

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

In the Matter of	)	File No.: EB-TCD-12-0000221 <sup>1</sup>
	)	
USA Teleport, Inc.	)	NAL/Acct. No.: 201032170920
	)	
	)	FRN: 0003775566

**ORDER ON REVIEW**

**Adopted: January 7, 2013**

**Released: January 8, 2013**

By the Commission:

**I. INTRODUCTION**

1. In this Order on Review we deny the “Answer to Memorandum Opinion and Order,” which we treat as an application for review, filed by USA Teleport, Inc. (USAT) on May 18, 2011.<sup>2</sup> USAT seeks review of the April 29, 2011 *Memorandum Opinion and Order*<sup>3</sup> of the Enforcement Bureau (Bureau) in which the Bureau denied USAT’s petition for reconsideration of a *Forfeiture Order*<sup>4</sup> issued on March 3, 2011. We find that USAT has not provided grounds upon which to overturn the Bureau’s decision.

**II. BACKGROUND**

2. USAT is a carrier based in North Miami Beach, Florida providing dial-around long distance services.<sup>5</sup> As a telecommunications carrier, USAT 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,<sup>6</sup> as well as the Commission’s

<sup>1</sup> This case was formerly assigned the file number EB-08-TC-5801. In January 2012, the Telecommunications Consumers Division assigned the case a new file number.

<sup>2</sup> Commission rules do not provide for the filing of an “Answer” to a Memorandum Opinion and Order. However, because the filing appears to seek Commission review of an action taken by the Enforcement Bureau and was filed within thirty days of the public notice of that action, we exercise our discretion to treat USAT’s filing as an application for review under Section 1.115 of the Commission’s rules, 47 C.F.R. § 1.115, and refer to it as such in the instant order.

<sup>3</sup> *USA Teleport, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 6431 (Enf. Bur. 2011) (*Memorandum Opinion and Order*).

<sup>4</sup> *USA Teleport, Inc.*, Order of Forfeiture, 26 FCC Rcd 2456 (Enf. Bur. 2011) (*Forfeiture Order*).

<sup>5</sup> See Email from Noemi Dolinsky, USA Teleport, to Marcy Greene, Deputy Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (Sept. 9, 2008) (on file in EB-TCD-12-0000221) (Dolinsky Email). The Dolinsky Email is attached to the Application for Review.

<sup>6</sup> 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.”

implementing rules and orders.<sup>7</sup> Pursuant to Section 64.2009(e) of the Commission's rules,<sup>8</sup> carriers and interconnected Voice over Internet Protocol (VoIP) service providers<sup>9</sup> 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 procedures sufficient to ensure compliance with the Commission's CPNI rules.

3. On September 5, 2008, the Telecommunications Consumers Division (TCD) of the Enforcement Bureau issued a letter of inquiry (LOI) to USAT asking whether the company had filed a Section 64.2009(e) CPNI compliance certification for calendar year 2007.<sup>10</sup> USAT responded by email on September 9, 2008,<sup>11</sup> and submitted a CPNI certification for calendar year 2007 the following day.<sup>12</sup> On February 24, 2009, TCD released the *Omnibus NAL*<sup>13</sup> against numerous companies, including USAT, 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*.<sup>14</sup> 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. USAT submitted a response to the *Omnibus NAL* on March 2, 2009.<sup>15</sup> USAT's arguments were considered and rejected in the March 3, 2011 *Forfeiture Order*.

4. On March 18, 2011, USAT filed an "Answer to Order of Forfeiture" which the Bureau treated as a petition for reconsideration (Petition for Reconsideration).<sup>16</sup> In a *Memorandum Opinion and*

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<sup>7</sup> 47 C.F.R. §§ 64.2001–64.2011.

<sup>8</sup> 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.

<sup>9</sup> An "interconnected Voice over Internet protocol (VoIP) service is a service that: (1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user's location; (3) Requires Internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network." 47 C.F.R. § 9.3.

<sup>10</sup> See Letter from Marcy Greene, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, FCC, to USA Teleport, Inc. at 1 (Sept. 5, 2008) (on file in EB-TCD-12-0000221).

<sup>11</sup> See Dolinsky Email.

<sup>12</sup> See USAT's "Annual 47 C.F.R. § 64.2009(e) CPNI Certification," dated Sept. 10, 2008.

<sup>13</sup> *Annual CPNI Certification*, Omnibus Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 2299 (Enf. Bur. 2009) (*Omnibus NAL*).

<sup>14</sup> *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).

