

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

In the Matter of)	
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42
)	
Telecommunications Carriers Eligible For Universal Service Support)	WC Docket No. 09-197
)	
Connect America Fund)	WC Docket No. 10-90

**REPLY TO OPPOSITION
OF
NTCA–THE RURAL BROADBAND ASSOCIATION,
WTA – ADVOCATES FOR RURAL BROADBAND AND,
JSI**

I. INTRODUCTION

NTCA–The Rural Broadband Association (“NTCA”),¹ WTA – Advocates for Rural Broadband,² and John Staurulakis, Inc. (“JSI”)³ (collectively “Rural Representatives” or “Respondents”) respectfully submit, pursuant to FCC rule 1.429,⁴ this reply to opposition to the CTIA Petition for Reconsideration⁵ filed in the above-captioned proceedings. The Rural Representatives herein support the CTIA Petition which correctly states that the document

¹ NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers (“RLECs”). All of NTCA’s members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities.

² WTA – Advocates for Rural Broadband (formerly known as “Western Telecommunications Alliance”) is a national trade association representing more than 280 rural telecommunications providers offering voice, broadband and video services in rural America. WTA members serve some of the most rural and hard-to-serve communities in the country and are providers of last resort to those communities.

³ JSI is a telecommunications consulting firm offering a full spectrum of regulatory, financial and operational services to over 275 primarily rural independent telecommunications providers in 45 states and the U.S. territory of Guam.

⁴ 47 C.F.R. § 1.429(g).

⁵ Petition for Partial Reconsideration by CTIA, WC Docket No. 11-42, *et al.* (fil. Aug. 13, 2015) (“CTIA Petition”).

retention rules recently adopted by the Commissions in an *Order on Reconsideration*⁶ issued in the Lifeline proceeding exceeded the Commission’s authority to the extent that it relied on Sections 222 and 201(b) of the Communications Act. The Rural Representatives also respond herein to the Opposition filed by the Privacy PIOs.⁷

II. THE COMMISSION SHOULD RECONSIDER ITS DETERMINATION THAT SECTIONS 222(a) AND 201(b) GRANT IT THE AUTHORITY TO REQUIRE ETCS TO RETAIN THE LIFELINE SUBSCRIBER ELIGIBILITY DATA AT ISSUE HEREIN

A. Neither Section 222(a) nor 201(b) of the Communications Act Grants the Commission the Authority to Adopt the Specific Document Retention & Security Rules Established by the *Order on Reconsideration*

The Rural Representatives’ members and clients take seriously their duty to protect the personal and private information entrusted to them by their customers. Strict data security practices are not only mandated generally by both state and federal laws,⁸ they make good business sense for any carrier. Strong data security protections are of even greater importance for RLECs, as the owners, managers, and operators of these small carriers operating in small rural towns and outlying areas know their customers personally, often living in the communities they serve. Thus, RLECs consider data security an important community responsibility.⁹ That

⁶ Lifeline and Link Up Reform and Modernization, WC Docket No. 11-42, Telecommunications Carriers Eligible for Universal Service Support, WC Docket No. 09-197, Connect America Fund, WC Docket No. 10-90, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71 (rel. Jun. 22, 2015) (“*Order on Reconsideration*”).

⁷ Opposition of Appalshop, Center for Democracy & Technology, Center for Digital Democracy, Center for Rural Strategies, Consumer Action, Consumer Federation of America, Consumer Watchdog, Free Press, New America’s Open Technology Institute, Public Knowledge, United Church of Christ, OC, Inc., and World Privacy Forum, WC Docket No. 11-42. *et al.*, (fil. Oct. 8, 2015) (“Privacy PIOs”).

