

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

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In the Matter of)	File No. EB-08-TC-3704
)	
Diamond Phone, Inc.)	NAL/Acct. No. 201032170352
)	
Apparent Liability for Forfeiture)	FRN: 0009886268
)	

ORDER OF FORFEITURE

Adopted: March 3, 2011

Released: March 3, 2011

By the Chief, Telecommunications Consumers Division, Enforcement Bureau:

I. INTRODUCTION AND BACKGROUND

1. In this Order of Forfeiture,¹ we assess a monetary forfeiture of twenty thousand dollars (\$20,000) against Diamond Phone Card, Inc. (“Diamond Phone”) for willfully or repeatedly violating section 222 of the Communications Act of 1934, as amended (the “Communications Act” or “Act”),² section 64.2009(e) of the Commission’s rules,³ and the Commission’s *EPIC CPNI Order*⁴ by failing to timely file an annual compliance certification with the Enforcement Bureau (“Bureau”) for calendar year 2007 on or before March 1, 2008.

2. Diamond Phone is a telecommunications carrier located in Elmhurst, New York providing prepaid phone card services. As a telecommunications carrier, Diamond Phone is subject to the requirements of section 222 of the Act and section 64.2009 of the Commission’s rules. Section 222 imposes the general duty on all telecommunications carriers to protect the confidentiality of their subscribers’ proprietary information.⁵ Protection of CPNI is a fundamental obligation of all

¹ 47 U.S.C. § 503(b)(1). The Commission has the authority under this section of the Communications Act to assess a forfeiture against any person who has “willfully or repeatedly failed to comply with any of the provisions of this [Act] or of any rule, regulation, or order issued by the Commission under this [Act]” For a violation to be willful, it need not be intentional. *See Application for Review of Southern California Broadcasting Co. Licensee, Radio Station KIEV (AM) Glendale, California*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88, ¶ 5 (1991) (“*Southern California Broadcasting*”), *recon. denied*, 7 FCC Rcd 3454 (1992).

² 47 U.S.C. § 222.

³ 47 C.F.R. § 64.2009(e).

⁴ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115; WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6953, ¶ 51 (2007) (“*EPIC CPNI Order*”); *aff’d sub nom. Nat’l Cable & Telecom. Assoc. v. FCC*, 555 F.3d 996 (D.C. Cir. 2009).

⁵ 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, (continued....)”

telecommunications carriers as provided by section 222 of the Act. The Commission required carriers to establish and maintain a system designed to ensure that carriers adequately protected their subscribers' CPNI.⁶ The Commission strengthened its privacy rules with the release of the *EPIC CPNI Order*, requiring that all companies subject to the CPNI rules file annually, on or before March 1, a certification with the Commission pursuant to amended rule 47 C.F.R. § 64.2009(e).⁷

3. The Bureau sent a Letter of Inquiry ("LOI") to Diamond Phone on September 2, 2008. In the LOI the Bureau asked Diamond Phone to provide copies and evidence of its timely filed CPNI compliance certificate for 2007, which was due by March 1, 2008, or an explanation as to why no certification was filed. Diamond Phone responded to the LOI by emailing a CPNI certification dated September 25, 2008.⁸ The Bureau concluded that Diamond Phone failed to submit satisfactory evidence of its timely filing of the annual CPNI compliance certification. On February 24, 2009, the Bureau released the *Omnibus NAL* against numerous companies, including Diamond Phone, proposing a monetary forfeiture of \$20,000 for the apparent failure to comply with section 64.2009(e) of the Commission's rules, and the Commission's *EPIC CPNI Order*, and ordered Diamond Phone to either pay the proposed forfeiture or file a written response within 30 days of the release date stating why the proposed forfeiture should be reduced or canceled.⁹ Diamond Phone did not submit a response to the *Omnibus NAL*.

II. DISCUSSION

4. Section 64.2009(e) of the Commission's rules requires telecommunications carriers such as Diamond Phone to file annually before March 1st a CPNI compliance certification signed by an officer of the carrier.¹⁰ By its own admission, Diamond Phone failed to comply with this Commission rule and is subject to forfeiture. Section 503(b) of the Communications Act authorizes the Commission to assess a forfeiture against a common carrier of up to \$150,000 for each violation of the Act or of any rule, regulation, or order issued by the Commission under the Act.¹¹ The Commission may assess this penalty

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equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier."

⁶ 47 C.F.R. § 64.2009(e) is one such requirement.

⁷ *EPIC CPNI Order*, 22 FCC Rcd at 6953, ¶ 51. 47 C.F.R. § 64.2009(e). Specifically, 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 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 our CPNI rules. The carrier must provide a statement accompanying the certification explaining how its operating procedures ensure that it is or is not in compliance with our CPNI rules. In addition, the carrier must include an explanation of any actions taken against data brokers and a summary of all customer complaints received in the past year concerning the unauthorized release of CPNI. This filing must be made annually on or before March 1 in EB Docket No. 06-36, for data pertaining to the previous calendar year. See also Enforcement Advisory No. 2011-02, 26 FCC Rcd 650 (Enf. Bur. 2011); Enforcement Advisory No. 2010-01, 25 FCC Rcd 361 (Enf. Bur. 2010).

