

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

In the Matter of
Hiawatha Broadband Communications, Inc.
Apparent Liability for Forfeiture
EB-06-TC-4497
NAL/Acct. No. 20073217 0042
FRN: 0006149223

ORDER

Adopted: May 27, 2010

Released: May 28, 2010

By the Chief, Enforcement Bureau:

1. In this Order, we adopt the attached Consent Decree entered into between the Enforcement Bureau ("Bureau") of the Federal Communications Commission ("FCC" or "Commission") and Hiawatha Broadband Communications, Inc. ("HBC"). The Consent Decree terminates an investigation and Notice of Apparent Liability for Forfeiture ("NAL") by the Bureau against HBC for possible violation of section 222 of the Communications Act of 1934, as amended ("Communications Act" or "Act"), 47 U.S.C. § 222, and section 64.2009(e) of the Commission's rules, 47 C.F.R. § 64.2009(e), regarding HBC's apparent failure to file a compliant annual customer proprietary network information ("CPNI") certification pursuant to 64.2009(e).

2. The Bureau and HBC have negotiated the terms of the Consent Decree that resolve this matter. A copy of the Consent Decree is attached hereto and incorporated by reference.

3. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree, terminating the investigation and cancelling the NAL.

4. In the absence of material new evidence relating to this matter, we conclude that our investigation raises no substantial or material questions of fact as to whether HBC possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.

5. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 503(b) of the Communications Act of 1934, as amended,¹ and sections 0.111 and 0.311 of the Commission's Rules,² the Consent Decree attached to this Order IS ADOPTED.

¹ 47 U.S.C. § 154(i), 503(b).

6. **IT IS FURTHER ORDERED** that the above-captioned investigation **IS TERMINATED** and the Notice of Apparent Liability for Forfeiture **IS CANCELLED**.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

² 47 C.F.R. §§ 0.111, 0.311.

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CONSENT DECREE

I. INTRODUCTION

1. The Enforcement Bureau (“the Bureau”) and Hiawatha Broadband Communications, Inc. (“HBC”), by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Bureau’s investigation into HBC’s possible noncompliance with the requirements of section 222 of the Communications Act of 1934, as amended, (“Communications Act” or “Act”), 47 U.S.C. § 222, and section 64.2009(e) of the Commission’s rule, 47 C.F.R. § 64.2009(e).¹

II. DEFINITIONS

- 2. For the purposes of this Consent Decree, the following definitions shall apply:
 - a. “Act” means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
 - b. “Adopting Order” means an Order of the Commission adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - c. “Bureau” means the Enforcement Bureau of the Federal Communications Commission.
 - d. “Commission” and “FCC” mean the Federal Communications Commission and all of its bureaus and offices.
 - e. “Compliance Plan” means the program described in this Consent Decree at paragraph 9.
 - f. “Effective Date” means the date on which the Commission releases the Adopting Order.

¹ 47 C.F.R. § 64.1120(c)(3)(ii).

- g. “HBC” means “Hiawatha Broadband Communications, Inc.” and its predecessors-in-interest and its successors-in-interest.
- h. “Investigation” means the investigation commenced by the Bureau’s December 5, 2006 Letter of Inquiry (“LOI”)² regarding whether HBC violated section 222 of the Communications Act and section 64.2009(a) of the Commission’s rules by failing to maintain a compliant customer proprietary network information (“CPNI”) certification.³
- i. “NAL” means Notice of Apparent Liability for Forfeiture.
- j. “Parties” means HBC and the Commission.
- k. “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.

III. BACKGROUND

3. Section 222 imposes the general duty on all telecommunications carriers to protect the confidentiality of their subscribers’ proprietary information.⁴ The Commission has issued rules implementing section 222 of the Act.⁵ The Commission required carriers to establish and maintain a system designed to ensure that carriers adequately protected their subscribers’ CPNI. Section 64.2009(e) is one such requirement. Pursuant to section 64.2009(e):

A telecommunications carrier must have an officer, as an agent of the carrier, sign and file with the Commission a compliance certificate on an annual basis. The officer must

² Letter from Marcy Greene, Deputy Division Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, to Robert Bartz, Vice President of Finance, HBC, December 5, 2006 (“December 5 LOI”).

