

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

In the Matter of)	
)	
Implementation of the Telecommunications Act of 1996:)	CC Docket No. 96-115
)	
Telecommunications Carriers' Use of Customer Proprietary network Information and other Customer Information;)	
)	
Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information)	RM-11277
)	

NOTICE OF PROPOSED RULEMAKING

Adopted: February 10, 2006

Released: February 14, 2006

Comment Date: [30 Days After Federal Register Publication of this Notice]

Reply Comment Date: [60 Days After Federal Register Publication of this Notice]

By the Commission: Chairman Martin, and Commissioners Copps, Adelstein, and Tate issuing separate statements.

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (Notice), we seek comment on what additional steps, if any, the Commission should take to further protect the privacy of customer proprietary network information (CPNI) that is collected and held by telecommunications carriers.¹ The Commission has long been committed to safeguarding customer privacy, and its rules implementing section 222 of the Communications Act require carriers to take specific steps to ensure that CPNI is adequately protected from unauthorized disclosure.² This Notice directly responds to the petition filed by the Electronic

¹ CPNI includes personally identifiable information derived from a customer's relationship with a telephone company, irrespective of whether the customer purchases wireline or wireless telephone service. Section 222 of the Communication Act of 1934, as amended, (Communications Act, or Act) establishes a duty of every telecommunications carrier to protect the confidentiality of its customers' CPNI. 47 U.S.C. § 222. Section 222 was added to the Communications Act by the Telecommunications Act of 1996. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 *et seq.*) (1996 Act).

² Prior to the 1996 Act, the Commission had established CPNI requirements applicable to the enhanced services operations of AT&T, the BOCs, and GTE, and the CPE operations of AT&T and the BOCs, in the Computer II, Computer III, GTE ONA, and BOC CPE Relief proceedings. *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, Second Report and Order and Further Notice of Proposed (continued...)

Privacy Information Center (EPIC) expressing concerns about the sufficiency of carrier practices related to CPNI.³ As the EPIC petition points out, numerous websites advertise the sale of personal telephone records for a price. Specifically, data brokers advertise the availability of cell phone records, which include calls to and/or from a particular cell phone number, the duration of such calls, and may even include the physical location of the cell phone. In addition to selling cell phone call records, many data brokers also claim to provide calling records for landline and voice over Internet protocol, as well as non-published phone numbers. In many cases, the data brokers claim to be able to provide this information within fairly quick time frames, ranging from a few hours to a few days. We find this conduct to be very disturbing and, accordingly, we grant EPIC's request and initiate a rulemaking to determine whether enhanced security and authentication standards for access to customer telephone records are warranted.

II. BACKGROUND

2. *Statutory Authority.* In section 222, Congress created a framework to govern telecommunications carriers' use of information obtained by virtue of providing a telecommunications service.⁴ The section 222 framework calibrates the protection of such information from disclosure and dissemination based on the sensitivity of the information. Thus, section 222 places fewer restrictions on the dissemination of information that is not highly sensitive and on information the customer authorizes to be released, than on the dissemination of more sensitive information the carrier has gathered about particular customers.⁵ Congress accorded CPNI, the category of customer information at issue in this Notice, the greatest level of protection under this framework.

3. CPNI is defined as "(A) information that relates to the quantity, technical configuration, type,

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Rulemaking, 13 FCC Rcd 8061, 8068-70, para. 7 (1998) (*CPNI Order*) (describing the Commission's privacy protections for confidential customer information in place prior to the 1996 Act).

³ Petition of the Electronic Privacy Information Center for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC Docket No. 96-115 (filed Aug. 30, 2005) (EPIC Petition).

⁴ Section 222(a) imposes a general duty on telecommunications carriers to protect the confidentiality of proprietary information – a duty owed to other carriers, equipment manufacturers, and customers. 47 U.S.C. § 222(a). Section 222(b) states that a carrier that receives or obtains proprietary information from other carriers in order to provide a telecommunications service may only use such information for that purpose and may not use that information for its own marketing efforts. 47 U.S.C. § 222(b). Section 222(c) outlines the confidentiality protections applicable to customer information. 47 U.S.C. § 222(c). Section 222(d) delineates certain exceptions to the general principle of confidentiality. 47 U.S.C. § 222(d). The Commission addressed the scope of section 222(e) in the *Subscriber List Information Order* and *Order on Reconsideration. Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended*, CC Docket Nos. 96-115, 96-98, and 99-273, Third Report and Order, Second Order on Reconsideration, and Notice of Proposed Rulemaking, 14 FCC Rcd 15550 (1999) (*Subscriber List Information Order*), on reconsideration, CC Docket No. 96-115, Memorandum Opinion and Order on Reconsideration, 19 FCC Rcd 18439 (2004) (*Order on Reconsideration*).

⁵ The Commission's previous orders in this proceeding have addressed three general categories of customer information to which different privacy protections and carrier obligations apply pursuant to section 222: (1) individually identifiable CPNI, (2) aggregate customer information, and (3) subscriber list information. See, e.g., *CPNI Order*; *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd 14409 (1999); *Clarification Order and Second Further Notice of Proposed Rulemaking*, 16 FCC Rcd 16506 (2001); *Third Report and Order*, 17 FCC Rcd 14860 (2002).

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 virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.”⁶ Practically speaking, CPNI includes information such as the phone numbers called by a consumer; the frequency, duration, and timing of such calls; and any services purchased by the consumer, such as call waiting. CPNI therefore includes highly-sensitive personal information.

4. Section 222 reflects the balance Congress sought to achieve between giving each customer ready access to his or her own CPNI, and protecting customers from unauthorized use or disclosure of CPNI. Every telecommunications carrier has a general duty pursuant to section 222(a) to protect the confidentiality of CPNI.⁷ In addition, section 222(c)(1) provides that a carrier may only use, disclose, or permit access to customers’ CPNI in limited circumstances: (1) as required by law; (2) with the customer’s approval; or (3) in its provision of the telecommunications service from which such information is derived, or services necessary to or used in the provision of such telecommunications service.⁸ Section 222 also guarantees that customers have a right to obtain access to, and compel disclosure of, their own CPNI.⁹ Specifically, pursuant to section 222(c)(2), every telecommunications carrier must disclose CPNI “upon affirmative written request by the customer, to any person designated by the customer.”¹⁰

5. *Existing Safeguards.* On February 26, 1998, the Commission released the *CPNI Order* in which it adopted a comprehensive set of rules implementing section 222.¹¹ The Commission’s CPNI rules have been amended from time to time since the *CPNI Order*, primarily in respects that do not directly impact this Notice. Here, we focus on the substance of the Commission’s rules most relevant to this Notice, and briefly review the history of the creation of those rules only to the extent necessary to prevent confusion regarding their substance.¹²

6. In the *CPNI Order* and subsequent orders, the Commission promulgated rules implementing the express statutory obligations of section 222. Included among the Commission’s CPNI regulations implementing the express statutory obligations of section 222 are requirements outlining the extent to which section 222 permits carriers to use CPNI to render the telecommunications service from which the CPNI was derived.¹³ Beyond such use, the Commission’s rules require carriers to obtain a customer’s

⁶ 47 U.S.C. § 222(h)(1).

⁷ 47 U.S.C. § 222(a).

⁸ 47 U.S.C. § 222(c)(1). Subsequent to the adoption of section 222(c)(1), Congress added section 222(f). Section 222(f) provides that for purposes of section 222(c)(1), without the “express prior authorization” of the customer, a customer shall not be considered to have approved the use or disclosure of or access to (1) call location information concerning the user of a commercial mobile service or (2) automatic crash notification information of any person other than for use in the operation of an automatic crash notification system. 47 U.S.C. § 222(f).

⁹ See *CPNI Order*, 13 FCC Rcd at 8101-02, para. 53.

¹⁰ 47 U.S.C. § 222(c)(2).

¹¹ *CPNI Order*, 13 FCC Rcd 8061.

¹² The Commission previously has summarized the history of the CPNI proceeding. *Third Report and Order*, 17 FCC Rcd at 14863-72, paras. 5-25.

