting the privacy of individual customers and the heightened sensitivity of information that reveals the identities of customers. In contrast, information that is *not* individually identifiable – such as where identifying customer data has been removed, or “anonymized” – is not subject to the statutory restrictions that apply to individually identifiable information. This too makes sense, given the less sensitive nature of records that do not contain customer identities.

Public Knowledge’s Petition nevertheless asks the Commission to declare that the same statutory restrictions that apply to personally identifiable information also extend to cover

¹ In addition to Verizon Wireless, the Verizon companies participating in this filing are the regulated, wholly-owned subsidiaries of Verizon Communications Inc. (“Verizon”).

anonymized information that is *not* personally identifiable, arguing that it might be possible in some circumstances to reverse engineer the customer's identity in some unspecified way.

Verizon takes seriously its obligation to protect the privacy of its customers' information and that is particularly true of information that is individually identifiable. As further explained in Verizon's privacy policy, unless required by law we will not sell or share information that individually identifies our customers with others outside of Verizon for non-Verizon purposes without the customer's consent. But Public Knowledge's petition sweeps far too broadly, and glosses over the fact that anonymizing information helps to *protect* customer privacy by removing individual identities. It also fails to recognize that context is important, and that risks present when information is disclosed publicly are different than when information is kept private and used by a company or its business partners subject to safeguards to protect the anonymized information. And it ignores the fact that the Federal Trade Commission has recommended specific reasonable measures to minimize privacy risks with anonymized data. In short, there is no basis for the Commission to grant Public Knowledge's request.

ARGUMENT

By its express terms, Section 222 restricts the ability of a telecommunications carrier to use, disclose or provide access to individually identifiable information that meets the definition of "customer proprietary network information," or "CPNI."² That restriction is set out in Section 222(c)(1), which provides:

² Section 222(h)(1) defines CPNI as "(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 a telephone exchange service or telephone toll service received by a customer of a carrier, except that such term does not include subscriber list information."

Except as required by law or 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 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.

(Emphasis added). In contrast, information that is *not* individually identifiable, such as “anonymized” records from which customers’ names and other identifying information have been removed, are not subject to the restrictions in Section 222(c)(1). As noted above, this distinction makes sense, given the interest in protecting the privacy of individual customers and the heightened sensitivity of information that reveals the identity of an individual customer.

Public Knowledge nonetheless asks the Commission to issue a Declaratory Ruling extending the restrictions on the use of individually identifiable information to also apply broadly to information that does *not* identify individual customers. Its arguments, however, are misplaced.

The Petition’s lead argument is that, as used in Section 222, “‘individually identifiable’ means ‘not aggregate.’” Petition at 3-4. Thus, according to the Petition, CPNI that is not aggregated before being used or disclosed is necessarily subject to Section 222(c)(1)’s restrictions. But that argument is inconsistent with both the terms and structure of the statute.

First, straightforward application of the express statutory terms makes clear that the restrictions imposed by Section 222(c)(1) apply only to information that both is of the type that is within the statutory definition of CPNI *and* is “individually identifiable.” Indeed, that provision both imposes the restrictions and specifies the information to which those restrictions apply. And it is clear that the restrictions apply only to “*individually identifiable* customer proprietary network information.” (Emphasis added). To be sure the statute does contain separate provisions (Section 222(c)(3), (h)(2)) addressing “aggregate” customer information, which

expressly permit the use and disclosure of aggregate information (and affirmatively require disclosure in some cases), but those provisions say nothing at all about the treatment of non-aggregated information.

Second, if Congress had wanted the restrictions imposed by Section 222(c)(1) to apply to all information of the type that would fall within the definition of CPNI that is not aggregated, it could have used different language. But it instead limited the restrictions in Section 222(c)(1) to CPNI that is “individually identifiable.” Likewise, if Congress had meant the term “individually identifiable” to mean “any CPNI that is not ‘aggregate information,’” it could have defined that term as such, but did not. Where Congress intends to create such a dichotomy, Congress knows how to express it and did so elsewhere in the Communications Act.³ In any event, the Petition’s reading of Section 222 would render meaningless Congress’ addition of the language “individually identifiable” in Section 222(c)(1). “It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”⁴ Rather, “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.... We would not presume to ascribe this difference to a simple mistake in draftsmanship.”⁵

³ See, e.g., 47 U.S.C. § 332(d), which defines private mobile radio service as “any mobile service ... that is not a commercial mobile service or the functional equivalent of a commercial mobile service.”

