

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
)
Petition of Public Knowledge et al.)
For a Declaratory Ruling Stating)
That the Sale of Non-Aggregate Call) **CG Docket No. 13-306**
Records by Telecommunications)
Providers without Customers’)
Consent Violates Section 222 of)
the Communications Act)

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these reply comments in response to the December 18, 2013 Federal Communications Commission (FCC) *Notice*¹ seeking comment on a December 11, 2013 petition filed by Public Knowledge and others² seeking a declaration that the sale of consumer phone records to the government violates the Telecommunications Act.

¹ *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 (Notice)*, WC Docket No. 13-306, Public Notice, DA 13-2415 (Wireline Comp. Bur. rel. Dec. 18, 2013). Available online at: <http://apps.fcc.gov/ecfs/document/view?id=7520963462>

² *Petition of Public Knowledge et al. for Declaratory Ruling Stating that the Sale of Non-Aggregate Call Records by Telecommunications Providers without Consumers' Consent Violates Section 222 of the Communications Act*, WC Dkt 13-306 (filed Dec. 11, 2013) (*Petition*). The Petition was filed by Public Knowledge, Benton Foundation, Center for Digital Democracy, Center for Media Justice, Chris Jay Hoofnagle, Common Cause, Consumer Action, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Press, New America Foundation's Open Technology Institute, and U.S. PIRG. It is available online at: <http://apps.fcc.gov/ecfs/document/view?id=7520963695>.

Specifically, the *Petition* asks the FCC to issue a declaratory ruling that: 1) under Section 222 of the Communications Act of 1934, as amended,³ non-aggregate call records that have been purged of personal identifiers but that leave customers' individual characteristics intact are protected as individually identifiable Customer Proprietary Network Information (CPNI), and 2) telecommunications providers, including AT&T, Verizon, Sprint, and T-Mobile, are prohibited from selling or sharing such records with third parties without customers' consent.

NARUC'S INTEREST

NARUC, a nonprofit organization founded in 1889, has members that include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, which are charged with regulating the activities of telecommunications,⁴ energy, and water utilities.

Congress and the courts⁵ have consistently recognized NARUC as a proper entity to represent the collective interests of the State public utility commissions.

³ 47 U.S.C. § 222, available online at: <http://transition.fcc.gov/Reports/1934new.pdf>.

⁴ NARUC's member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competing local exchange carriers (LECs). These commissions are obligated to ensure that local phone service supplied by the incumbent LECs is provided universally at just and reasonable rates. They have a further interest to encourage unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. *See, e.g.*, 47 U.S.C. § 252 (1996).

⁵ *See United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd* 672 F.2d 469 (5th Cir. 1982), *aff'd en banc on reh'g*, 702 F.2d 532 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985). *See also Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

In the Federal Telecommunications Act,⁶ Congress references NARUC as “the national organization of the State commissions” responsible for economic and safety regulation of the intrastate operation of carriers and utilities.⁷

The disclosures that are the subject of the *Petition* appear directly counter to federal law and are inconsistent with both the FCC’s (and State commissions) *parens patriae* obligations to protect the public interest.

In November of 2013, shortly before the *Petition* was filed, NARUC passed a *Resolution Calling for, at a Minimum, Disclosure of Provider Actions Facilitating Governmental Surveillance and Retention of Private and Personal Communications via Traditional, Wireless and/or Internet Protocol Networks*.⁸

While NARUC has not take a position on the specific request advanced in the *Petition*, NARUC certainly and strongly supports the agency investigation necessarily required by the petitioners’ requests.

Specifically, given the facts presented, the FCC is obligated to, at a minimum:

⁶ *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq.*, Pub.L.No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) (“Act” or “1996 Act”).

⁷ See 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon; Cf. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the “bingo card” system.”)

⁸ For your convenience the resolution is attached to this pleading as Appendix A and also is available online at: <http://www.naruc.org/Resolutions/Resolution-Calling-for-at-a-Minimum-Disclosure-of-Provider-Actions-Facilitating-Governmental-Surveillance-and-Retention-of-Private-and-Personal-Communications.pdf>. Compare, November 15, 2013 *Letter from the Electronic Privacy Information Center to Tom Wheeler, Chairman, Federal Communications Commission*, discussing NARUC’s resolution, available online at: <http://epic.org/privacy/terrorism/fisa/EPIC-FCC-Wheeler-Ltr.pdf>. See also the June 11, 2013 *Letter from the Electronic Privacy Information Center to Mignon Clyburn, Chairman, Federal Communications Commission*, available online at: <http://epic.org/privacy/terrorism/fisa/EPIC-FCC-re-Verizon.pdf>.