¹³ As the Commission discussed in the *CPNI Order*, “the language of section 222(c)(1)(A) and (B) reflects Congress’ judgment that customer approval for carriers to use, disclose, and permit access to CPNI can be inferred in the context of an existing customer-carrier relationship. This is so because the customer is aware that its carrier

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knowing consent before using or disclosing CPNI. As most relevant to this Notice, under the Commission's existing rules, telecommunications carriers must receive opt-in (affirmative) consent before disclosing CPNI to third parties or affiliates that do not provide communications-related services.¹⁴ Consistent with section 222(c)(2), the Commission's rules recognize that a carrier must comply with the express desire of a customer seeking the disclosure of his or her CPNI.¹⁵

7. In addition to adopting restrictions on the use and disclosure of CPNI, the Commission in the *CPNI Order* also adopted a set of rules designed to ensure that telecommunications carriers establish effective safeguards to protect against unauthorized use or disclosure of CPNI.¹⁶ Among these safeguards are rules that require carriers to design their customer service records in such a way that the status of a customer's CPNI approval can be clearly established.¹⁷ The Commission also requires telecommunications carriers to train their personnel as to when they are and are not authorized to use CPNI, and requires carriers to have an express disciplinary process in place.¹⁸ The Commission's safeguard rules also require carriers to maintain records that track access to customer CPNI records. Specifically, section 64.2009(c) of the Commission's rules requires carriers to "maintain a record of all instances where CPNI was disclosed or provided to third parties, or where third parties were allowed access to CPNI," and to maintain such records for a period of at least one year.¹⁹ The Commission's safeguard rules also require the establishment of a supervisory review process for outbound marketing campaigns.²⁰ Finally, the Commission requires each carrier to certify annually regarding its compliance with the carrier's CPNI requirements and to make this certification publicly available.²¹

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has access to CPNI, and, through subscription to the carrier's service, has implicitly approved the carrier's use of CPNI within that existing relationship." *CPNI Order*, 13 FCC Rcd at 8080, para. 23 (introducing the "total service approach" to defining the boundaries of a customer's implied consent concerning use of CPNI); *see also* 47 C.F.R. § 64.2005(a).

¹⁴ Except as required by law, carriers may not disclose CPNI to third parties or their own affiliates that do not provide communications-related services unless the consumer has given "opt in" consent, which is express written, oral, or electronic consent. 47 C.F.R. §§ 64.2005(b), 64.2007(b)(3); 64.2008(e); *see also* 47 C.F.R. § 64.2003(h) (defining "opt-in approval"). Under the Commission's current rules, carriers must receive a customer's opt-out approval before intra-company use of CPNI beyond the total service approach, and before disclosing CPNI to affiliates and joint venture partners that provide communications-related services. 47 U.S.C. § 64.2005(a), (b); *see also* 47 C.F.R. § 64.2005(b)(1). A customer is deemed to have provided "opt-out approval" if that customer has been given appropriate notification of the carrier's request for consent consistent with the Commission's rules and the subscriber has failed to object to such use or disclosure within the waiting period described in section 64.2008(d)(1) of the Commission's rules, a minimum of 30 days. 47 C.F.R. § 64.2003(i); *see also* 47 C.F.R. § 64.2008(d)(1).

¹⁵ 47 U.S.C. § 222(c)(2); *see also, e.g., CPNI Order*, 13 FCC Rcd at 8101-02, para. 53; 47 C.F.R. § 2005(b)(3) (prohibiting the disclosure of CPNI without opt-in consent except as permitted by section 222 of the Act or the Commission's rules); Arizona Corporation Commission Petition for Clarification and/or Reconsideration (filed Oct. 21, 2002).

¹⁶ *CPNI Order*, 13 FCC Rcd at 8195, para. 193.

¹⁷ 47 C.F.R. § 64.2009(a); *see also CPNI Order*, 13 FCC Rcd at 8198, para. 198.

¹⁸ 47 C.F.R. § 64.2009(b); *see also CPNI Order*, 13 FCC Rcd at 8198, para. 198.

¹⁹ 47 C.F.R. § 64.2009(c); *see also CPNI Order*, 13 FCC Rcd at 8198-99, para. 199.

²⁰ 47 C.F.R. § 64.2009(d); *see also CPNI Order*, 13 FCC Rcd at 8199, para. 200.

²¹ 47 C.F.R. § 64.2009(3); *see also CPNI Reconsideration Order*, 14 FCC Rcd 14409, 14468 n.331 (1999) (clarifying that carriers must "make these certifications available for public inspection, copying and/or printing at any time during regular business hours at a centrally located business office of the carrier"). The Commission's

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8. *EPIC Petition*. On August 30, 2005, EPIC filed with the Commission the petition under consideration in this proceeding. EPIC petitions the Commission to investigate telecommunications carriers' current security practices and to initiate a rulemaking proceeding to consider establishing more stringent security standards for telecommunications carriers to govern the disclosure of CPNI. On September 29, 2005, the Commission issued a public notice seeking comment on EPIC's petition.²² The Commission received comments and reply comments and *ex parte* submissions from several telecommunications carriers, CTIA (a trade group representing wireless carriers), and from numerous concerned citizens.²³

III. DISCUSSION

9. In this Notice, we request comment on the issues raised by EPIC. As noted above, EPIC alleges that the Commission's CPNI regulations are insufficient to prevent the unauthorized disclosure of CPNI.²⁴ EPIC asks the Commission to initiate a rulemaking proceeding to investigate what security measures telecommunications carriers currently have in place for verifying the identity of people requesting CPNI; what inadequacies currently exist in those measures that allow third parties such as online data brokers and private investigators to access CPNI without the customer's knowledge or authorization; and what kind of security measures are warranted to better protect telecommunications customers from unauthorized access to CPNI.²⁵

10. EPIC has supplied information to the Commission to support its contention that numerous online data brokers and private investigators widely advertise their ability to obtain CPNI without the account holder's knowledge and consent.²⁶ Specifically, EPIC alleges that some data brokers offer services to retrieve telephone call records, sometimes requiring only the telephone number associated with the requested CPNI.²⁷ EPIC further alleges that such data brokers sometimes offer to obtain this personal information in as little as several hours.²⁸ EPIC does not claim it knows specifically how these

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rules also require carriers to notify the Commission in writing within five business days of any instance in which the opt-out mechanisms did not work properly, to such a degree that consumers' inability to opt-out is more than an anomaly. 47 C.F.R. § 64.2009(f); *see Third Report and Order*, 17 FCC Rcd at 14910-11, paras. 114-15 (adopting such requirement).

²² Consumer & Governmental Affairs Bureau, Reference Information Center, Petition for Rulemakings Filed, RM-11277, Public Notice (CGB Sept. 29, 2005), *available at* <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261315A1.pdf>.

²³ The list of parties who filed comments or reply comments in response to the September 29, 2005 Public Notice is set forth in Appendix A. Appendix A also lists 66 individual consumers who filed *ex parte* comments through the Commission's Electronic Comment Filing System.

²⁴ EPIC Petition at 1; *see also* Verizon Wireless Comments at 2.

²⁵ EPIC Petition at 10.

²⁶ *See, e.g.*, EPIC Petition, Appendix C (providing a list of 40 web sites offering to sell CPNI to third parties); *see also* EPIC Reply at 1 ("The prevalence of phone record advertisements, and the apparent ease with which these companies could obtain records from carriers, made it clear that carriers' practices are to some extent responsible for these security problems."); EPIC FTC Complaint at 4-5 (listing several web sites that offer to the general public third party call detail records, cell phone location information, and other information). Verizon Wireless notes in its comments that it is not aware of how a "social engineer" could have access to location tracking information because this information is not available to customer service representatives. *See* Verizon Wireless Comments at 3 n.6.

²⁷ EPIC Petition at 5-6.

²⁸ *See id.*

online data brokers and private investigators are obtaining unauthorized access to CPNI.²⁹ EPIC suggests that “[d]ata brokers and private investigators are taking advantage of inadequate security through pretexting, the practice of pretending to have authority to access protected records; through cracking consumers’ online accounts with communications carriers; and possibly through dishonest insiders at the carriers.”³⁰ EPIC suggests that unauthorized third parties are exploiting existing security standards and states that “[t]elecommunications carriers are not responsible for actively disseminating information to unauthorized third parties.”³¹ While not all commenters agree that the Commission should initiate the present rulemaking proceeding, none of the commenters dispute that EPIC has identified a problem that needs to be addressed in some manner. One carrier comments that “EPIC’s Petition rightly points out a growing problem which the Commission should address.”³²

11. Pursuant to our authority under section 222 of the Act, we seek comment on the nature and scope of the problem identified by EPIC.³³ Further, we seek comment on whether such intervention will adequately remedy the identified problem. Data brokers typically do not explain on their websites how they obtain the CPNI that they market and sell. Thus, we seek comment generally on how CPNI is maintained and secured by carriers and how data brokers are able to obtain CPNI from carriers. Specifically, how is CPNI being made available to unauthorized third parties? Who is able to obtain unauthorized access to CPNI, and for what range of purposes? To the extent third parties are able to obtain unauthorized access to CPNI, what are the methods by which they obtain such access? Is such access primarily through “pretexting,” which we understand in this context to be a person falsely representing to a telecommunications carrier that he or she is a company employee or a particular

²⁹ See EPIC Petition at 6 (stating that “online private investigators do not reveal how they actually obtain this information. However, EPIC is aware of no legal way to reliably and quickly obtain call detail information.”).

