

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	File No.: EB-TCD-12-0000219 ¹
)	
Think 12 Corporation d/b/a Hello Depot)	NAL/Acct. No.: 200932170826
)	
)	FRN: 0010729283

ORDER ON REVIEW

Adopted: December 20, 2012

Released: December 21, 2012

By the Commission:

I. INTRODUCTION

1. In this Order on Review, we deny the Application for Review filed by Think 12 Corporation (Think 12),² of the October 28, 2011 *Memorandum Opinion and Order*³ of the Enforcement Bureau (Bureau), in which the Bureau denied Think 12's petition for reconsideration of a February 25, 2011 *Forfeiture Order*.⁴ We find that Think 12 has not provided grounds upon which to overturn the Bureau's decision.

II. BACKGROUND

2. Think 12 is a telecommunications carrier based in Itasca, Illinois that resells interexchange services. As a telecommunications carrier, Think 12 is subject to the requirements of the Communications Act of 1934, as amended (Act or Communications Act), relating to customer proprietary network information (CPNI), set forth in Section 222 of the Act,⁵ as well as the Commission's implementing rules and orders.⁶ Pursuant to Section 64.2009(e) of the Commission's rules, carriers (and certain others) must file annually, on or before March 1, a certification with the Commission, over the signature of an officer, that the officer has personal knowledge that the carrier has established operating

¹ This case was formerly assigned the file number EB-08-TC-5708. In January 2012, the Telecommunications Consumers Division assigned the case a new number.

² Think 12 filed an Application for Review under Section 47 C.F.R. § 1.115 of the Commission's rules on Nov. 25, 2011.

³ *Think 12 Corporation d/b/a Hello Depot*, Memorandum Opinion and Order, 26 FCC Rcd 15152 (Enf. Bur. 2011) (*Memorandum Opinion and Order*).

⁴ *Think 12 Corporation d/b/a Hello Depot*, Order of Forfeiture, 26 FCC Rcd 2135 (Enf. Bur. 2011) (*Forfeiture Order*).

⁵ Section 222 of the Act, 47 U.S.C § 222, provides: "Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier."

⁶ 47 C.F.R. §§ 64.2001-2011.

procedures sufficient to ensure compliance with the Commission's CPNI rules.⁷

3. On September 5, 2008, the Bureau issued a letter of inquiry (LOI) to Think 12 asking whether the company had filed a Section 64.2009(e) CPNI compliance certification for calendar year 2007.⁸ Think 12 responded by submitting a CPNI certification for calendar year 2007, dated September 18, 2008.⁹

4. On February 24, 2009, the Bureau released the *Omnibus NAL*¹⁰ against numerous companies, including Think 12, proposing a monetary forfeiture of \$20,000 for the apparent failure to timely file a CPNI certification as required by Section 64.2009(e) of the Commission's rules and the Commission's *EPIC CPNI Order*.¹¹ The NAL ordered the companies to either pay the proposed forfeiture or file a written response within 30 days stating why the proposed forfeiture should be reduced or canceled. Think 12 submitted a response to the *Omnibus NAL* on March 25, 2009.¹² In its response, Think 12 conceded that it was unaware of the CPNI compliance certification filing requirement until it received the LOI.¹³ On February 25, 2011, the Bureau issued its *Forfeiture Order*, finding that Think 12's admitted ignorance of the law, as well as its other arguments—that it was unable to pay the forfeiture, had a history of compliance with CPNI rules, and had not previously received CPNI complaints—were insufficient to cancel or reduce the forfeiture.¹⁴

5. On March 28, 2011, Think 12 submitted a petition for reconsideration.¹⁵ In the October 28, 2011 *Memorandum Opinion and Order* the Bureau denied the petition, concluding that Think 12 had not raised new facts or shown an error or omission in the *Forfeiture Order*.¹⁶ Think 12 thereafter filed an Application for Review of the *Memorandum Opinion and Order* on November 25, 2011.¹⁷

III. DISCUSSION

6. In this Order on Review, we deny Think 12's Application for Review and affirm the Bureau's *Memorandum Opinion and Order*. Think 12's Application for Review largely reiterates

⁷ 47 C.F.R. § 64.2009(e). The carrier must provide a statement accompanying the certification explaining how its operating procedures ensure that it is or is not in compliance with the Commission's CPNI rules. In addition, the carrier must include an explanation of any actions taken against data brokers and a summary of all customer complaints received in the past year concerning the unauthorized release of CPNI. This filing must be made annually on or before March 1 in EB Docket No. 06-36, for data pertaining to the previous calendar year.