⁸ See email from David Rimas to Marcy Greene (Sept. 24, 2008). Diamond Phone submitted its 2007 CPNI compliance certification (dated Sept. 25, 2008) after it received notice from the Commission of this investigation of potential non-compliance with section 222 of the Act and section 64.2009 of the Commission's rules. See Diamond Phone's "Annual 47 C.F.R. § 64.2009(e) CPNI Certification," dated Sept. 25, 2008.

⁹ *Annual CPNI Certification*, Omnibus Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 2299 (Enf. Bur. 2009) ("*Omnibus NAL*").

¹⁰ 47 C.F.R. § 64.2009(e); see also *EPIC CPNI Order*, 22 FCC Rcd at 6953-54, ¶¶ 51-53.

¹¹ 47 U.S.C. § 503(b)(2)(B); see also 47 C.F.R. § 1.80(b)(2); *Amendment of Section 1.80 of the Commission's Rules*, Order, 12 FCC Rcd 1038 (1997)(inflation adjustment to \$100,000/\$1,100,000); *Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000)(inflation adjustment to \$120,000/\$1,200,000); *Amendment of Section 1.80 of the Commission's Rules and* (continued...)

if it determines that the carrier's noncompliance is "willful or repeated."¹² For a violation to be willful, it need not be intentional.¹³ In exercising our forfeiture authority, we are required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁴ In addition, the Commission has established guidelines for forfeiture amounts and, where there is no specific base amount for a violation, retained discretion to set an amount on a case-by-case basis.¹⁵

5. The Commission's Forfeiture Policy Statement does not establish a base forfeiture amount for the failure to timely file an annual CPNI certification. The \$3,000 base forfeiture amount suggested in the Commission's Forfeiture Policy Statement for failure to file documents generally is inadequate when applied to failure to file CPNI certifications. The Commission adopted the annual CPNI certification filing requirement to "ensure that carriers regularly focus their attention on their duty to safeguard CPNI. . . [and] remind carriers of the Commission's oversight and high priority regarding carrier performance in this area."¹⁶ In the *Omnibus NAL*, the Commission took into account the statutory factors for determining a forfeiture amount, the gravity of the offense, FCC precedent involving violations of our CPNI rules, and the fact that protection of a subscriber's CPNI is an important carrier obligation and the certification filing is an important part of that obligation.¹⁷ Taking these factors into account, the Commission proposed a forfeiture amount in the *Omnibus NAL* of \$20,000 which is significantly lower than the maximum allowable forfeiture under section 503(b) and is also much lower than the \$100,000 forfeitures assessed against carriers in prior Commission actions involving violations of our CPNI rules.¹⁸ Further, pursuant to the statutory factors, our rules, and the Forfeiture Policy Statement and find that no further downward adjustment from the \$20,000 forfeiture amount is warranted.

6. As a preliminary matter, Diamond Phone's failure to timely file its annual 2007 CPNI certification is not disputed. Diamond Phone submitted the required certification only after the Commission notified it that it was investigating Diamond Phone's compliance with our rules and that it might be subject to enforcement action, including forfeitures.

7. In addition, Diamond Phone failed to show past compliance with the Commission's CPNI certification requirements. Prior to the annual certification filing requirement, carriers were required to have a CPNI compliance plan and keep an annual CPNI compliance certificate in their files (*i.e.*, carriers were required to annually certify but were not required to file the certification with the Commission).¹⁹ In lieu of an annual filing requirement, carriers were required to produce their annual

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Adjustment of Forfeiture Maxima to Reflect Inflation, Order, 23 FCC Rcd 9845 (2008) (inflation adjustment to \$150,000/\$1,500,000). See also FCC Enforcement Advisory No. 2011-02, 26 FCC Rcd 650 (Enf. Bur. 2011). At the time the *Omnibus NAL* was released the maximum forfeiture was \$130,000 for each violation of the Act or of any rule, regulation, or order issued by the Commission. See *Omnibus NAL*, 24 FCC Rcd at 2301, ¶ 5.

¹² See 47 U.S.C. § 503(b)(1)(B).

¹³ See, e.g., *Southern California Broadcasting*, 6 FCC Rcd at 4387-88, ¶ 5.

¹⁴ See 47 U.S.C. § 503(b)(2)(E); see also *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, 12 FCC Rcd 17087, 17100-17101, ¶ 27 (1997) ("*Forfeiture Policy Statement*"); *recon. denied*, 15 FCC Rcd 303 (1999).

¹⁵ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17098-99, ¶ 22.

¹⁶ *EPIC CPNI Order*, 22 FCC Rcd at 6953, ¶ 51.

¹⁷ See *Omnibus NAL*, 24 FCC Rcd at 2302, ¶ 8; see also *EPIC CPNI Order*, 22 FCC Rcd at 6953, ¶ 51.