- investigate whether carriers that have supplied data, call and/or text records, Internet data, voice communications, correspondence and materials to the NSA, acted in compliance with their obligations under Section 222 of the Act and the FCC's CPNI rules;
- investigate whether such carriers acted reasonably in providing data to the NSA, apparently without challenge; and
- re-examine its CPNI rules and other rules related to privacy of consumer data, including consideration of whether carriers should be obligated to regularly (at least annually) notify consumers that CPNI data call and/or text records, Internet data, voice communications, correspondence and materials maintained by those providers may be released.

In support of these positions, NARUC respectfully submits the following:

DISCUSSION

The FCC should identify carriers that have supplied CPNI to the government and investigate whether the carriers have complied with Section 222 and the FCC's implementing regulations.

Until recent disclosures in the media, consumers had reasonable expectations that information about their phone calls and other communications services would remain private. Many of those expectations are directly protected by Section 222 of the federal Telecommunications Act, which requires carriers to protect CPNI.

In September 2013, the *New York Times* reported on the Hemisphere Project, a program in which AT&T sells CPNI to federal and local drug enforcement agents.⁹ Massive in scope, the Hemisphere database collects four billion call records daily,

⁹ Shane, Scott & Moynihan, Colin, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.'s*, N.Y. TIMES, Sept. 1, 2013, at A1, at <http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html?pagewanted=1&r=1>.

which include “every call that passes through an AT&T switch – not just those made by AT&T customers . . .”¹⁰

AT&T grants government officials’ access to CPNI pursuant to administrative subpoenas, which are issued by the U.S. Drug Enforcement Administration (DEA) and are not subject to judicial oversight.¹¹

In November, *The New York Times* reported that AT&T sells CPNI to the U.S. Central Intelligence Agency (CIA).¹² According to the report, “[t]he C.I.A. supplies phone numbers of overseas terrorism suspects, and AT&T searches its database and provides records of calls that may help identify foreign associates [.]”¹³

It does not appear that AT&T is under a court order or subpoena to disclose CPNI to the CIA.¹⁴

Moreover, AT&T and other carriers have been compensated for providing the U.S. National Security Agency (NSA) with the requested communications metadata (including data that is classified as CPNI) without challenging the legality of the NSA’s requests.¹⁵

¹⁰ *Id.*

¹¹ *Id.*

¹² Savage, Charlie, *C.I.A. Is Said to Pay AT&T for Call Data*, N.Y. TIMES, Nov. 7, 2013, at A1, available at <http://www.nytimes.com/2013/11/07/us/cia-is-said-to-pay-att-for-call-data.html?pagewanted=1>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Fung, Brian, *U.S. phone companies never once challenged NSA data requests*, Washington Post (Sept. 18, 2013), available online at: <http://www.washingtonpost.com/blogs/the-switch/wp/2013/09/18/u-s-phone-companies-never-once-challenged-nsa-data-requests/>.

AT&T's actions violate Section 222 of the Telecommunications Act of 1996, which mandates that telecommunications carriers, such as AT&T, protect CPNI.¹⁶

As the Petition indicates, and numerous press accounts¹⁷ suggest, AT&T is not alone. Indeed, at least AT&T, Verizon, Sprint, and T-Mobile incorporate by reference in the fine print of - what are by definition - adhesion contracts – what certainly appear to be required customer waivers of CPNI-related privacy rights.¹⁸

These waivers, like the industry sale of data to NSA and the Drug Enforcement Administration, appear on their face to be inconsistent with Section 222 obligations.

And there is no question that the FCC has the authority, the resources, and the clear obligation to investigate these matters.

CONCLUSION

For the foregoing reasons, NARUC respectfully urges the FCC to immediately investigate whether carriers that have supplied data, call and/or text records, Internet data, voice communications, correspondence and materials to the

¹⁶ 47 U.S.C. § 222, available online at: <http://transition.fcc.gov/Reports/1934new.pdf>.

¹⁷ See, e.g., Soltani, Ashkan, *Here's everything you should know about NSA address book spying in one FAQ*, Washington Post, October 14, 2013, available online at: <http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/14/heres-everything-you-know-about-nsa-address-book-spying-in-one-faq/>; Swartz, Mathew J., *NSA Harvests Personal Contact Lists, Too*, InformationWeek, October 15, 2013, available online at: <http://www.informationweek.com/security/risk-management/nsa-harvests-personal-contact-lists-too/d/d-id/1111947>.