³⁰ EPIC Petition at 1. Both Verizon Wireless and Cingular have filed civil lawsuits seeking to prevent third parties from obtaining unauthorized access to CPNI. See, e.g., *Cellco Partnership d/b/a/ Verizon Wireless v. Source Resources*, Permanent Injunction on Consent, Docket No. SOM-L-1013-05 (Sup. Ct. of N.J.; Law Div.: Somerset County, Sept. 13, 2005); see also *Complaint of Cingular in Cingular Wireless LLC v. Data Find Solutions, Inc., James Kester, 1st Source Information Specialists, Inc., Kenneth W. Gorman, Steven Schwartz, John Does 1-100, and XYZ Corps. 1-100*, Docket No. 1 05-CV 3269-CC (D.N.D. Ga. filed Dec. 23, 2005) (Cingular Petition); see also *Verizon Wireless Comments at 3* (stating that Verizon Wireless is pursuing similar actions against other parties). Cingular’s petition suggests that it believes EPIC correctly has identified at least some of the means third parties are using to obtain unauthorized access to CPNI. See, e.g., *Cingular Petition at 2-3* (alleging that defendants have wrongfully obtained CPNI through “social engineering,” improper hacking, and/or unauthorized access to online account information stored in Cingular’s computer network”).

³¹ EPIC Petition at 5-6.

³² *Verizon Comments at 1* (urging the Commission not to initiate the present Notice but instead to work with the FTC on ways to track and combat actions by those persons that unlawfully obtain and sell CPNI). Verizon Wireless reports that unauthorized persons attempt to obtain confidential customer information by misrepresenting their identities to customer service personnel several times a day. See *Verizon Wireless Comments at 3* (noting that such “individuals, who advertise freely on the Internet, either pose as Verizon Wireless customers or employees seeking information on their accounts, or they claim that they are attempting to obtain the information on behalf of the customer. They employ a variety of different tactics to obtain information about a customer’s mobile number, address, call detail, and copies of bills.”); see also *EPIC Reply at 7-8*.

³³ We are sensitive to commenters’ concerns that this proceeding not inadvertently undermine the protections telecommunications carriers currently have in place to guard against unauthorized access to, and unauthorized disclosure of, CPNI. See, e.g., *Verizon Comments at 1*; *Verizon Wireless Comments at 4*. Nevertheless, we believe that a comprehensive record can be developed in response to this Notice without undermining carriers’ existing CPNI safeguards and urge commenters to be mindful of these considerations when providing information in response to this Notice. Commenters desiring confidential treatment of their submissions should request that their submission, or a specific part thereof, be withheld from public inspection. 47 C.F.R. § 0.459.

customer who seeks access to his or her own CPNI?³⁴ What other methods, if any, are third parties using to obtain unauthorized access to CPNI? Is there any evidence that third parties are “hacking” or otherwise obtaining unauthorized access to consumers’ online accounts with communications carriers? If so, is there any evidence that such occurrences are widespread? Is there any evidence that dishonest insiders at the carriers are providing third parties with unauthorized access to CPNI? Is there any evidence to show that the problems identified by EPIC are better or worse at smaller carriers? What other evidence is relevant to the nature and scope of the unauthorized disclosure of CPNI to third parties?

12. We also seek comment on whether our existing opt-out regime sufficiently protects the privacy of CPNI in the context of CPNI disclosed to telecommunications carriers’ joint venture partners and independent contractors. Specifically, we seek comment on whether there is a greater possibility of dissemination of customers’ private information in this situation, and whether the Commission should instead require carriers to obtain opt-in consent from a customer before disclosing that customer’s CPNI to the carrier’s joint venture partners or independent contractors that provide communications-related services.³⁵ Would this change in the Commission’s regulations better protect customer privacy notwithstanding the Commission’s current safeguards applicable to the release of CPNI to carriers’ partners and independent contractors?³⁶ What are the costs to telecommunications carriers, consumers and other parties of such a change? Would the consumer benefits of such a change outweigh the costs?

13. We also seek comment on carriers’ current practices regarding the disclosure of CPNI and whether they are sufficient. What steps do carriers take to verify that a person seeking access to CPNI is the customer or employee he or she purports to be? For instance, do telecommunications carriers have heightened verification requirements if a purported customer contacts the carrier seeking CPNI from a telephone number other than the number assigned to that customer? When a carrier discloses CPNI to a person it believes to be a customer, how does that carrier transmit the CPNI to the customer? Do carriers provide customers with CPNI over the telephone, by regular mail, by e-mail, or by fax? Should there be any limitations on the transmission of CPNI? What is the impact of section 222(c)(2) on this issue, which requires carriers to disclose CPNI to any person designated by the customer upon the affirmative written consent of the customer?³⁷ Do carriers take any routine confirmatory steps after disclosing CPNI to a person they believe to be a customer? For instance, do carriers contact the customer through a means that is highly likely to reach the real customer to confirm for that customer that his or her CPNI has been disclosed, such as by notifying the customer of such disclosure at his or her assigned telephone number and/or via regular mail at that customer’s home address? As a general matter, are the Commission’s existing regulatory safeguards to protect the privacy of CPNI adequate? If not, what specific rule changes

³⁴ Some commenters alternatively refer to this practice as “social engineering.” *See, e.g.*, Verizon Wireless Comments at 3 n.6. CTIA claimed in testimony before Congress that “[o]verwhelmingly, the vast majority of cell phone records are being fraudulently obtained through the use of ‘pretexting.’” *See* Letter from Paul Garnett to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-115 Attach. at 2 (filed Feb. 2, 2006) (CTIA Feb. 2 *Ex Parte* Letter).

³⁵ Under the Commission’s existing rules, carriers may not disclose CPNI to such third parties or their own affiliates that do not provide communications-related services unless the consumer has given “opt in” consent. *See* 47 C.F.R. §§ 64.2005(b), 64.2007(b)(3); 64.2008(e). However, telecommunications carriers are permitted to disclose CPNI to their joint venture partners and independent contractors that provide communications-related services after obtaining a customer’s “opt-out” consent. 47 C.F.R. §§ 64.2005(b), 64.2007(b)(1). Such disclosure is subject to joint venture/contractor safeguards that require the telecommunications carrier to enter into confidentiality agreements with independent contractors or joint venture partners that protect the confidentiality of a customer’s CPNI. *See* 47 C.F.R. § 64.2007(b)(2).

³⁶ *See* 47 C.F.R. § 64.2007(b)(2); *see also* 47 U.S.C. § 217.

³⁷ 47 U.S.C. § 222(c)(2).

are needed to identify and solve the concerns raised by EPIC? What other practices regarding the disclosure of CPNI are relevant to this Notice?

14. EPIC proposes that we consider requiring carriers to institute certain security measures to more adequately protect CPNI. In particular, EPIC proposes five forms of security measures that it maintains would more adequately protect access to CPNI: consumer-set passwords, audit trails, encryption, limiting data retention, and notice procedures. We seek comment about the feasibility and advisability of these and other measures.