⁸ A list of data security and breach notification laws can be found at: <http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx>

⁹ It must be stated, contrary to the over-the-top suggestion by the Privacy PIOs, that the CTIA Petition (and those filings in support of that Petition) do not “rest[] on the remarkable contention that applicants for and participants in the Lifeline program are entitled to no protection whatsoever when it comes to carriers’ handling of personal information.” At no point does the Petition take such a position. Rather, Petitioner and those commenting in support (including the Rural Representatives) simply raise legitimate

said, like all Commission actions, the specific document retention rules adopted by the *Order on Reconsideration* must be grounded in the Communications Act of 1934, as amended, and the Commission’s process must comply with the requirements of the Administrative Procedure Act (“APA”). As the CTIA Petition and ACA comments¹⁰ in support state, neither the plain text of Section 222 nor precedent grant the Commission authority over customer data beyond Customer Proprietary Network Information (“CPNI”) as explicitly defined by Section 222(h).

To begin with, Section 222(h) defines the entire bounds of information to which Section 222 applies. Section 222(a) does not establish a separate or additional category of protected data beyond CPNI as defined by Section 222(h). More specifically, as CTIA states, Section 222(a) simply identifies the three parties to which carriers have duties under Section 222 as a whole (carriers, equipment manufacturers, and customers). In that sense, it merely frames the general context for Section 222 as a whole by identifying whom the statute protects, leaving other sections to define more specifically the Commission’s ultimate grant of authority to regulate. Section 222(c) then defines carriers’ responsibilities as to one of those categories identified by Subsection (a)—customers. As CTIA states, Section 222(c) expressly “limits the type of *customer* information to which the statute applies to CPNI.”¹¹ “CPNI” is, in turn, defined in Section 222(h) as information related 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

questions as to the Commission’s compliance with Administrative Procedure Act and the Commission’s assertion of legal authority pursuant to Sections 222(a) and 201(b) of the Communications Act to adopt the document retention rules at issue herein.

¹⁰ Comments of the American Cable Association (“ACA”), WC Docket No. 11-42 *et al.* (fil. Oct. 8, 2015).

¹¹ CTIA Petition, p. 4.

virtue of the carrier-customer relationship.”¹² The type of *customer* information contemplated by the *Order on Reconsideration* is not found anywhere in Section 222(h).

When considered in context, had Congress intended that Section 222(a) confer separate authority to more broadly regulate carrier practices, the exceptions contained in Section 222(d) would make little sense. As CTIA notes, because the exceptions apply only to CPNI and not to other categories of customer proprietary information, the interpretation of Section 222(a) favored by the Commission and the Privacy PIOs would mean that a carrier could share CPNI but not other data with first responders. It is reasonable to assume, when looking at Section 222 as a whole, that had Congress intended Subsection (a) to operate as an independent duty on carriers, that intention would also be reflected in the language of Subsection (d). Because it is not, the only reasonable interpretation is that Section 222(a) was merely a general statement of the purpose of the statute and was never intended to be utilized in the manner it was in the *Order on Reconsideration*.¹³

For similar reasons, the *TerraCom/YourTel NAL*¹⁴ does not support the Commission’s action in the *Order on Reconsideration*. For one, the Commission in *TerraCom/YourTel* states that “[h]ad Congress wanted to limit the protections of subsection (a) to CPNI, it could have done so.”¹⁵ Yet this “analysis” fails to at any point address the other provisions of Section 222

¹² 47 C.F.R. § 222(h).

¹³ Indeed, one might query why subsections (b) through (h) of Section 222 are even necessary if Congress had intended to give the Commission such a broad grant of authority under 222(a). If Section 222(a) gives the Commission sweeping jurisdiction to regulate every data security practice of a carrier under the auspices of protecting proprietary information of consumers, manufacturers, and other carriers, there would have been no need whatsoever for Congress to then define specific kinds of proprietary information and prescribe the specific treatment thereof in ensuing sections.

¹⁴ *TerraCom, Inc. and YourTel America, Inc, NAL*, File No.: EB-TCD-13-00009175, Acct. No.: 201432170015, Apparent Liability for Forfeiture, FRNs: 0010103745 and 0020097572, FCC 14-173 (rel. Oct. 24, 2014) (“*TerraCom/YourTel NAL*”).