¹⁸ As the Petition points out at pages 9-10, AT&T specifies it "may share" both "anonymous" and aggregate data "with other companies and entities." To render data "anonymous," AT&T "remove[s] data fields ... that can reasonably be used to identify you" and also "use[s] statistical techniques and operational controls to anonymize data." Under Section 222, AT&T can share aggregate data with other companies and entities without customers' consent, but the non-aggregate data it refers to as "anonymous" is still protected as individually identifiable CPNI. See, *AT&T Privacy Policy FAQ*, online at <http://www.att.com/gen/privacy•policy?pid=13692>. AT&T thereby reserves the right to share this information to companies and other entities without customers' consent, in violation of Section 222. Similarly, Verizon specifies it may share both "anonymous" and aggregate data with third parties. Under Section 222, any non-aggregate data that Verizon refers to as "anonymous" is still protected as individually identifiable CPNI. But Verizon also "reserves" the right to share this information with third parties without customers' consent, in apparent violation of Section 222. See, *Privacy Policy: Full Privacy Policy, Verizon*, <http://www.verizon.com/about/privacy/policy/>. Compare, *Sprint Corporation Privacy Policy, Sprint*, at: <http://www.sprint.com/legal/privacy.html> and *T-Mobile Privacy Policy, T-Mobile*, online at: <http://www.t-mobile.com/company/website/privacypolicy.aspx#fullpolicy>.

NSA acted in compliance with their obligations under Section 222 of the Act and the FCC's CPNI rules. The information collected, and any violations indentified, will no doubt provide a useful record for re-examining and perhaps revising the FCC existing CPNI disclosure and customer notification rules as well as enforcement practices.

Respectfully Submitted,

/s/ James Bradford Ramsay

James Bradford Ramsay
GENERAL COUNSEL
National Association of Regulatory
Utility Commissioners
1101 Vermont Ave, NW Suite 200
Washington, DC 20005
Phone: 202.898.2207
E-Mail: jramsay@naruc.org

March 3, 2014

Appendix A

Resolution Calling for, at a Minimum, Disclosure of Provider Actions Facilitating Governmental Surveillance and Retention of Private and Personal Communications via Traditional, Wireless and/or Internet Protocol Networks

WHEREAS, The Fourth Amendment to the Constitution provides that, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;” **and**

WHEREAS, Many consumers have expectations that privacy protections apply to emails, phone calls, and other communications information; *and*

WHEREAS, These expectations are reinforced by Section 222 of the Communications Act under which telecommunications carriers have an obligation to protect Customer Proprietary Network Information (CPNI); *and*

WHEREAS, It has been reported that, notwithstanding such protections, the National Security Agency (NSA) has been obtaining extensive data on communications of individual citizens; *and*

WHEREAS, The National Security Agency’s digital data collection apparently extends to the contact lists of individual users, culled in part from people’s online email address books, instant messaging ‘buddy lists,’ as well as information in Facebook accounts [“Here’s everything you should know about NSA address book spying in one FAQ,” Washington Post, October 14, 2013; “NSA Harvests Personal Contact Lists, Too,” InformationWeek, October 15, 2013]; *and*

WHEREAS, It appears that telecommunications carriers subject to regulation by the Federal Communications Commission (FCC) have been compensated for providing such information and have provided the NSA with communications metadata (including data that is classified as CPNI) without challenging the legality of the NSA’s requests. [The Washington Post, “U.S. phone companies never once challenged NSA Data requests,” September 18, 2013]; *and*

WHEREAS, It is now apparent that these practices are not consistent with public expectations of privacy and confidentiality, such as those embedded in the FCC’s CPNI rules; *now, therefore, be it*

RESOLVED, That the National Association of Regulatory Utility Commissioners, convened at its 125th Annual Meeting in Orlando, Florida, recommends that the FCC investigate whether the telecommunications carriers subject to its jurisdiction which have supplied data, call and/or text records, Internet data, voice communications, correspondence and materials to the NSA acted in compliance with their obligations under Section 222 of the Act (concerning CPNI) and the FCC's CPNI rules; *and be it further*

RESOLVED, That, as part of its inquiry, the FCC investigates whether such telecommunications carriers acted reasonably in providing data to the NSA, apparently without challenge; *and be it further*

RESOLVED, That in light of the fact that telecommunications carriers may be providing CPNI data to the NSA, the FCC should reexamine its CPNI rules and other rules related to privacy of consumer data, including consideration of whether carriers should be obligated to regularly (at least annually) notify consumers that CPNI data call and/or text records, Internet data, voice communications, correspondence and materials maintained by those providers may be released.

Sponsored by the Committee on Telecommunications

Recommended by the NARUC Board of Directors November 19, 2013

Adopted by the NARUC Committee of the Whole November 20, 2013