15. *Consumer-set passwords.* EPIC maintains that data brokers use the Internet to obtain common biographical data such as a person's date of birth, mother's maiden name, or social security number.³⁸ According to EPIC, these and similar "biographical identifiers" are readily available through public records and online databases, and may easily be used to falsely authenticate a request for CPNI.³⁹ EPIC argues that a consumer-set password, chosen by the account holder at the time of phone activation, would greatly increase the security of CPNI.⁴⁰ Some commenters acknowledge that customer-set passwords can increase the security of CPNI, and state that customers already have the option of adding a password or code to their accounts.⁴¹ Commenters also see disadvantages to relying on passwords to protect CPNI. Verizon and Verizon Wireless report that some customers dislike passwords, and that password systems hamper the transaction of legitimate business.⁴² CTIA notes that password systems invite fraudulent requests for "lost" passwords.⁴³ EPIC agrees that certain password procedures are easy for online data brokers to circumvent, but argues that techniques such as a "shared secret" (e.g., what was the name of your first pet?) can protect customers from fraudulent password manipulation.⁴⁴

16. We solicit comment on the advisability of requiring carriers to adopt a consumer-set password system to protect access to CPNI. Would requiring the use of passwords materially increase the security of CPNI? Would such a requirement intrude on the preference of some customers not to have to remember a password? Does the customer's ability to change a password play into the hands of online data brokers, and, if so, how can this danger be minimized? Should the Commission require telecommunications carriers to notify customers if their password is changed? If so, should such notification be made by letter, e-mail, text message, voice-mail message, or some other specific means? Should small carriers be exempt from password-related security procedures we might require of large carriers?

17. *Audit trails.* EPIC suggests that we require carriers to record all instances when a customer's records have been accessed, whether information was disclosed, and to whom.⁴⁵ According to EPIC, maintaining an audit trail would deter company insiders from selling information, and could help carriers identify and investigate security breaches.⁴⁶ EPIC points out that our rules already require carriers to record any CPNI disclosure for use in marketing or to third parties, and suggests that we extend the

³⁸ EPIC Petition at 8.

³⁹ EPIC Petition at 8, 11.

⁴⁰ EPIC Petition at 11.

⁴¹ Verizon Wireless Comments at 7; CTIA Comments at 11-12.

⁴² Verizon Comments at 3-4; Verizon Wireless Comments at 6-7.

⁴³ CTIA Comments at 18.

⁴⁴ EPIC Reply Comments at 5.

⁴⁵ EPIC Petition at 11.

⁴⁶ EPIC Reply Comments at 7.

requirement to include disclosure of CPNI to account holders.⁴⁷ BellSouth asserts that maintaining such an audit trail could be unreasonably costly.⁴⁸ Other commenters express uncertainty whether such a rule would in fact alter carriers' existing practices.⁴⁹

18. We ask carriers to review the requirements of our rule 64.2009(c), and to assess the benefits and burdens of similarly recording disclosure of CPNI to the customer account holder. Do most carriers routinely log disclosure of CPNI to subscribers as well as to third parties? We ask commenters to assess the benefits and burdens of this requirement, including on small telecommunications carriers.

19. *Encryption.* EPIC suggests that data stored by the carrier should be encrypted.⁵⁰ Commenters respond that data is already encrypted where appropriate, as when a customer uses the Internet to order service or to view call records, and that encrypting stored records would increase costs and slow legitimate inquiries without offering significant benefits in return.⁵¹ In particular, commenters regard encryption as responsive to security problems that are essentially unrelated to protecting against inappropriate disclosure of CPNI.⁵² We invite commenters to discuss whether encrypting stored CPNI data would be useful, and to weigh the costs and benefits of encryption. Does evidence suggest that CPNI records have been fraudulently accessed directly from databases without going through a carrier's personnel or on-line customer access site? Would requiring encryption place an undue burden on small carriers?

20. *Limiting data retention.* EPIC suggests that call records should be deleted when they are no longer needed for billing or dispute purposes.⁵³ As an alternative, EPIC suggests that carriers should "deidentify" records, that is, separate data that identify a particular caller from the general transaction records.⁵⁴ Commenters respond that they hesitate to destroy or remove identification data from records that could become subject to dispute, and that destroying records might conflict with our Part 42 record-keeping requirements.⁵⁵ Commenters also observe that destruction of records is not mandated by law, and

⁴⁷ EPIC Reply Comments at 7; *see* 47 C.F.R. § 64.2009(c):

All carriers shall maintain a record, electronically or in some other manner, of their own and their affiliates' sales and marketing campaigns that use their customers' CPNI. All carriers shall maintain a record of all instances where CPNI was disclosed or provided to third parties, or where third parties were allowed access to CPNI. The record must include a description of each campaign, the specific CPNI that was used in the campaign, and what products and services were offered as a part of the campaign. Carriers shall retain the record for a minimum of one year.

⁴⁸ BellSouth Comments at 5-6.

⁴⁹ Verizon Comments at 4; Verizon Wireless Comments at 7 (stating that Verizon Wireless already records (1) all instances when a customer's record is accessed, (2) the subject of the discussion, and (3) whether information was disclosed to the customer); CTIA Comments at 19 (claiming that carriers already follow such procedures); CTIA Feb. 2 *Ex Parte* Letter Attach. at 6 ("[W]hen call records are accessed, it is logged in the customer service database, so the carrier can see who looked at what records. Further, CSRs are trained to annotate the customer record whenever an account change or event occurs. A CSR will note when a customer called and asked for his or her records.").

⁵⁰ EPIC Petition at 11.

⁵¹ CTIA Comments at 11, 19; Verizon Wireless Comments at 8; Verizon Comments at 2, 4-5.

⁵² Verizon Comments at 2-3.

⁵³ EPIC Petition at 11.

⁵⁴ EPIC Petition at 11-12.

⁵⁵ Verizon Wireless Comments at 8-9; CTIA Comments at 19-20; *see* 47 C.F.R. §§ 42.01-11.

question whether destroying old records contributes to solving the underlying problem of making records less susceptible to fraudulent disclosure.⁵⁶ We seek comment on whether CPNI records should eventually be deleted, and, if so, how long such records should be kept. What costs and benefits would result from requiring carriers to separate identifying data from transactional records? Would deleting CPNI or removing personal identification conflict with other priorities, such as dispute resolution or law enforcement?

21. *Notice.* EPIC suggests that companies notify customers when the security of their CPNI may have been breached.⁵⁷ According to EPIC, such notification could help the affected individual mitigate any harm from the security breach, and assure the public that their personal data are actually secure.⁵⁸ Verizon Wireless responds that a notice requirement is unnecessary because customers are already routinely notified of any known security breach.⁵⁹ Verizon questions the usefulness of requiring carriers to notify customers of security breaches because, if CPNI is given to someone posing as the customer, the carrier will not know that a breach has occurred.⁶⁰

22. We invite commenters to consider the potential value of notification as a precautionary measure before releasing CPNI. For example, we seek comment on whether carriers should be required to call the customer's registered telephone number for that account to verify the customer's identity before releasing CPNI to that subscriber. Should certain types of requests trigger an advance notification requirement? For example, should we require carriers to take extra precaution to verify the authenticity of requests that data be sent somewhere other than the mailing address where the account is registered or a known e-mail address, or requests that originate from a number other than a telephone number listed on the customer's account? Should requests for CPNI that carriers receive via the Internet receive heightened scrutiny? Should carriers offer customers the option of precautionary verification before releasing CPNI? If so, should carriers offer this service to customers on an "opt-in" or "opt-out" basis?⁶¹

23. We also invite commenters to weigh the costs and benefits of routinely notifying customers after any release of their CPNI, including incidents where the carrier has no grounds to suspect that the request is not legitimate. For example, should carriers include a statement on or with the customer's invoice when that customer's CPNI records have been accessed? Should release of CPNI trigger a voicemail notification for wireless customers? If carriers offer customers the option of receiving notice after the release of CPNI, should they do so on an "opt in" or "opt out" basis? We solicit comment regarding the cost of notification, how costs might be minimized and recovered, and whether notification requirements should be specially tailored for small companies.

24. Public response to EPIC's petition reflects concern that improper release of CPNI can have dire consequences for customers' personal safety.⁶² Should we require carriers to permit customers to put an absolute "no release" order on their CPNI, possibly subject to existing exceptions in section 222(c)(1)?⁶³ Also, does the mobile and personal nature of wireless phones increase the privacy

⁵⁶ CTIA Comments at 19-20.

⁵⁷ EPIC Petition at 11.

⁵⁸ EPIC Petition at 11.

⁵⁹ Verizon Wireless Comments at 8.

⁶⁰ Verizon Comments at 5.

⁶¹ See *supra* note 14 (defining "opt-in" and "opt-out" approval).

⁶² See, e.g., Nancy Curtin, Electronic Comment Filing System (filed Jan. 17, 2006) (expressing concern that, when a battered wife or stalker is involved, selling CPNI may put someone's life at risk).

⁶³ 47 U.S.C. § 222(c)(1).

expectations of wireless customers, and should wireless CPNI receive additional protection? Should wireless subscriber list information be given any special consideration? We seek comment regarding whether carriers should accord special protection to the CPNI of certain categories of telephone users, such as, for example, minors.