¹⁵ *Id.*, ¶ 15.

discussed above—Subsections (c) and (d)—that do in fact limit Subsection (a) and in fact contradict the notion that Subsection (a) is an independent source of authority. Indeed, the Commission in *TerraCom/YourTel NAL* ignores Subsection (c) altogether except when addressing whether the term “applicant” is synonymous with “customer.”¹⁶ Moreover, as CTIA correctly points out, “notices of apparent liability for forfeiture are only ‘tentative conclusions’ of the Commission are insufficient to put parties on notice of official agency policy.”¹⁷ Thus, this tentative conclusion cannot and does not serve as authority for the Commission to “remind”¹⁸ carriers of their duties in a subsequent *Order on Reconsideration*.

This last point is particularly compelling in light of the fact that the use of Section 222(a) to cover the data at issue herein represents a radical departure from any previous articulation or understanding of the scope of Section 222. The interpretation of Section 222(a) as applicable to information provided by Lifeline applicants to carriers creates entirely new substantive legal obligations for Eligible Telecommunications Carriers (“ETCs”). It creates an entirely new category of data for which carriers are subject to enforcement actions and fines for failing to protect. In fact, the *TerraCom/YourTel NAL* admits that Section 201(b) has never been used to regulate data privacy or prohibit unlawful cybersecurity or data protection practices.¹⁹ In addition, while the *TerraCom/YourTel NAL* asserts that the Commission had previously made clear that Section 222(a) requires carriers to “take every reasonable precaution to protect the

¹⁶ *Id.*, ¶¶ 21-28.

¹⁷ CTIA PFR, p. 8 & fn. 21 (citations omitted).

¹⁸ *Order on Reconsideration*, ¶ 234 (“We remind ETCs that pursuant to section 222 of the Act, they have a duty to protect ‘the confidentiality of proprietary information’ of customers.”) (citing Section 222(a)).

¹⁹ *TerraCom/YourTel NAL*, fn. 74.

confidentiality of proprietary or personal customer information”²⁰ that admonition was specific as to *CPNI only* and not some broader category of data.

Finally, Section 201(b) does not provide the Commission with any independent basis for adopting the rules at issue. Much as the rest of Section 222 would have been unnecessary if Section 222(a) were as broadly intended as the Commission has asserted, CTIA is correct in stating that had Congress believed Section 201(b) conferred upon the Commission the authority to adopt data security rules, the adoption of Section 222 would have likewise been entirely unnecessary. Indeed, as CTIA notes, Congress on two separate occasions—in enacting and later amending Section 222—made clear its belief that the Communications Act as a whole and Section 201(b) did *not* grant the Commission such an expansive source of authority. ACA, recognizing the implications of the Commission’s newly expansive view of Section 201(b)’s reach, states that “[s]uch a limitless view of the Commission’s authority over common carriers in Section 201(b) would render much of the rest of Title II, with its minutely detailed rules, exceptions and exemptions, largely if not completely superfluous. Congress could not have

²⁰ In the *TerraCom/YourTel NAL* the Commission states that Section 222(a) clearly applies to “proprietary information” of customers, a category of data broader than CPNI. The NAL points to a 2007 CPNI Order and states that “[t]he Commission has made clear that section 222(a) requires carriers to ‘take every reasonable precaution to protect the confidentiality of proprietary or personal customer information’ and that it was ‘committing to taking resolute enforcement action to ensure that the goals of section 222 are achieved.’” *TerraCom/YourTel NAL*, ¶ 13, citing 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, FCC 07-22 (rel. Apr. 2, 2007) (“2007 CPNI Order”), ¶ 65. Yet context makes clear that this previous Commission admonition to carriers that they should protect “proprietary information” in the 2007 CPNI Order was specific as to *CPNI only*. 2007 CPNI Order, ¶ 65 (“By adopting certain specific minimum standards regarding what measures carriers must take to protect the privacy of CPNI, and by committing to taking resolute enforcement action to ensure that the goals of section 222 are achieved, we believe we appropriately balance consumer privacy interests with carriers’ interests in minimizing burdens on their customers.”) (emphasis added). Indeed, the entirety of paragraph 65 and in fact the entire 2007 CPNI Order cited by the Commission in the *TerraCom/YourTel NAL* refers only to CPNI and not a broader category of data.