⁴ *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001), quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). See also *United States v. Menasche*, 348 U.S. 528, 538–539 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute’” (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))).

⁵ *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal citations omitted; emphasis in original).

Third, as noted above, the reading under which Section 222(c)(1) applies only to individually identifiable CPNI best achieves Congress’s dual objectives of “balanc[ing] both competitive and consumer privacy interests with respect to CPNI.”⁶ The language it chose for Section 222(c)(1), which imposed restrictions on the use of information that would present the gravest risk for an individual customer’s privacy, was sensible in this context: It gave individually identifiable information about a customer’s use of telecommunications services the highest degree of protection in connection with carriers’ use of data for commercial purposes such as marketing, but did not restrict the use of information if it is not individually identifiable. This framework ensures that individual privacy interests are protected while anonymized information – to which a carrier, by definition, has applied privacy protections by removing information that can identify the customer – presents less of a privacy risk for consumers and could be used or disclosed.

A federal appellate court has noted the distinction between “individually identifiable” CPNI and anonymized information from which customer identities are removed, commenting that the restriction against disclosure of individually identifiable CPNI might “not even be called into question” as to such anonymized information.⁷ In ruling that AT&T was required by Section 251 of the Act to disclose interconnection agreements it had with other carriers to a complaining CLEC, CMC Telecom, the court rejected AT&T’s argument that Section 222 prohibited disclosure of the agreements. The court held that given Section 251’s agreement disclosure requirements, the “except as otherwise provide by law” provision in Section 222(c)(1) applied. The court continued:

⁶ 1996 Act Conf. Rep. at 205.

⁷ *CMC Telecom, Inc. v. Michigan Bell Telephone Co.*, 637 F.3d 626 (6th Cir. 2011).

Aside from the statutory arguments, AT&T's brief reveals that its concerns about disclosing CPNI are largely driven by its desire to avoid sharing its customers' names with competitors. AT&T may be able to avoid this disclosure by providing CMC with redacted versions of the individualized contract, so long as those contracts contain enough information to constitute an offer. That is, AT&T may be able to anonymize the contracts so that CMS can learn the terms on which AT&T provides individual offers without learning the identities of AT&T's customers. With redacted contracts, it is possible that Section 222 would not even be called into question, as that section only prohibits disclosure of "individually identifiable" CPNI.⁸

A recent Commission order also is consistent with interpreting Section 222(c)(1) not to encompass anonymized information. In addressing carriers' obligations to safeguard data stored on mobile devices, the Commission distinguished anonymized or aggregate data from data that is entitled to protection under Section 222(c)(1):

In this regard we note that Verizon Wireless argues that "precise location information warrants different protections than anonymous or aggregate data" and, therefore, "the extent of notice provided, and necessity or manner of consumer consent, will vary depending on the circumstances." This illustration is fully consistent with our conclusion. Aggregate customer information is not subject to the privacy obligations in section 222(c)(1). Rather, section 222 is calibrated to apply its strongest protections to "individually identifiable" CPNI.⁹

The Petition contends that even if anonymized call records are not subject to Section 222(c)(1) simply because they are not aggregate information, they still should be treated as such "because in many cases sufficient information remains in anonymized records to link them back to individual people." Petition at 6. However, it glosses over the fact that anonymizing information helps to *protect* customer privacy by removing individual identities. It presents no factual evidence that shows customers have been identified from anonymized information about customers' use of telecommunications services. None of the re-identification research cited

⁸ *Id.* at 631.

⁹ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information*, CC Docket No. 96-115, FCC 13-89, Declaratory Ruling (rel. June 27, 2013).

concludes that all, or even most, de-identified data sets are susceptible to re-identification.