25. *Other approaches.* We encourage commenters to think broadly and creatively about how best to guard against fraudulent or unauthorized disclosure of CPNI. We take seriously commenters' concern that we recognize the danger of "giving wrongdoers a roadmap."⁶⁴ EPIC agrees that carriers should avoid discussing weaknesses and specific procedures in a public record.⁶⁵ To the extent commenters believe that certain anti-fraud tactics are better developed away from public scrutiny, we ask them to describe steps they intend to take privately to develop more effective measures to secure CPNI from unauthorized disclosure. For example, should carriers develop a working group tasked with improving CPNI security procedures? Are some anti-fraud measures, such as audit trails and notification procedures, actually more effective if their existence is well publicized? Are commenters aware of any measures state regulatory commissions may have taken relating to CPNI privacy and fraudulent access to records? If so, what can we learn from their experience? Inasmuch as commenters disagree with any of these proposals, we encourage them to suggest modifications, and to contribute new ideas of their own.

26. *Enforcement.* Are there any steps the Commission should take to enhance its ability to enforce the requirements of section 222 and the Commission's regulations relating to CPNI?⁶⁶ Is there a set of security requirements that the Commission should adopt that would exempt a carrier from liability or establish a safe harbor if the carrier implemented those requirements?⁶⁷ Likewise, should failure to comply with some minimum set of requirements form the basis of a violation? What other measures might enhance the Commission's ability to enforce its CPNI regulations?

27. *Reporting and Notification.* In part because "CPNI" is not a term with which most customers are familiar, we seek comment on whether the notifications carriers provide subscribers regarding the use and disclosure of CPNI are written clearly enough so that customers adequately understand that the notices concern the privacy of personal telephone records and the scope of disclosure authorized. We note that section 64.2008(c) of the Commission's rules requires that customer notifications be comprehensible and not be misleading.⁶⁸ We seek comment on what changes to our rules, if any, are necessary to ensure that customers fully understand what personal records telecommunications carriers seek permission to use and/or disclose.

28. Should the Commission adopt any additional reporting requirements related to the disclosure of CPNI? As noted above, the Commission's existing rules require carriers to provide written notice within five business days to the Commission of any instance where the opt-out mechanisms do not work

⁶⁴ Verizon Comments at 1; Verizon Wireless Comments at 1, 5; CTIA Comments at 2.

⁶⁵ EPIC Reply Comments at 4-5. EPIC's own discussion of accessing Cingular Wireless CPNI illustrates the problem. *See* EPIC Reply Comments at 5.

⁶⁶ Some commenters argue that the current rules are sufficient, claiming that "telecommunications carriers are already subject to clear and unambiguous obligations to guard the confidentiality of CPNI and to ensure that it is not disclosed to third parties without customer approval or as required by law." *See* BellSouth Comments at 2.

⁶⁷ Some commenters make the point that "setting particular guidelines on the types of measures carriers must take to protect CPNI might actually make the problem *worse* because it would give wrongdoers a roadmap of the information they need in order to obtain CPNI." Verizon Comments at 3; *see also* SBC Comments at 2 (arguing that mandated security measures would quickly become obsolete and that pretexters would "immediately try to figure out a way around them"); CTIA Comments at 3; CTIA Reply at 3.

⁶⁸ 47 C.F.R. § 64.2008(c).

properly to such a degree that consumers' inability to opt-out is more than an anomaly.⁶⁹ Should the Commission adopt a similar reporting requirement in cases of unauthorized access to or disclosure of CPNI? Should the Commission require carriers to report *all* instances of unauthorized access to or disclosure of CPNI? As discussed above, are there any additional requirements the Commission should adopt that would help ensure that carriers are being made aware of instances in which they disclose or provide access to CPNI without proper customer authorization? Should any requirements the Commission adopts in the context of the present rulemaking extend to VoIP service providers or other IP-enabled service providers?⁷⁰

29. The Commission's current rules require each telecommunications carrier to 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 that are adequate to ensure compliance with the Commission's CPNI rules and to make that certification available to the public.⁷¹ We believe the lack of uniformity relating to certifications could be an obstacle to effective enforcement of our CPNI rules. We tentatively conclude that the Commission should amend its rules to require carriers to certify no later than January 1st (or other date specified by the Commission) of each year, covering the preceding calendar year, and to file the compliance certificate with the Commission within 30 days. Carriers should attach to this annual section 64.2009(e) certification an explanation of any actions taken against data brokers and a summary of all consumer complaints received in the past year concerning the unauthorized release of CPNI. We seek comment on this proposal. We also seek comment on whether this Commission-filing requirement should only be imposed on telecommunications carriers that are not small telephone companies as defined by the Small Business Administration.

30. Commenters should assess the burdens as well as the benefits of any specific measures they urge the Commission to adopt, and address whether any less burdensome measures could achieve the same benefits. Should small telecommunications carriers be subject to different CPNI-related obligations than large telecommunications carriers? Assuming that the regulatory obligations ultimately should be identical among all telecommunications carriers, should small telecommunications carriers be given a longer deadline to implement any new requirements that are adopted in this proceeding? Finally, are there any considerations other than those raised above that the Commission should take into account as it considers information submitted in response to this Notice?

⁶⁹ 47 C.F.R. § 64.2009(f); *see also supra* note 21.

⁷⁰ The Commission has sought comment on related issues in the wireline Internet broadband access services rulemaking and the IP-Enabled Services proceeding and may take official notice of comments filed in those dockets. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era, Report and Order and Notice of Proposed Rulemaking, CC Docket Nos. 01-337, 02-33, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, FCC 05-150 (rel. Sept. 23, 2005); see also IP-Enabled Services, Notice of Proposed Rulemaking, WC Docket No. 04-36, 19 FCC Rcd. 4863 (2004).*

⁷¹ 47 C.F.R. § 64.2009(e); *see also CPNI Order*, 13 FCC Rcd at 8199, para. 201 (requiring the annual certification to be made publicly available). Under Section 64.2009(e), a carrier must include with its annual certification a statement explaining how its operating procedures ensure that it is or is not in compliance with the Commission's CPNI rules. 47 C.F.R. § 64.2009(e).

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility

31. As required by the Regulatory Flexibility Act, 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this Notice. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this Notice and must have a separate and distinct heading designating them as responses to the IRFA.

B. Paperwork Reduction Act

32. This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due **60 days after date of publication in the Federal Register**. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

C. Other Procedural Matters

1. Ex Parte Presentations

33. The rulemaking this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules.⁷² Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required.⁷³ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.⁷⁴

2. Comment Filing Procedures

34. Pursuant to sections 1.415 and 1.419 of the Commission's rules,⁷⁵ interested parties may file comments and reply comments regarding the Notice on or before the dates indicated on the first page of this document. **All filings related to this Notice of Proposed Rulemaking should refer to CC Docket**

⁷² 47 C.F.R. §§ 1.200 *et seq.*

⁷³ *See* 47 C.F.R. § 1.1206(b)(2).

⁷⁴ 47 C.F.R. § 1.1206(b).

⁷⁵ 47 C.F.R. §§ 1.415, 1.419.

No. 96-115.⁷⁶ Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
- ECFS filers must transmit one electronic copy of the comments for CC Docket No. 96-115. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.
- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, S.W., Washington D.C. 20554.

35. Parties should send a copy of their filings to Janice Myles, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-C140, 445 12th Street, S.W., Washington, D.C. 20554, or by e-mail to janice.myles@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

36. Documents in CC Docket No. 96-115 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street S.W., Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

⁷⁶ The issues raised in EPIC's Petition and RM-11277 are subsumed in CC Docket No. 96-115. We therefore incorporate the comments and reply comments and *ex parte* presentations in RM-11277 into CC Docket No. 96-115 and terminate RM-11277 to prevent parties from being burdened by duplicate filings. Parties that have submitted materials in RM-11277 do not need to re-file those same materials in CC Docket No. 96-115 in order for them to be considered in this rulemaking proceeding.

3. Accessible Formats

37. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov; phone: 202-418-0530 or TTY: 202-418-0432.

V. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 222 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 222, that this Notice in CC Docket No. 96-115 and RM-11277 IS ADOPTED.

39. IT IS FURTHER ORDERED that the Petition for Rulemaking of the Electronic Privacy Information Center IS GRANTED to the extent described herein.