³ 47 C.F.R. § 64.2009(e).

⁴ Section 222 of the Communications Act, 47 U.S.C § 222, provides that: “Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.”

⁵ In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket Nos. 96-115 and 96-149, FCC 98-27, *Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061 (1998) (“CPNI Order”). *See also*, In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket Nos. 96-115 and 96-149, FCC 99-223, *Order on Reconsideration and Petitions for Forbearance* 14 FCC Rcd 14409 (1999); *see also* In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket Nos. 96-115 and 96-149; 2000 Biennial Regulatory Review - Review of Policies and Rules Concerning Unauthorized Changes of Consumers’ Long Distance Carriers, CC Docket No. 00-257, *Third Report and Order and Third Further Notice of Proposed Rulemaking*, 17 FCC Rcd 14860 (2002).

state in the certification that he or she has personal knowledge that the company has established operating procedures that are adequate to ensure compliance with the rules in this subpart. The carrier must provide a statement accompanying the certification explaining how its operating procedures ensure that it is or is not in compliance with the rules in this subpart.⁶

4. The Bureau has been investigating the adequacy of procedures implemented by telecommunications carriers to ensure confidentiality of their subscribers' CPNI based on concerns regarding the apparent availability to third parties of sensitive, personal subscriber information. For example, some companies, known as "data brokers" have advertised the availability of records of wireless subscribers' incoming and outgoing telephone calls for a fee.⁷ Data brokers have also advertised the availability of call information that relates to certain land line toll calls.⁸

5. As part of its inquiry into these issues, the Bureau sent an LOI to HBC on December 5, 2006, directing it to produce the compliance certificate for the previous five (5) years that it had prepared pursuant to section 64.2009(e) of the Commission's rules.⁹ On December 12, 2006, HBC submitted a document in response to the Bureau's LOI. The Bureau concluded that the document submitted by HBC did not satisfy the requirements set forth in the rule and that HBC had apparently failed to comply with the requirement that it have a corporate officer with personal knowledge execute an annual certificate stating that the company has established operating procedures adequate to ensure compliance with the Commission's rules. Further, HBC did not provide any additional information in response to the Bureau's request to demonstrate that it had otherwise complied with the Commission's CPNI rules by preparing and maintaining a certificate that satisfied the requirements of section 64.2009(e). Finally, HBC failed to provide any compliance certificates for the years preceding the most recent one, executed February 2, 2006. Accordingly, on March 27, 2007, the Bureau released an NAL against HBC proposing a monetary forfeiture of \$100,000 for its apparent failure to comply with section 64.2009(e) of the Commission's rules,¹⁰ and ordered the company either to pay the proposed forfeiture or file a written response within thirty (30) days of the NAL release date stating why the proposed forfeiture should be reduced or canceled. HBC filed its response to the NAL on April 27, 2007, seeking cancellation or reduction of the proposed forfeiture.

IV. TERMS OF AGREEMENT

6. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order without change, addition, modification, or deletion.

7. **Jurisdiction.** HBC agrees that the Commission has jurisdiction over it and the matters contained in this Consent Decree and has the authority to enter into and adopt this Consent Decree.

⁶ 47 C.F.R. § 64.2009(e).

⁷ See, e.g. <http://www.epic.org/privacy/iei/>.

⁸ See *id.*

⁹ See fn 3, *supra*.

¹⁰ *In the Matter of Hiawatha Broadband Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 5501 (Enf. Bur. Rel. March 28, 2007) ("NAL").

8. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the date on which the Bureau releases the Adopting Order. Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other Order of the Commission. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Commission Order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission Order.

9. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate its investigation. In consideration for the termination of said investigation, HBC agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that the Bureau will not use the facts developed in this investigation through the Effective Date of the Consent Decree, or the existence of this Consent Decree, to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against HBC concerning the matters that were the subject of the investigation. The Bureau also agrees that it will not use the facts developed in this investigation through the Effective Date of this Consent Decree, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against HBC with respect to HBC's basic qualifications, including its character qualifications, to be a Commission licensee or authorized common carrier or hold Commission authorizations.

10. **Compliance Plans.** For purposes of settling the matters set forth herein and to help ensure compliance with the Commission's CPNI rules, HBC agrees to take all measures necessary to achieve full compliance with section 64.2009(e) of the of the Commission's rules. HBC agrees to train its personnel as to when they are or are not authorized to use CPNI. HBC further agrees to have an express disciplinary process in place for the unauthorized use of CPNI. Additionally, HBC agrees to submit a copy of its annual 64.2009(e) compliance certificate for each of two (2) years following the Effective Date of this Consent Decree to the Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission 445 12th Street, S.W., Room 4-C244, Washington, D.C. 20554, and must include the file number listed above. HBC will also send an electronic copy of its certification to other Telecommunications Consumers Division staff as directed by the Division Chief. This Consent Decree will expire two (2) years after the Effective Date or upon the termination of the certification requirement set forth in section 64.2009(e) of the Commission's rules, 47 C.F.R. § 64.2009(e), whichever is earlier.

11. **Section 208 Complaints; Subsequent Investigations.** Except as expressly provided in this Consent Decree, this Consent Decree shall not prevent the Commission or its delegated authority from investigating new evidence of noncompliance by HBC with the Act, the rules, or the Adopting Order or from adjudicating complaints filed pursuant to section 208 of the Act. The Commission's adjudication of any such complaints will be based solely on the record developed in that proceeding.

12. **Voluntary Contribution.** HBC agrees that it will make a voluntary contribution to the United States Treasury in the amount of two thousand dollars (\$2,000). The contribution will be made within thirty (30) calendar days after the Effective Date of the Adopting Order. The payment must be made by check or similar instrument, payable to the Order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced in the caption of the Adopting Order. Payment by check or money Order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payments by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account Number in block 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment

type code). HBC will also send electronic notification on the date said payment is made to Johnny Drake at Johnny.Drake@fcc.gov.

13. **Waivers.** HBC waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Order adopting this Consent Decree, provided the Commission issues an Order adopting the Consent Decree without change, addition, modification, or deletion. HBC shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither HBC nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and HBC shall waive any statutory right to a trial *de novo*. HBC hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree.

14. **Severability.** The Parties agree that if any of the provisions of the Adopting Order or the Consent Decree shall be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render unenforceable the entire Adopting Order or Consent Decree, but rather the entire Adopting Order or Consent Decree shall be construed as if not containing the particular invalid or unenforceable provision or provisions, and the rights and obligations of the Parties shall be construed and enforced accordingly. In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

15. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent rule or Order adopted by the Commission (except an Order specifically intended to revise the terms of this Consent Decree to which HBC does not expressly consent) that provision will be superseded by such Commission rule or Order.

16. **Successors and Assigns.** HBC agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

17. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties. The Parties further agree that this Consent Decree reflects a compromise and was entered into by HBC to avoid further cost and inconvenience of the investigation. Neither the Consent Decree nor the payment of monies pursuant to the Consent Decree is to be construed as an admission of liability or an admission of noncompliance with the requirements of the Act or the Commission's Rules and Orders. The Parties further agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Act or the Commission's Rules and Orders.

18. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

19. **Paragraph Headings.** The headings of the Paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

20. **Authorized Representative.** Each party represents and warrants to the other that it has full power and authority to enter into this Consent Decree.

21. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

Kris A. Monteith
Chief, Enforcement Bureau
Federal Communications Commission

Robert Bartz
Vice President of Finance
Hiawatha Broadband Communications, Inc.

Date

Date