⁸ See Letter from Marcy Greene, Deputy Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Think 12 (Sept. 5, 2008) at 1 (on file in EB-TCD-12-0000219).

⁹ See Think 12's "Annual 47 C.F.R. § 64.2009(e) CPNI Certification," dated Sept. 18, 2008.

¹⁰ *Annual CPNI Certification*, Omnibus Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 2299 (Enf. Bur. 2009) (*Omnibus NAL*).

¹¹ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6953, para. 51 (2007) (*EPIC CPNI Order*), *aff'd sub nom. Nat'l Cable & Telecom. Assoc. v. FCC*, 555 F.3d 996 (D.C. Cir. 2009).

¹² See Response to Omnibus Notice of Apparent Liability for Forfeiture (filed Mar. 25, 2009) (on file in EB-TCD-12-0000219) (Response to NAL).

¹³ See Response to NAL, Declaration of Jeom Heui Lee at 1.

¹⁴ See *Forfeiture Order*, 26 FCC Rcd at 2137-40, paras. 6-10.

¹⁵ See Petition for Reconsideration (filed Mar. 28, 2011) (on file in EB-TCD-12-0000219).

¹⁶ *Memorandum Opinion and Order*, 26 FCC Rcd at 15154, para. 6.

¹⁷ Application for Review (filed Nov. 25, 2011) (on file in EB-TCD-12-0000219).

arguments it made before the Bureau in its Petition for Reconsideration, and provides additional new financial information to support its claim that it is unable to pay the forfeiture. We agree with the Bureau's disposition of the arguments Think 12 made before, and find the new financial information procedurally improper and, in any event, substantively unpersuasive, as discussed below.

7. Think 12 raised three issues in its Petition for Reconsideration: that due to financial difficulties it would be unable to pay the forfeiture amount,¹⁸ that it was in compliance with our CPNI rules and had a confidentiality policy for handling customers' information, even though it had failed to timely file the compliance certification;¹⁹ and that it had no history of prior complaints regarding misuse or mishandling of customer information.²⁰ The Bureau declined to reconsider Think 12's claim of financial hardship; based on the tax returns Think 12 had submitted for years 2004, 2005, and 2006 and other information derived from its investigation, the Bureau concluded that Think 12 had not demonstrated an inability to pay the proposed forfeiture amount.²¹ With respect to Think 12's assertions that it had a history of protecting CPNI—as evidenced by its confidentiality policy and the absence of complaints—the Bureau declined to reconsider imposing the forfeiture because it concluded that Think 12 failed to demonstrate that the company met its obligation to complete and independently maintain annual CPNI compliance certifications.²²

8. In its Application for Review, Think 12 presents no new argumentation with respect to the latter two issues raised in its Petition for Reconsideration. Rather, it merely incorporates that Petition by reference. We agree with the Bureau's analysis of those issues in the *Memorandum Opinion and Order* and reject Think 12's arguments for the reasons stated therein.

9. With respect to its argument that it cannot pay the proposed forfeiture, Think 12 does raise a new argument in its Application for Review; it has now produced new financial information that, it asserts, raises an "important or material question of fact regarding financial hardship" that the Bureau did not address.²³ This new financial information consists of tax returns for years 2007, 2008, and 2009, as well as unaudited financial statements for 2010 and 2011.

10. As a matter of procedure, the Commission does not consider newly presented factual information at this stage in a proceeding. The Commission's rules explicitly state: "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."²⁴ Think 12 did not present, and the Bureau has had no opportunity to consider, new financial information. Thus, procedurally, the Application for Review must be denied. Enforcement of our procedural rules promotes orderliness and finality in the administrative process and thereby serves the public interest, convenience, and necessity.²⁵ It would be especially inappropriate to accept Think 12's newly-submitted financial information at this juncture because the Bureau previously invited the company to provide such information, but it did not do so. In issuing the penalty of \$20,000 in

¹⁸ Petition for Reconsideration at 2-3.