¹⁸ See *Omnibus NAL*, 24 FCC Rcd at 2299-2303, ¶¶ 5-8. The prior actions involved violations of the Commission's CPNI rules in effect in 2006. See *id.* at 2302, ¶ 7.

¹⁹ *Omnibus NAL*, 24 FCC Rcd at 2302, ¶ 7. This prior rule is discussed in the *EPIC CPNI Order*: "each telecommunications carrier must have an officer, as an agent of the carrier, sign a compliance certificate on an annual basis stating that the officer has personal knowledge that the company has established operating procedures (continued....)"

certifications for inspection upon Commission request.²⁰ Diamond Phone has failed to show that it was in compliance with the earlier certification requirement.²¹ Thus, the Commission cannot consider past CPNI compliance as a mitigating factor.

8. Moreover, in a number of recent actions, the Commission has held that the failure to file forms is a continuing violation until cured,²² *i.e.*, Diamond Phone continued to violate the certification filing requirement for calendar year 2007 until it filed the certification. Failure to file the annual CPNI certification jeopardizes the Commission's ability to effectively monitor and respond to violations of consumer's privacy. The annual certification filing obligation is specifically intended to "ensure that carriers regularly focus their attention on their duty to safeguard CPNI" and allow the Commission to "monitor the industry's response to CPNI privacy issues and to take any necessary steps to ensure that carriers are managing customer CPNI securely."²³ As we discussed above, Diamond Phone has failed to show that it maintained an annual, but unfiled, CPNI compliance certification. Thus, no downward adjustment is warranted in this case because Diamond Phone has failed to show that it has a history of compliance with our CPNI rules.

9. With respect to inability to pay or hardship adjustment, we stated in the *Omnibus NAL*:

The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.²⁴

Diamond Phone has not provided federal tax returns, financial statements, or any other information to support an inability to pay adjustment. We therefore conclude that Diamond Phone has not demonstrated an inability to pay the proposed forfeiture amount of \$20,000.²⁵

III. CONCLUSION

10. In the *Omnibus NAL*, the Bureau considered several factors including the amount of forfeiture necessary to have the intended deterrent effect. The Bureau concluded that the goal of deterring (Continued from previous page) _____
that are adequate to ensure compliance with the Commission's CPNI rules and to make that certification available to the public." *EPIC CPNI Order*, 22 FCC Rcd at 6953, ¶ 52 (citation omitted).

²⁰ *Omnibus NAL*, 24 FCC Rcd at 2302, ¶ 7.

²¹ The 2007 CPNI compliance certification Diamond Phone submitted to the Bureau was dated Sept. 25, 2008. Diamond Phone has failed to show that it had an earlier CPNI compliance certification.

²² *Annual CPNI Certification*, Omnibus Notice of Apparent Liability for Forfeiture and Order, DA 11-371, ¶ 8 (Enf. Bur. Feb. 25, 2011); *STI Prepaid, LLC*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 17836, 17845, ¶ 20 (Enf. Bur. 2010); *Champaign Telephone Company d/b/a CT Communications, Inc.*, Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 17814, 17818-18, ¶ 9 (Spec. Enf. Div. 2010); *Lightyear Network Solutions, LLC*, Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 16212, 16217, ¶ 12 (Spec. Enf. Div. 2010); *Alpheus Communications, LP*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 8993, 8998, ¶ 12 (Enf. Bur. 2010); *Compass Global, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 6125, 6138-39, ¶ 31 (2008); *Telrite Corp.*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 7231, 7244, ¶ 30 (2008); *VCI Company*, Notice of Apparent Liability for Forfeiture and Order, 22 FCC Rcd 15933, 15940, ¶ 20 (2007).

²³ *EPIC CPNI Order*, 22 FCC Rcd at 6953, ¶ 51.

²⁴ *Omnibus NAL*, 24 FCC Rcd at 2304, ¶ 16.

²⁵ See *Long Distance Direct, Inc.*, Apparent Liability for Forfeiture, Memorandum Opinion and Order, 15 FCC Rcd 3297, 3305-06, ¶¶ 22-23 (2000).

future non-compliance would be met by issuing forfeitures consistent with the proposed amount. We take noncompliance with our CPNI rules very seriously. This forfeiture order should advise Diamond Phone and other carriers that the protection of a subscriber's CPNI and the annual CPNI compliance certification filing requirements are important carrier obligations.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that Diamond Phone Card, Inc. **SHALL FORFEIT** to the United States government the sum of \$20,000 for willfully and repeatedly violating the Act and the Commission's rules.

12. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the rules within thirty (30) days of the release of this Forfeiture Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account No. and FRN referenced above. 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-C 2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment 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 number 24A. Diamond Phone Card, Inc. will also send electronic notification on the date said payment is made to johnny.drake@fcc.gov. Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

13. **IT IS FURTHER ORDERED** that a copy of this *Order for Forfeiture* shall be sent by Certified Mail Return Receipt Requested and First Class Mail to the company at 87-20 Queens Blvd., Elmhurst, NY 11373.

FEDERAL COMMUNICATIONS COMMISSION

Richard A. Hindman
Chief
Telecommunications Consumers Division
Enforcement Bureau