<sup>15</sup> See Letter from Noemi Dolinsky, USA Teleport, to the Office of the Secretary, FCC, and to Marcy Greene, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, FCC, (Mar. 2, 2009) (on file in EB-TCD-12-0000221) (Response to NAL).

<sup>16</sup> See Answer to Order of Forfeiture (Mar. 8, 2011) (on file in EB-TCD-12-0000221). The Bureau treated USAT's filing as a petition for reconsideration under Section 1.106 of the Commission's rules, 47 U.S.C. § 1.106.

*Order* released April 29, 2011, the Bureau found that USAT had largely repeated the arguments it had made in its response to the *Omnibus NAL* and concluded that USAT had raised no new facts and relied on arguments that revealed no error or omission in the *Forfeiture Order*.<sup>17</sup> The Bureau stated that the fact that USAT failed to timely file a CPNI compliance certificate for calendar year 2007 was not disputed and affirmed the *Forfeiture Order* and denied USAT's petition for reconsideration.<sup>18</sup> USAT filed an "Answer to Memorandum Opinion & Order" on May 18, 2011 which we are treating as an application for review (Application for Review).<sup>19</sup>

### III. DISCUSSION

5. By *Memorandum Opinion and Order* the Bureau denied USAT's Petition for Reconsideration filed on March 18, 2011, affirmed the *Forfeiture Order* and ordered USAT to pay the forfeiture amount of \$20,000.<sup>20</sup> For the reasons discussed below, we agree with the Bureau's disposition of the case and deny USAT's Application for Review.

6. In its Application for Review, USAT largely repeats the arguments it made before the Bureau in its Petition for Reconsideration. USAT's principal argument on reconsideration and again in its Application for Review continues to be that "USAT filed late . . . because the due date of the filing was unknown by [USAT]."<sup>21</sup> In essence USAT's argument is that because it was unaware of the filing requirement, it should not be held liable for violating the Commission's rules.<sup>22</sup> In its Application for Review, however, USAT now seems to be taking this argument a step further by stating: "The Commission cannot reaffirm the Forfeiture Order because in this case the administrative oversight that caused the lack of knowledge is the responsibility of the Commission."<sup>23</sup> USAT cites a January 28, 2011 Enforcement Advisory<sup>24</sup> and other recent Bureau actions designed to enhance compliance with the CPNI

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<sup>17</sup> *Memorandum Opinion and Order*, 26 FCC Rcd at 6433, para. 8.

<sup>18</sup> *Id.*, 26 FCC Rcd at 6434, paras. 9, 16, 17.

<sup>19</sup> Answer to Memorandum Opinion & Order (May 18, 2011) (on file in EB-TCD-12-0000221) (Application for Review). We treat this filing as an application for review. *See supra* note 1.

<sup>20</sup> *Memorandum Opinion & Order*, 26 FCC Rcd at 6433-37, paras. 8-14.

<sup>21</sup> *See, e.g.*, Application for Review at para. 7.

<sup>22</sup> *See, e.g., id.* at paras. 5, 7, 8, 9, 10, and 13. USAT stated that it "filed late a form because the due date of the filing was unknown by it." *Id.* at para. 7. As part of its argument for avoiding liability based on lack of knowledge, USAT also challenged the *Forfeiture Order's* finding that the violation was "willful." USAT argued that the violation could not have been "willful" because it was unaware of the rule requiring that it file a CPNI compliance certification by March 1<sup>st</sup> 2008 for the year 2007. *Memorandum Opinion and Order*, 26 FCC Rcd at 6434, para. 9. In its Application for Review, however, USAT does not contest the Bureau's findings with respect to the violation being "willful".

<sup>23</sup> Application for Review at para. 9.

<sup>24</sup> FCC Enforcement Advisory, "Telecommunications Carriers and Interconnected VOIP Providers Reminded of Requirement to File Annual Reports Certifying Compliance with Commission Rules Protecting Customer Proprietary Network Information," 26 FCC Rcd 650 (Enf. Bur. 2011).

certification filing requirement<sup>25</sup> as support for its view that the Commission erred in not giving USAT and other carriers and interconnected VoIP providers the same type of notice in the past.<sup>26</sup>

7. We reject USAT's contention that it could not or should not be held liable for failure to file its CPNI compliance certification because it was unaware of its obligation under the rules and we agree with the Bureau's decision below. To begin with, we find that the Bureau's recent actions designed to enhance compliance with our CPNI rules have no bearing on this case. As the Bureau found in the *Memorandum Opinion and Order*,<sup>27</sup>

to the extent USAT argues it was entitled to personal notice of the *EPIC CPNI Order*'s amendment to section 64.2009(e) of the Commission's rules,<sup>28</sup> that contention is utterly without merit. The amendment requiring carriers to file CPNI compliance certifications with the Commission was promulgated pursuant to the Commission's general rulemaking authority.<sup>29</sup> As such, proper and timely publication in the Federal Register—which USAT does not dispute occurred here—furnished sufficient notice under section 553(b) of the Administrative Procedure Act.<sup>30</sup>