¹⁹ *Id.* at 3-4.

²⁰ *Id.* at 4-5.

²¹ *Memorandum Opinion and Order*, 26 FCC Rcd at 15155, para. 9.

²² Think 12 conceded that it did not meet that obligation, arguing it never knew such certifications were required. *See id.* at 3-4 ("[Think 12] failed to notice and educate itself with respect to the specific rules and the filing requirements thereunder. . .").

²³ Application for Review at 2.

²⁴ 47 C.F.R. § 1.115(c).

²⁵ *See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, Memorandum Opinion and Order, 15 FCC Rcd 10579, 10580, para. 3 (2000).

the *Forfeiture Order*, the Bureau considered tax returns for years 2004, 2005, and 2006 provided by Think 12.²⁶ In considering Think 12's petition for reconsideration of that order, the Bureau requested that the company produce additional updated tax returns, but as stated in the *Memorandum Opinion and Order*, "the company did not avail itself of that opportunity."²⁷ In its Application for Review, Think 12 candidly admits that it failed to provide updated tax returns for years 2007-2009, and simply states that its inaction was due to reliance on legal advice.²⁸ We thus dismiss Think 12's application for review.

11. As an alternative and independent basis for our decision, we conclude that such information does not support its inability to pay argument. Based on our review of Think 12's tax returns for 2007-2009 and unaudited financial statements for 2010 and 2011,²⁹ and considering a factor within the range that the Commission has previously found reasonable in determining inability to pay,³⁰ we conclude that the forfeiture amount is reasonable and that Think 12 has not demonstrated an inability to pay.

12. Accordingly, upon review of the Application for Review and the entire record herein, we conclude that Think 12 has failed to demonstrate that the Bureau erred in imposing a forfeiture for a violation of Section 222 of the Communications Act and Section 64.2009 of the Commission's rules. We find that the Bureau properly decided the matters before it and we uphold the Bureau's decision to impose a \$20,000 forfeiture in its *Forfeiture Order* and *Memorandum Opinion and Order*.

IV. ORDERING CLAUSES

13. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 405 of the Act and Section 1.115 of the Commission's rules, Think 12 Corporation's Application for Review **IS DISMISSED**. As an alternative independent holding as set forth herein, the Application for Review **IS DENIED**.

14. It is **FURTHER ORDERED** that the *Forfeiture Order* and *Memorandum Opinion and Order* **ARE AFFIRMED** and that pursuant to Section 503(b) of the Act, Think 12 Corporation **SHALL FORFEIT** to the U.S. Government the sum of \$20,000.

15. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release date of this Order on Review.³¹ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.³² Think 12 Corporation shall send

²⁶ *Forfeiture Order*, 26 FCC Rcd at 2139, para 9.

²⁷ *Memorandum Opinion and Order*, 26 FCC Rcd at 15155, para 9.

²⁸ Application for Review at 2.

²⁹ Section 1.80(b)(4) of our rules provides that a downward adjustment or cancellation of the base forfeiture amount may be warranted in circumstances where the violator has demonstrated an inability to pay. 47 C.F.R. § 1.80(b)(4). In the *Omnibus NAL* the Bureau stated: "The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted." *Omnibus NAL*, 24 FCC Rcd at 2304, para. 16.

³⁰ See, e.g., *Hoosier Broadcasting Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 8640, 8641, para. 7 (2000) (finding that penalty of approximately 7.6 percent of target's gross revenues not excessive); *Local Long Distance, Inc.*, Forfeiture Order, 15 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues).

³¹ 47 C.F.R. § 1.80.

³² 47 U.S.C. § 504(a).

electronic notification of payment to Johnny Drake at johnny.drake@fcc.gov on the date said payment is made.

16. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.³³ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

17. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554.³⁴ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

18. **IT IS FURTHER ORDERED** that a copy of this Order on Review shall be sent by Certified Mail Return Receipt Requested and First Class Mail to Think 12 Corporation d/b/a Hello Depot at 650 East Devon Avenue, Suite 133, Itasca, IL 60143.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³³ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

³⁴ See 47 C.F.R. § 1.1914.