Those studies conclude that in certain unique fact situations certain data may be susceptible to specific kinds of re-identification attacks, but the studies do not extend to information of the type that would fall within the definition of CPNI. And the Petition does not explain why it is reasonable to assume that anonymous information of that type could be re-identified.

The Petition's factual claims also involve publicly released de-identified data, but such data is very different from de-identified data that a carrier keeps private. When data is released publicly – everyone (including bad actors) – can try to re-identify the data. In the case of de-identified data that is not made public, however, that risk is minimized by carriers' adoption of a variety of security controls designed to protect the data. For example, carriers can implement protections such as encryption designed to prevent access to data outside the company, and limit access only the data only to authorized persons. In addition, carriers have data retention policies that maintain data only for as long as necessary. Contractual provisions can further restrict how business partners can use or share information by, for example, prohibiting a partner from using the data for its own purposes or from attempting to re-identify the data, mandating the use of data protection measures, including encryption and use restrictions and prohibitions, and by providing audit rights and detailing other remedies.

The Petition does not acknowledge the protective value of these technical, administrative and legal controls that are used with anonymizing customer information in reducing the risk of re-identification. Nor does it acknowledge that the FTC has recommended specific reasonable measures to minimize privacy risks with de-identified data, including appropriate de-identification techniques, a public commitment to de-identification and, where data is shared with third parties, contractual safeguards to prevent re-identification. Whether a

particular measure is reasonable will vary depending on various factors including, notably, whether a company publishes the data externally.¹⁰

Anonymizing call records is intended to safeguard customer-identifying data, and absent specific facts proving that it does not do so, there is no basis for the Commission to intervene. Even if the Petition could have demonstrated that a carrier's anonymized call records had been re-identified, the Commission would need to assess whether the carrier took reasonable measures, such as those the FTC has described, to prevent third parties from re-identifying the data.¹¹ That fact-specific inquiry, however, is not the proper subject for a declaratory ruling. Because the Petition's claims are highly fact-dependent and based merely on a hypothesis that some carrier call records might be susceptible to re-identification, these claims are not

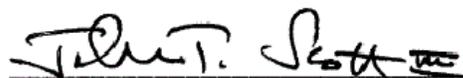
¹⁰ See Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), at 21, <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

¹¹ See 47 C.F.R. § 64.2010(a) (“Telecommunications carriers must take *reasonable measures* to discover and protect against attempts to gain unauthorized access to CPNI.” (emphasis added)); *2013 CPNI Order* ¶ 30 (“To the extent that a carrier’s *failure to take reasonable precautions* renders private customer information unprotected or results in disclosure of individually identifiable CPNI, we believe that a violation of section 222 may have occurred. *Any decision would depend on the facts and circumstances in a particular case.*” (emphasis added)); *2007 CPNI Order* ¶¶ 63-66 (“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.”).

appropriate for resolution through a generally-applicable ruling that interprets the meaning of a statute.¹² The Commission should deny the Petition for these reasons as well.

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Dated: January 17, 2014

¹² *In the Matter of Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, 18 FCC Rcd 21813, ¶ 18 n.87 (2003), *remanded on other grounds sub nom AT&T v. FCC*, 394 F.3d 933 (2005) (“declaratory relief is inappropriate when the facts are disputed.”); *In the Matter of Communique Telecommunications, Inc. dba Logically*, 10 FCC Rcd 10399, ¶ 33 (CCB 1995) (“Issues that are heavily dependent on factual situations are not appropriately addressed through a declaratory ruling.”), *citing Competitive Telecommunications Association*, 4 FCC Rcd 5364 (CCB 1989)); *In the Matter of Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, First Order on Reconsideration, 15 FCC Rcd 7207, ¶ 22 n.43 (1999) (the Commission has declined to issue a declaratory ruling when facts were disputed or not clearly developed); *In the Matter of The Chesapeake and Potomac Telephone Company of Maryland, Memorandum Opinion and Order on Reconsideration*, 2 FCC Rcd 3528, ¶ 35 (1987) (“A declaratory ruling proceeding is not an appropriate vehicle for the resolution of disputed questions of fact.”)