40. IT IS FURTHER ORDERED that the proceeding in RM-11277 IS HEREBY TERMINATED.

41. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

COMMENTERS
RM-11277

<u>Comments</u>	<u>Abbreviation</u>
BellSouth Corporation	BellSouth
CTIA – The Wireless Association	CTIA
Verizon telephone companies	Verizon
Verizon Wireless	Verizon Wireless

REPLY COMMENTERS
RM-11277

<u>Reply Comments</u>	<u>Abbreviation</u>
CTIA – The Wireless Association	CTIA
Electronic Privacy Information Center	EPIC
Frank Camarillo	Frank Camarillo

INDIVIDUALS FILING *EX PARTE* COMMENTS
RM-11277

<u>Ex Parte Comments from Individuals</u>
Carol Adams
Anonymous, received Jan. 17, 2006
Jane Bailey
George Bishop
Wendy Boykin
Jason Brugh
Georgia Case
Chris Chamblee
Oscar Christophersen
Nancy Curtin
Mark Dailey
Sue Esser
Neil Fairmer
Janice M. Farina
Larry Foley
David R. Forest
Barbra Glass
Richard Glenn Guillory
Matthew Guy
Richard N. Hathaway
H.J. Hathcock
M.J. Heise
Stephanie Hoel
Thomas D. Hopwood
Mark R. Ivan
Rosemarie K. Jones
Wanda Jones

Roger Jurgensen
Louann Kenyon
Donna E. Kidd
Rick LaFave
Phil Lawson
Nancy Lebrecht
Matt LeConte
Kathy Ledbetter
Andrew Lindeman
Lisa
Carol S. Matthews
George Mercer
Michael A. Missey
Brian Morris
Greg Mumm
Kaci Newman
Amey Pennington
Darren Pennington
D.M. Perkins
Robert D. Reiswig
Chris Riban
Mike Riban
Suzy Robertson
Linda Rossi
Victoria Marie Rum
Patricia L. Russo
Darryl Scott
Roger Scott
Bonnie S. Seehoffer
Jim Shields
Bernard Soffer
Sherrill Smas
Donald Timpe
Julie D. Walker
M.L. Willingham
Donald Winn
Starr Wilson
Katherine & Gary Yaeger
Tony Zintsmaster

APPENDIX B**INITIAL REGULATORY FLEXIBILITY ANALYSIS**

42. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁷⁷ the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities that might result from this Notice. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided above. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.⁷⁸ In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.⁷⁹

A. Need for, and Objectives of, the Proposed Rules

43. In the Notice, we grant EPIC's petition for rulemaking and seek comment on what security measures telecommunications carriers currently have in place for verifying the identity of people requesting CPNI; what inadequacies currently exist in those measures that allow third parties such as online data brokers and private investigators to access CPNI without the customer's knowledge or authorization; and what kind of security measures may be warranted to better protect telecommunications customers from unauthorized access to CPNI. In particular, we seek comment on EPIC's five proposals to address the unauthorized means of obtaining CPNI: (1) consumer-set passwords; (2) audit trails; (3) encryption; (4) limiting data retention; and (5) procedures for notice to the customer on release of CPNI data. We also seek comment on what steps the Commission should take to enforce its CPNI rules and whether carriers should be required to report further on the release of CPNI.

B. Legal Basis

44. The legal basis for any action that may be taken pursuant to the *Notice* is contained in sections 1, 4(i), 4(j), and 222 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 222.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply

45. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.⁸⁰ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁸¹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁸² A small business concern is one which:

⁷⁷ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996).

⁷⁸ See 5 U.S.C. § 603(a).

⁷⁹ See 5 U.S.C. § 603(a).

⁸⁰ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

⁸¹ 5 U.S.C. § 601(6).

⁸² 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity

(continued....)

(1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁸³

46. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.⁸⁴

47. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.⁸⁵

48. *Small Governmental Jurisdictions.* The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”⁸⁶ Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.⁸⁷ We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.”⁸⁸ Thus, we estimate that most governmental jurisdictions are small.

1. Telecommunications Service Entities

a. Wireline Carriers and Service Providers

49. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”⁸⁹ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.⁹⁰ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

50. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The

(...continued from previous page)

for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁸³ 15 U.S.C. § 632.

⁸⁴ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

⁸⁵ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

⁸⁶ 5 U.S.C. § 601(5).

⁸⁷ U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, Section 8, page 272, Table 415.

⁸⁸ We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

⁸⁹ 15 U.S.C. § 632.

⁹⁰ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁹¹ According to Commission data,⁹² 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

51. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁹³ According to Commission data,⁹⁴ 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are “Shared-Tenant Service Providers,” and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are “Other Local Service Providers.” Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities that may be affected by our action.

52. *Local Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁹⁵ According to Commission data,⁹⁶ 143 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 141 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by our action.

53. *Toll Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁹⁷ According to Commission data,⁹⁸ 770 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 747 have 1,500 or fewer employees and 23 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our action.

54. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a

⁹¹ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

⁹² FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (April 2005) (“Trends in Telephone Service”). This source uses data that are current as of October 1, 2004.

⁹³ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

⁹⁴ “Trends in Telephone Service” at Table 5.3.

⁹⁵ 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

⁹⁶ “Trends in Telephone Service” at Table 5.3.

⁹⁷ 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

⁹⁸ “Trends in Telephone Service” at Table 5.3.

small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁹⁹ According to Commission data,¹⁰⁰ 613 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 609 have 1,500 or fewer employees and four have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

55. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁰¹ According to Commission data,¹⁰² 316 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 292 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action.

56. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁰³ According to Commission data,¹⁰⁴ 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 20 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our action.

57. *Prepaid Calling Card Providers*. Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁰⁵ According to Commission data,¹⁰⁶ 89 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, 88 are estimated to have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that all or the majority of prepaid calling card providers are small entities that may be affected by our action.

58. *800 and 800-Like Service Subscribers*.¹⁰⁷ Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (“toll free”) subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁰⁸ The

⁹⁹ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

¹⁰⁰ “Trends in Telephone Service” at Table 5.3.

¹⁰¹ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

¹⁰² “Trends in Telephone Service” at Table 5.3.

¹⁰³ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

¹⁰⁴ “Trends in Telephone Service” at Table 5.3.

¹⁰⁵ 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

¹⁰⁶ “Trends in Telephone Service” at Table 5.3.

¹⁰⁷ We include all toll-free number subscribers in this category, including those for 888 numbers.

¹⁰⁸ 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, and 877 numbers in use.¹⁰⁹ According to our data, at the end of January, 1999, the number of 800 numbers assigned was 7,692,955; the number of 888 numbers assigned was 7,706,393; and the number of 877 numbers assigned was 1,946,538. We do not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, we estimate that there are 7,692,955 or fewer small entity 800 subscribers; 7,706,393 or fewer small entity 888 subscribers; and 1,946,538 or fewer small entity 877 subscribers.

b. International Service Providers

59. The Commission has not developed a small business size standard specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad census categories of “Satellite Telecommunications” and “Other Telecommunications.” Under both categories, such a business is small if it has \$12.5 million or less in average annual receipts.¹¹⁰

60. The first category of Satellite Telecommunications “comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”¹¹¹ For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year.¹¹² Of this total, 307 firms had annual receipts of under \$10 million, and 26 firms had receipts of \$10 million to \$24,999,999.¹¹³ Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

61. The second category of Other Telecommunications “comprises establishments primarily engaged in (1) providing specialized telecommunications applications, such as satellite tracking, communications telemetry, and radar station operations; or (2) providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems.”¹¹⁴ For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.¹¹⁵ Of this total, 259 firms had annual receipts of under \$10 million and 15 firms had annual receipts of \$10 million to \$24,999,999.¹¹⁶ Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

¹⁰⁹ See FCC, Common Carrier Bureau, Industry Analysis Division, *Study on Telephone Trends*, Tables 21.2, 21.3, and 21.4 (Feb. 1999).

¹¹⁰ 13 C.F.R. § 121.201, NAICS codes 517410 and 517910.

¹¹¹ U.S. Census Bureau, “2002 NAICS Definitions: 517410 Satellite Telecommunications” (www.census.gov), visited Feb. 2006).

¹¹² U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 517410 (issued Nov. 2005).

¹¹³ *Id.* An additional 38 firms had annual receipts of \$25 million or more.

¹¹⁴ U.S. Census Bureau, “2002 NAICS Definitions: 517910 Other Telecommunications” (www.census.gov), visited Feb. 2006).

¹¹⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 517910 (issued Nov. 2005).