intended such a result, and the Commission cites no legislative history suggesting that it did.”²¹ The Commission cannot and should not interpret Section 201(b) as rendering superfluous the entirety of Section 222 (including the detailed definitions and exceptions therein) and the judgment of Congress in defining the outer reaches of the Commission’s authority over carriers’ data security practices.

B. The Commission Should Summarily Reject the Assertion that Petitioner CTIA Lacks Standing

The Privacy PIOs’ reliance on the *Sprint/Clearwire Recon Order*²² as support for the notion that Petitioner CTIA lacks standing under Section 405 to seek reconsideration of the *Order on Reconsideration* is misplaced.²³ The issue in the *Sprint/Clearwire Recon Order* centered on Petitioners’ conceding that the transaction at issue was properly approved by the Commission. Petitioners simply took issue with the “Spectrum Screen” used to evaluate the transaction and with how it would be used to evaluate future transactions.²⁴ At no point did Petitioners take issue with the Commission’s legal authority for any action taken—indeed Petitioners raised what amounted to policy arguments. This stands in stark contrast to the issues at hand in this proceeding, where Petitioner does take issue with the Commission’s underlying legal authority to take action imposing additional data security rules beyond the scope of existing CPNI rules in statute and Commission regulations. While CTIA and others may believe that the policy aim of the new document retention and protection rules is just, CTIA (and the Rural Representatives) raise legitimate questions as to the Commission’s underlying legal authority to pursue such policy aims and the Commission’s compliance with the procedural requirements of

²¹ ACA, p.8.

²² *Sprint Nextel Corp. and Clearwire Corp., Order on Reconsideration and Terminating Proceeding*, 27 FCC Rcd 16478 (2012) (“*Sprint/Clearwire Recon Order*”).

²³ Privacy PIOs, pp. 5-6.

²⁴ *Sprint/Clearwire Recon Order*, ¶ 5.

the APA. Accordingly, the Commission should dismiss the notion that parties raising questions as to legal authority are not “aggrieved” by the Commission’s actions under Section 405.²⁵

The Commission should also reject the curious assertion that because CTIA does not challenge the policy implications of the *Order on Reconsideration* but only the legal authority underpinning such policy that the Commission has not taken any “action” as required by Section 405 or that such action lies in the “comfortably far off and hypothetical future.”²⁶ Far from being hypothetical or in the future, the Commission’s “action” in the *Order on Reconsideration* requires ETCs to, at a minimum employ “firewalls and boundary protections; protective naming conventions; user authentication requirements; and usage restrictions, to protect the confidentiality of consumers’ proprietary personal information retained for this or other allowable purposes.”²⁷ Each of these requirements are now applicable to a vast quantity of documents that ETCs were, prior to the adoption of the *Order on Reconsideration*, prohibited from retaining.²⁸ ETCs are indeed “aggrieved” to the extent that their existing security practices must now be deployed for perhaps thousands of sensitive documents each year. It is also worth noting that the *Order on Reconsideration* ignores its own initial privacy concerns, those raised

²⁵ Privacy PIOs, p. 5.

²⁶ *Id.*, p. 6.

²⁷ *Order on Reconsideration*, ¶ 235.

