Public Knowledge

December 6, 2013

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: GN Docket No. 12-353, Comment Sought on the Technological Transition of the Nation's Communications Infrastructure; GN Docket No. 13-5, Technology Transitions Policy Task Force WB Docket No. 13-306, Petition of Public Knowledge et al. for Declaratory Ruling that Section 222 of the Communications Act Prohibits Telecommunications Providers from Selling Non-Aggregate Call Records Without Customers' Consent

Dear Ms. Dortch:

On May 27, 2014 I met with Tim Sterling, WCB/CPD, Madelein Findley, OGC, Matthew DelNero, WCB, Jamie Suskind, Kristine Forgotstein, WCB, Jon Sallet, OGC, Denise Coca, WCB, with regard to the above captioned proceedings.

GN Docket No. 12-353, Docket No. 13-5

I stated that the Commission needs to move quickly to resolve outstanding concerns such as the managerial framework submitted by COMPTEL[1] and the recent letter submitted by Public Knowledge and other consumer groups with regard to efforts by some providers to force migration from services still subject to Section 214(a) in violation of their obligations under the statute.[2] With regard to the later, I noted that the Commission could pursue several avenues ranging from an enforcement Letter of Inquiry to a general inquiry into industry practices to an information request or some combination of the above – as long as the Commission actually ***does something.*** Continued failure of the agency to act undermines the confidence of the public in the agency's ability to manage the transition and protect consumers.

In addition, I urged the Commission to act quickly on our pending confidentiality challenge. The most recent filing by AT&T[3] does not resolve the issues set forth in Public Knowledge's challenge.

This is not a product launch. This is a pilot program for the express purpose of testing whether

[1] Letter of Angie Kronenberg, COMPTEL, filed April 2, 2014, GN Docket No. 13-5, et al.

[2] Letter of Public Knowledge, et al., filed May 12, 2013 GN Docket No. 13-5 http://apps.fcc.gov/ecfs/comment/view?id=6017610666

[3] Letter of Robert Barber, filed May 27, 2014, GN Docket No. 13-5, http://apps.fcc.gov/ecfs/document/view?id=7521152146

AT&T can discontinue existing TDM services under the "impairment" standard of Section 214(a). Unlike a product launch, where details of timing could confer competitive advantage to a rival, details of timing in a pilot project are essential to the public debate and have no commercial value.

Purpose of Pilot Projects And the Section 214(a) Impairment Standard

I noted that there continues to be considerable confusion over the relationship between the pilot projects and Section 214(a). There are two ways of looking at the AT&T proposed projects (and any other such projects as the Commission may authorize).

The first if a very simple test of whether substituting the target technology for existing TDM can be done safely. This is essentially beta project testing. Put crudely, what happens when AT&T flips the switch. Does the network crash or not?

While such a test is potentially useful, it does little to inform the Commission of whether replacement of the TDM service with the target service would "reduce, or impair service to the community, or any part of the community." The Commission would still need to determine on a case-by-case basis whether the level of service provided meets or exceeds the previous service levels – however defined.

Alternatively, the Commission can use the pilots to make technical determinations, as recommended by Public Knowledge.[4] Companies such as AT&T wishing to demonstrate that their target technology meets the necessary technical standard can – and should – use the pilot projects to conduct tests along the lines outlined by Public Knowledge, compared to a control group within the target community. Once approved, a technology would be presumed to meet the Commission's technical requirements for all subsequent Section 214(a) and thus streamline the entire process. Ideally, the Commission would produce a "checklist" based on the empirical evidence gathered in a well constructed trial program that would serve as a guide for companies seeking 214(a) approval to discontinue traditional services.

Pressing Need for the FCC To Clarify the Section 214(a) Process.

It is imperative that the Commission act quickly to clarify the Section 214(a) process. As Public Knowledge has repeatedly stated, the traditional Section 214(a) process is simply not suited to the situation where a carrier wishes to discontinue an existing service still in high demand in the service territory and replace it with another service. Critically, the Commission must make clear

[4] See Letter of Harold Feld, Senior V.P., Public Knowledge to Chairman Tom Wheeler (January 13, 2014), available at: http://apps.fcc.gov/ecfs/document/view?id=7521065344

what is necessary to meet the "impairment" standard under Section 214(a). *i.e.*, What is required so that replacement of TDM with the target service does not "reduce" or "impair" service to the community, or any portion of the community. In accordance with the unanimous vote adopting the framework for the IP Transition,[5] the Commission must answer this question with reference to the "Enduring Values" identified in the order: Public Safety & National Security, Universal Access, Competition, and Consumer Protection.