¹¹⁶ *Id.* An additional 14 firms had annual receipts of \$25 million or more.

c. Wireless Telecommunications Service Providers

62. Below, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

63. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of “Paging”¹¹⁷ and “Cellular and Other Wireless Telecommunications.”¹¹⁸ Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.¹¹⁹ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.¹²⁰ Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.¹²¹ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.¹²² Thus, under this second category and size standard, the majority of firms can, again, be considered small.

64. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category “Cellular and Other Wireless Telecommunications.”¹²³ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.¹²⁴ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.¹²⁵ Thus, under this category and size standard, the great majority of firms can be considered small. Also, according to Commission data, 437 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services, which are placed together in the data.¹²⁶ We have estimated that 260 of these are small, under

¹¹⁷ 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

¹¹⁸ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

¹¹⁹ U.S. Census Bureau, 2002 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms for the United States: 2002, NAICS code 517211 (issued November 2005).

¹²⁰ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

¹²¹ U.S. Census Bureau, 2002 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms for the United States: 2002, NAICS code 517212 (issued November 2005).

¹²² *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

¹²³ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

¹²⁴ U.S. Census Bureau, 2002 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms for the United States: 2002, NAICS code 517212 (issued November 2005).

¹²⁵ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

¹²⁶ “Trends in Telephone Service” at Table 5.3.

the SBA small business size standard.¹²⁷

65. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census category, “Cellular and Other Wireless Telecommunications.”¹²⁸ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.¹²⁹ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.¹³⁰ Thus, under this category and associated small business size standard, the majority of firms can be considered small. In the Paging *Third Report and Order*, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.¹³¹ A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.¹³² The SBA has approved these small business size standards.¹³³ An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.¹³⁴ Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to Commission data, 375 carriers reported that they were engaged in the provision of paging and messaging services.¹³⁵ Of those, we estimate that 370 are small, under the SBA-approved small business size standard.¹³⁶

66. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for “Cellular and Other Wireless Telecommunications” services.¹³⁷ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.¹³⁸ According to Commission data, 445 carriers reported that they were engaged in the provision of wireless

¹²⁷ *Id.*

¹²⁸ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

¹²⁹ U.S. Census Bureau, 2002 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms for the United States: 2002, NAICS code 517211 (issued November 2005).

¹³⁰ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

¹³¹ *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, paras. 291-295, 62 FR 16004 (Apr. 3, 1997).

¹³² See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998) (SBA Dec. 2, 1998 Letter).

¹³³ *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, paras. 98-107 (1999).

¹³⁴ *Id.* at 10085, para. 98.

¹³⁵ “Trends in Telephone Service” at Table 5.3.

¹³⁶ *Id.*

¹³⁷ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

¹³⁸ *Id.*

telephony.¹³⁹ We have estimated that 245 of these are small under the SBA small business size standard.

67. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.¹⁴⁰ For Block F, an additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁴¹ These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.¹⁴² No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.¹⁴³ On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

68. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.¹⁴⁴ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million. A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million. The SBA has approved these small business size standards.¹⁴⁵ In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the

¹³⁹ “Trends in Telephone Service” at Table 5.3.

¹⁴⁰ See *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824, 61 FR 33859 (July 1, 1996) (*PCS Order*); see also 47 C.F.R. § 24.720(b).

¹⁴¹ See *PCS Order*, 11 FCC Rcd 7824.

¹⁴² See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332, 59 FR 37566 (July 22, 1994).

¹⁴³ FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997); see also *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436, 62 FR 55348 (Oct. 24, 1997).

¹⁴⁴ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, Docket No. ET 92-100, Docket No. PP 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 10456, 65 FR 35875 (June 6, 2000).

¹⁴⁵ See SBA Dec. 2, 1998 Letter.

number of licenses that will be awarded to small entities in future auctions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined. The Commission assumes, for purposes of this analysis that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

69. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.¹⁴⁶ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).¹⁴⁷ The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.¹⁴⁸ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

70. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.¹⁴⁹ We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.¹⁵⁰ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

71. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.¹⁵¹ There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services.¹⁵² Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.¹⁵³

2. Cable and OVS Operators

72. *Cable and Other Program Distribution.* This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating \$12.5 million or less in revenue annually.¹⁵⁴ According to Census Bureau data for 2002, there were a total of

¹⁴⁶ The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

¹⁴⁷ BETRS is defined in sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

¹⁴⁸ 13 C.F.R. § 121.201, NAICS code 517212.

¹⁴⁹ The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

¹⁵⁰ 13 C.F.R. § 121.201, NAICS codes 517212.

¹⁵¹ This service is governed by Subpart I of Part 22 of the Commission's rules. See 47 C.F.R. §§ 22.1001-22.1037.

¹⁵² 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

¹⁵³ *Id.*

¹⁵⁴ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513220 (changed to 517510 in October 2002).

1,191 firms in this category that operated for the entire year.¹⁵⁵ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.¹⁵⁶ Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

73. *Cable System Operators.* The Commission has developed its own small business size standards for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.¹⁵⁷ In addition, a "small system" is a system serving 15,000 or fewer subscribers.¹⁵⁸

74. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."¹⁵⁹ The Commission has determined that there are approximately 67,700,000 subscribers in the United States.¹⁶⁰ Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.¹⁶¹ Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,¹⁶² and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

75. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.¹⁶³ The SBA has created a small business size standard for Cable and Other Program Distribution.¹⁶⁴ This standard provides that a small entity is one with \$12.5 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.¹⁶⁵ Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate

¹⁵⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

¹⁵⁶ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

¹⁵⁷ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

¹⁵⁸ 47 C.F.R. § 76.901(c).

¹⁵⁹ 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

¹⁶⁰ *See* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

¹⁶¹ 47 C.F.R. § 76.901(f).

¹⁶² The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

¹⁶³ *See* 47 U.S.C. § 573.

¹⁶⁴ 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002).

¹⁶⁵ *See* <<http://www.fcc.gov/csb/ovs/csovscer.html>> (current as of March 2002).

OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

3. Internet Service Providers

76. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers (ISPs). ISPs “provide clients access to the Internet and generally provide related services such as web hosting, web page designing, and hardware or software consulting related to Internet connectivity.”¹⁶⁶ Under the SBA size standard, such a business is small if it has average annual receipts of \$21 million or less.¹⁶⁷ According to Census Bureau data for 2002, there were 2,529 firms in this category that operated for the entire year.¹⁶⁸ Of these, 2,437 firms had annual receipts of under \$10 million, and 47 firms had receipts of \$10 million or more but less than \$25 million.¹⁶⁹ Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

77. *All Other Information Services.* “This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives).”¹⁷⁰ Our action pertains to VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is \$6 million or less in average annual receipts.¹⁷¹ According to Census Bureau data for 1997, there were 195 firms in this category that operated for the entire year.¹⁷² Of these, 172 had annual receipts of under \$5 million, and an additional nine firms had receipts of between \$5 million and \$9,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

78. Should the Commission decide to adopt any regulations to ensure that all providers of telecommunications services meet consumer protection needs in regard to CPNI, the associated rules potentially could modify the reporting and recordkeeping requirements of certain telecommunications

¹⁶⁶ U.S. Census Bureau, “2002 NAICS Definitions: 518111 Internet Service Providers” (Feb. 2004) <www.census.gov>.

¹⁶⁷ 13 C.F.R. § 121.201, NAICS code 518111 (changed from previous code 514191, “On-Line Information Services,” in Oct. 2002).

¹⁶⁸ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 518111 (issued November 2005).

¹⁶⁹ *Id.* An additional 45 firms had annual receipts of \$25 million or more.

¹⁷⁰ U.S. Census Bureau, “2002 NAICS Definitions: 519190 All Other Information Services” (Feb. 2004) <www.census.gov>.

¹⁷¹ 13 C.F.R. § 121.201, NAICS code 519190 (changed from 514199 in Oct. 2002).