²⁸ In fact, in the *2012 Lifeline Order*, the Commission clearly instructed ETCs to “examine such documentation as appropriate to verify a consumer’s program or income-based eligibility for initiating Lifeline service, ETCs are not required to and *should not retain copies of the documentation.*” *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11 (rel. Feb. 6, 2012) (“*Lifeline Reform Order*”), ¶ 101.

by ILECs,²⁹ valid worries about the administrative implications,³⁰ as well as a compromise proposed by Smith Bagley in which ETCs would be allowed rather than required to retain documentation.³¹ Moreover, the new requirement contradicts existing federal requirements which instruct organizations to “minimize the use, collection, and retention of PII to what is strictly necessary to accomplish their business purpose and mission.”³²

Even more curious is the assertion that the *Order on Reconsideration* does not require CTIA members “to do anything, nor does it expose them to additional penalties in a future enforcement proceeding.”³³ This line of argument is based on the assertion that the *Order on Reconsideration* is merely a “reminder” of already interpreted statutory provisions. This argument ignores the fact that this previous statutory interpretation came in a Notice of Apparent Liability that faulted certain ETCs’ data protection practices without setting forth specific rule changes or other requirements applicable to all ETCs going forward. The latter *was* done by the *Order on Reconsideration*—far from being a “reminder” it set out specific minimum requirements and adopted significant substantive changes to Sections 54.404 and 54.410 of the Commission’s rules. Furthermore, imposing a requirement that ETCs adopt specific data security practices stands in stark contrast to the Commission’s prior “best practices” policy

²⁹ See, Letter from Anisa A. Latif, Associate Director, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-42, at 2 (fil. May 13, 2015) (May 13, 2015 AT&T Ex Parte); Letter from Alan Buzacott, Executive Director, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-42, at 1 (fil. June 10, 2015); Letter from Melissa Newman, Senior Vice President, Century Link, to Marlene H. Dortch, Secretary FCC, WC Docket No. 11-42, at 1-2 (filed June 10, 2015); Letter from Jenny Prime, Director, Cox Enterprises, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-42, at 1-2 (fil. June 11, 2015).

³⁰ See, Comments of The Gila River Indian Community and Gila River Telecommunications, Inc., WC Docket No. 11-42 *et al.*, p 4 (fil. July 24, 2012).

³¹ See, Comments of Smith Bagley, Inc., WC Docket No. 11-42, p. 8.

³² See, Special Publication 800-122, "Guide to Protecting the Confidentiality of Personally Identifiable Information", published April 2010 <http://csrc.nist.gov/publications/nistpubs/800-122/sp800-122.pdf>, p. ES-2 (last accessed October 15, 2015).

³³ Privacy PIOs, p. 6.

approach to security. For example, existing CPNI regulations requiring carriers to “take reasonable measures to discover and protect against attempts to gain unauthorized access to CPNI.”³⁴ Indeed, the majority of data security requirements at the state and federal levels provide flexibility for companies to implement security practices that account for the unique circumstances of individual companies rather than a one-size-fits-all approach as set forth in the *Order on Reconsideration*.³⁵

At bottom, each of the Privacy PIOs’ standing arguments come down to repeated references to CTIA not objecting to the substance of the rules at issue. This is essentially an assertion that parties subject to Commission jurisdiction should not be concerned with the legal underpinnings of Commission rules unless they also object to the policy implications of those rules as well. However, putting this assertion aside, members and clients of Petitioner and the Rural Representatives are now obligated to retain and protect an entirely new category of data pursuant to entirely new interpretations of two key sections of the Communications Act. Furthermore, the Privacy PIOs all but ignore CTIA’s detailed objections to the substantive and highly specific requirements mandated to be implemented by ETCs in paragraph 235 of the *Order on Reconsideration*. Thus, as “aggrieved” parties pursuant to Section 405 of the Communications Act, the Rural Representatives respectfully urge the Commission to reconsider its interpretation of Sections 222(a) and 201(b).

III. CONCLUSION

For all of these reasons, the Commission should reconsider the data retention rules and practices adopted in the *Order on Reconsideration*.

³⁴ 47 C.F.R. § 64.2010(a).

³⁵ In addition to identifying specific protections ETCs must use, the *Order on Reconsideration* also reserves the right for the Enforcement Bureau to “evaluate the security measures employed by ETCs on a case by case basis.” *Order on Reconsideration*, ¶ 235.

Respectfully submitted,

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