We may consider three separate components.

A. What policies should the Commission adopt as applicable to any new service? These questions are properly addressed in the open proceedings listed by Comptel in its managerial framework letter.

B. What technical standards for covered services must the service meet. E.g., what consistent voice quality as measured in quantifiable – not merely qualitative – measurements. This should be a pure question of engineering, supported by technical trials and other relevant engineering data, industry standards and best practices, and other technical sources.

C. What services must be covered? This is a mixed question of policy and engineering. For example, the Commission has long required under Part 68 that providers permit any network attachment that does not harm the network (having previously determined that it was "inherently unreasonable" for the network operator to prohibit network attachments that do not harm the network). Whether not loss of this capability constitutes "impairment" or "reduction in service" is a question of policy. But if the Commission determines that the new service must permit network attachments, then the question of how becomes an engineering question.

Issues Relating To CPNI Petition (Docket No. 13-306)

I reiterated the main points from Public Knowledge's *ex parte* filed April 28, 2014.[6] In addition, I noted that the resolution of the CPNI Petition has commercial and competitive consequences as well as privacy consequences. For example, AT&T offers alarm services, as do rival firms. AT&T may provide to its business unit the location of any exchange where a some predetermined number of callers place calls to the complaint department of a rival alarm company. While "anonymized," this information clearly conveys to AT&T a commercial advantage over a rival alarm firm by indicating a geographic region where customers are unhappy with a rival. Alternatively, Comcast – which now offers energy services – could sell to itself information on the number of times rival energy firms make calls to its phone customers

[5] In re Technology Transitions, GN Docket No. 13-5, Order, Report and Order, etc. (rel. January 31, 2014) http://apps.fcc.gov/ecfs/document/view?id=7521070313

[6] http://apps.fcc.gov/ecfs/document/view?id=7521100373

and the duration of the call. From this information, even though it is “anonymized,” Comcast would gain a competitive advantage by gauging the level of interest in rival services by its customers based on the duration of the calls.

It is precisely this sort of anticompetitive conduct that Congress intended to prohibit under the CPNI rules. Even if the information is purchased by a third party, as the CIA did with AT&T, the potential for anticompetitive conduct is significant. For example, assume Amex discovers the phone number of Visa’s complaint department. Amex could buy from carriers information pertaining to the number of calls to the complaint department and the duration of these calls. From this, Amex could deduce significant information with regard to the Visa customer satisfaction that Visa would regard as proprietary.

I stated that the Commission could resolve the pending Request for Declaratory Ruling by determining that when a carrier access CPNI for the purpose of anonymizing the information to sell to others, it violates the CPNI statute because, of necessity, it access CPNI for the purpose of rendering fit for sale. If the Commission makes this determination, it should also rule that generic disclosures on websites such as those cited in Public Knowledge’s initial *Petition* do not satisfy the specific notice requirement, and that customers must be given meaningful opportunities to opt out.

In addition, as PK previously urged, the Commission should recognize that there are only two types of information under the statute: “individually identifiable customer proprietary network information” and “aggregate customer information.” The Commission should reject the effort of carriers to create a third class of information “individual information the carrier considers sufficiently anonymized to no longer be individually identifiable but still not aggregate information either.” If the Commission feels it must define the statutory terms further, PK suggests the following definitions.

1. "Individually identifiable customer proprietary network information" means customer proprietary network information that is not aggregate.
2. "Aggregate customer information" means information that cannot reasonably used to determine either the identity or any characteristic of any individual, that combines information from more than one individual, and that is not in response to a direct request from a third party based on information which would otherwise qualify as individually identifiable CPNI.

For example, the CIA request to AT&T for metadata associated with specific phone calls initiated in foreign countries and terminating in the United States could not be considered “Aggregate” because it is based on specific information that would otherwise be considered CPNI, strongly suggesting that the CIA has the means to disaggregate the information.

In accordance with Section 1.1206(b) of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/ Harold Feld
Senior Vice President
PUBLIC KNOWLEDGE

cc: Jon Sallet
Tim Sterling
Madelien Finley
Matthew DelNero
Jamie Suskind
Kristine Forgotstien
Denise Coca