¹⁷² U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 514199 (issued Oct. 2000). This category was created for the 2002 Economic Census by taking a portion of the superseded 1997 category, “All Other Information Services,” NAICS code 514199. The data cited in the text above are derived from the superseded category.

providers. We could, for instance, require that telecommunications providers require customer password-related security procedures to access CPNI data and/or encrypt CPNI data.¹⁷³ We could also require that telecommunications providers maintain more extensive records regarding CPNI data and report additional CPNI information to their customers and the Commission.¹⁷⁴ We tentatively conclude that the Commission should amend its rules to require carriers to certify no later than January 1st (or other date specified by the Commission) of each year, covering the preceding calendar year, and to file the compliance certificate with the Commission within 30 days.¹⁷⁵ We further tentatively conclude that carriers should attach to this annual section 64.2009(e) certification an explanation of any actions taken against data brokers and a summary of all consumer complaints received in the past year concerning the unauthorized release of CPNI.¹⁷⁶ These proposals may impose additional reporting or recordkeeping requirements on entities. We seek comment on the possible burden these requirements would place on small entities.¹⁷⁷ Also, we seek comment on whether a special approach toward any possible compliance burdens on small entities might be appropriate.¹⁷⁸ Entities, especially small businesses, are encouraged to quantify the costs and benefits of any reporting requirement that may be established in this proceeding.¹⁷⁹

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

79. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹⁸⁰

80. The Commission's primary objective is to develop a framework for protecting a customer's CPNI, regardless of the customer's underlying technology. We seek comment here on the effect the various proposals described in the Notice will have on small entities, and on what effect alternative rules would have on those entities.¹⁸¹ We invite comment on ways in which the Commission can achieve its goal of protecting consumers while at the same time impose minimal burdens on small telecommunications service providers. With respect to any of our consumer protection regulations already in place, has the Commission adopted any provisions for small entities that we should similarly consider here? Specifically, we invite comment on whether the problems identified by EPIC are better or worse at smaller carriers.¹⁸² We invite comment on whether small carriers should be exempt from

¹⁷³ See Notice at paras. 16, 19.

¹⁷⁴ See Notice at paras. 18, 23, 29, 30.

¹⁷⁵ See Notice at para. 29.

¹⁷⁶ See *id.*

¹⁷⁷ See Notice at paras. 16, 18, 19, 23, 29.

¹⁷⁸ See Notice at para. 30.

¹⁷⁹ See Notice at paras. 12, 19, 20, 23.

¹⁸⁰ 5 U.S.C. § 603(c).

¹⁸¹ See Notice at paras. 11, 12, 16, 18, 19, 23, 29, 30.

¹⁸² See Notice at para. 11.

password-related security procedures to protect CPNI.¹⁸³ We invite comment on the benefits and burdens of recording audit trails for the disclosure of CPNI on small carriers.¹⁸⁴ We invite comment on whether requiring a small carrier to encrypt its stored data would be unduly burdensome.¹⁸⁵ We solicit comment on the cost to a small carrier of notifying a customer upon release of CPNI.¹⁸⁶ We seek comment on whether the Commission should amend its rules to require carriers to file annual certifications concerning CPNI and whether this requirement should extend to only telecommunications carriers that are not small telephone companies as defined by the Small Business Administration, and whether small carriers should be subject to different CPNI-related obligations.¹⁸⁷

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

81. None.

¹⁸³ See Notice at para. 16.

¹⁸⁴ See Notice at para. 18.

¹⁸⁵ See Notice at para. 19.

¹⁸⁶ See Notice at para. 23.

¹⁸⁷ See Notice at paras. 29-30.

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: *Implementation of the Telecommunications Act of 1996; Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC Docket No. 96-115, RM-11277*

With this Notice of Proposed Rulemaking, we ask how we can better protect customers' private telephone records from unauthorized disclosure. This item responds directly to the petition filed with the Commission by the Electronic Privacy Information Center (EPIC). In its Petition, EPIC expresses concerns about the sufficiency of carrier practices relating to customer proprietary network information (CPNI) in light of numerous reports that online "data brokers" and private investigators are engaged in the sale of customers' personal telephone records. EPIC claims that these data brokers are obtaining unauthorized access to CPNI through various possible means, including through "pretexting" – that is, by pretending to be a customer seeking access to that customer's own telephone records. Today, we seek comment on whether additional Commission rules are necessary to strengthen the safeguards currently in place to protect consumers' sensitive telephone record data. I support this Notice because I am deeply concerned about reports of companies trafficking in personal telephone records and I want to thank my fellow Commissioners for considering this Notice expeditiously.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Implementation of the Telecommunications Act of 1996; Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information*, CC Docket No. 96-115, RM-11277

American consumers deserve the security of knowing that their personal phone records are not for sale. By starting this proceeding, we pledge to protect consumers from unscrupulous data brokers who have built a business on selling information about our private conversations. The Commission also commits to adjusting its rules to further safeguard privacy and prevent the unauthorized disclosure of customer proprietary network information (CPNI). For these reasons, I am pleased to support today's effort.

Privacy issues must always be on the Commission's front burner – but sometimes they languish. We have a three-and-a-half-year-old Notice of Proposed Rulemaking on CPNI safeguards and enforcement that needs to be acted on. We have a three-year-old proceeding on the dissemination of CPNI to unaffiliated third parties, initiated by a petition from the Arizona Corporation Commission, that also has stalled. And last year, we reclassified wireline broadband Internet access services, but left for another day the chilling question of whether or not privacy protections followed this regulatory remix. It's time to move ahead. I hope today we begin a new chapter.

We live in a day and age where our cherished right to privacy suffers from a daily fusillade of data gathering. Companies can monitor what we do, stores can study what we buy, technologies can track what we watch, see and hear. Consumers rightfully expect that regulatory agencies like this one will do something to protect them from this bombardment, to give them a measure of confidence that not every aspect of their personal information is available to the highest bidder.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: *Implementation of the Telecommunications Act of 1996; Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information*, CC Docket No. 96-115, RM-11277

I am very pleased that we open this rulemaking to address an issue of momentous personal importance to American consumers: the troublesome proliferation of telephone call records being made available on the Internet without customers' knowledge or consent. Last summer, a watchful public interest group, the Electronic Privacy Information Center (EPIC), alerted the FCC to this trend and filed a petition asking us to tighten our rules for protecting consumer call records. We take an important step here by granting EPIC's petition and issuing this Notice of Proposed Rulemaking to find ways to tighten our rules and provide greater security for these sensitive consumer records.

Telephone call records can include some of the most private personal information about an individual. Finding out who people are calling and for how long can be like picking someone's brain about their friends, plans or business dealings. Unauthorized access to call records is a highly invasive intrusion into both the personal and professional lives of consumers. Disclosure of these records is far more than a mere annoyance; indeed, it can lead to tragic consequences.

Congress recognized the sensitivity of this information in the Telecommunications Act of 1996 when it prohibited phone companies from using or disclosing customer proprietary network information without the customer's approval. It charged the Commission with enforcing this privacy protection and the Commission has previously adopted a set of rules designed to ensure that telephone companies have effective safeguards in place.

Telephone companies are required to have firewalls in place to protect consumers' private information but instead these records are blazing all over the Internet, available on numerous web sites even as we issue this Notice. I appreciate the recent efforts of several phone companies to take legal action against data brokers. This is an important step to shutting these data brokers down. Still, the Commission must also take immediate steps to ensure that we have sufficiently strong consumer privacy rules in place and that phone companies are employing effective safeguards to shield this data from harm. So, our efforts here to strengthen our rules are critical and time sensitive. We ask the right questions in this Notice, and I'm glad that we once again seek comment on how to protect consumer privacy as communications migrate to broadband and IP platforms. Our challenge now will be to move quickly to shut the tap on this information drain.

I also support our efforts to bring swift enforcement action against companies that are violating our rules. Even as we look to improve our rules and as Congress considers additional safeguards, we must use our existing authority to quickly address abuses of this private information.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re: *Implementation of the Telecommunications Act of 1996; Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC Docket No. 96-115, RM-11277*

The brokerage of personal information – whether it be personal identity, financial records, or a list of your phone calls – is intolerable. “Pretexting” is nothing more than stealing; robbing consumers in a variety of slick ways of their most personal information.

I support this Notice of Proposed Rulemaking and Chairman Martin’s call for swift action by this Commission to see that we are doing our part to protect the consumers who look to us to ensure that the proper rules are in place to keep their personal phone data confidential. State Attorneys General have been very active pursuing the companies behind these criminal acts, and I commend them for their efforts. Also, our partners at the Federal Trade Commission have been actively investigating the practice of fraudulently obtaining and selling personal data, including call records.

While my philosophy leans towards market-based solutions with minimal government intervention, this issue provides a perfect example of the appropriateness of government intervention, investigation, and enforcement. Indeed, national security is of utmost importance, but so is personal security. We must be as vigilant to protect our personal digital borders as we are our nation’s physical borders.

The action we take today should send a clear message to information snatchers – who are attacking our citizens in the privacy of their own homes – that we take seriously our obligation to protect consumers’ most personal information.