Additionally, in the *Memorandum Opinion and Order*, the Bureau found that “on the facts of this case, USAT's claimed ignorance of the certification filing requirement does not warrant mitigation of the forfeiture. As we have repeatedly held, ‘administrative oversight,’ ‘lack of knowledge,’ or ‘erroneous beliefs’ are not factors that warrant a forfeiture's reduction.”<sup>31</sup> In short, the fact remains that USAT failed to timely file its CPNI compliance certification and nothing in USAT's Application for Review or the record below persuades us that the Bureau erred in finding USAT violated our CPNI certification rules. Accordingly, we agree with the Bureau's disposition of this matter and affirm its decision.

8. USAT also argued in its Petition for Reconsideration and again in its Application for Review that in essence (1) no penalty should be imposed because it had a history of compliance with the Commission's CPNI rules, and (2) while USAT did not submit any evidence of financial hardship to justify a reduction in the penalty, it asserts that it is entitled to such reduction.<sup>32</sup>

9. We agree with the Bureau's disposition of these arguments. With regard to USAT's argument that it has a history of compliance with the CPNI rules, the relevant fact for purposes of this case is that USAT did not meet its obligation to complete and independently maintain annual CPNI

<sup>25</sup> See *Annual CPNI Certification, Omnibus Notice of Apparent Liability for Forfeiture and Order*, 26 FCC Rcd 2160 (Enf. Bur. 2011).

<sup>26</sup> Application for Review at para. 9.

<sup>27</sup> *Id.*, 26 FCC Rcd at 6436, para. 13.

<sup>28</sup> See Petition for Reconsideration at 1–4, paras. 2, 6, 8, Conclusion.

<sup>29</sup> See *EPIC CPNI Order*, 22 FCC Rcd at 6933, para. 11 (summarizing the history of the rulemaking).

<sup>30</sup> 5 U.S.C. § 553(b); see *United States v. Daniels*, 418 F. Supp. 1074, 1077 (D.S.D. 1976).

<sup>31</sup> *Memorandum Opinion and Order*, 26 FCC Rcd at 6434, para. 9 (citing *STI Prepaid, LLC*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 17836, 17845, para. 20 (Enf. Bur. 2010) (citing *So. Cal. Broad. Co. Licensee, Radio Station KIEV (AM) Glendale, Cal.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387, para. 3 (1991)).

<sup>32</sup> Petition for Reconsideration at paras. 7-9; Application for Review at paras. 7, 9, 12, and 14.

compliance certifications. Indeed, USAT expressly acknowledges that it filed its certification form “late”.<sup>33</sup> The fact that USAT may or may not have complied with *other* CPNI rules is simply not relevant to the question of whether USAT violated section 64.2009(e). While USAT may believe there is little value in the Commission’s requirement that it file an annual certification form,<sup>34</sup> licensees have an obligation to follow *all* of the Commission’s rules, not just those that they think are important. With respect to USAT’s claim of financial hardship, we observe, as the Bureau did below, that “USAT has offered no evidence of financial hardship—let alone evidence of the kind we have expressly explained is required.”<sup>35</sup> Accordingly, we affirm the Bureau’s decision.

10. Finally,<sup>36</sup> we note that in the background section of USAT’s Application for Review it asserts for the first time that the Bureau’s characterization of its service as a “telecommunications service” in the *Forfeiture Order* was incorrect.<sup>37</sup> In this regard USAT asserts that it is a “VoIP long distance provider.”<sup>38</sup> Although the Commission has not addressed whether interconnected VoIP service constitutes a telecommunications service, it has elected to impose the same CPNI requirements on providers of both services.<sup>39</sup> As a result, *both* interconnected VoIP and telecommunications service providers must file annual CPNI certifications. Further, at the time the Bureau released the *Omnibus NAL* and assessed the forfeiture against USAT, USAT was a Commission licensee<sup>40</sup> and the amount of the forfeiture, \$20,000, thus was well within the range of forfeitures that could be assessed for continuing violations by a Commission licensee.<sup>41</sup>

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<sup>33</sup> Application for Review at para. 7.

<sup>34</sup> Application for Review at para. 12.

<sup>35</sup> *Id.*, para 14.

<sup>36</sup> USAT also suggests for the first time that the Bureau failed to comply with its own ordering clauses by failing to send a copy of the *Forfeiture Order* via certified mail. Application for Review at para 1. USAT admits that it received an electronic copy of the *Forfeiture Order* and that it subsequently timely filed its Application for Review. *Id.* Thus, even if the Bureau failed to send the *Forfeiture Order* by certified mail, we note that such failure is harmless error, not prejudicial procedural error warranting Commission review. In *Shinseki v. Sanders*, 556 U.S. 396 (2009) (*Shinseki*), the Supreme Court stated that under the harmless error rule, “the burden of showing that an error is harmful normally falls upon the party attacking the agency’s determination.” *Shinseki*, 556 U.S. at 409, *citing* among other cases, *American Airlines, Inc. v. Dept. of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000) (declining to remand where appellant failed to show that error in administrative proceeding was harmful). Because USAT admits that it received an electronic copy of the Forfeiture Order, it has not shown that its failure to receive a copy of the Forfeiture Order by certified mail was harmful. We conclude that such failure provides no basis upon which to alter the Bureau’s decision.

<sup>37</sup> Application for Review at para. 2.

<sup>38</sup> *Id.*

<sup>39</sup> The CPNI rules impose obligations on telecommunications carriers. The rules define “carrier” and “telecommunications carrier” to have the same meaning as that set forth for “telecommunications carrier” in the Act, 47 U.S.C. § 153(44), and to include “an entity that provides interconnected VoIP service.” 47 C.F.R. § 64.2003(o).

<sup>40</sup> *See, e.g.*, Radio Station Authorization, File No. SES-LIC-19990604-00935, Call Sign E990225, grant date: 08/20/1999, expiration date: 08/20/2009; Radio Station Authorization, File No. SES-MOD-20000721-01188, Call Sign E980299, grant date: 03/06/2001, expiration date: 8/20/2009.

<sup>41</sup> Section 503(b)(2)(C) of the Act gives the Commission discretion to assess forfeitures for non-common carriers that hold Commission licenses such as USAT of up to \$16,000 for each violation or \$112,000 for continuing violations. 47 U.S.C. § 503(b)(2) (C); *see also* 47 C.F.R. § 1.80(b)(3). In 2008, the Commission amended Section (continued....)

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

#### IV. ORDERING CLAUSES

12. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 405 of the Act and Section 1.115 of the Commission's rules, the Answer to Memorandum Opinion and Order filed by USA Teleport, Inc., which we treat as an Application for Review, **IS DENIED**.

13. 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, USA Teleport, Inc. **SHALL FORFEIT** to the U.S. Government the sum of \$20,000.

14. 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.<sup>42</sup> 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.<sup>43</sup> USA Teleport, Inc. shall send electronic notification of payment to Johnny Drake at [johnny.drake@fcc.gov](mailto:johnny.drake@fcc.gov) on the date said payment is made.

15. 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.<sup>44</sup> 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

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1.80(b)(3) of the rules to increase the maximum forfeiture amounts in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. *See Amendment of Section 1.80 of the Commission's Rules and Adjustment for Forfeiture Maxima to Reflect Inflation*, Order, 23 FCC Rcd 9845, 9847 (2008) (adjusting the maximum statutory amounts for non-common carriers and others not to exceed \$16,000 for a single violation and \$112,500 for continuing violations). As the Bureau correctly found in the *Forfeiture Order* and affirmed in the *Memorandum Opinion and Order*, USAT's failure to file its 2007 CPNI compliance certification was a "continuing violation until cured." *Forfeiture Order*, 26 FCC Rcd at 2459, para. 8; *Memorandum Opinion and Order*, 26 FCC Rcd at 6435, para. 12. Because USAT did not cure the violation until September 10, 2008, over six months after the filing deadline, the Bureau was well within its statutory authority to assess a \$20,000 forfeiture for violation of the Act and our CPNI rules. While we acknowledge USAT's characterization of its service as VoIP long distance without ruling on whether, in fact, it is a VoIP provider or a telecommunications service provider, we find that the classification of USAT's service has no bearing on our finding of liability in this case.

<sup>42</sup> 47 C.F.R. § 1.80.

<sup>43</sup> 47 U.S.C. § 504(a).

<sup>44</sup> An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

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.

16. 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.<sup>45</sup> If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by telephone, 1-877-480-3201, or by e-mail, [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov).

17. **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 USA Teleport, Inc. at 127th NE 167th Street, Unit B, North Miami Beach, FL 33162.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>45</sup> See 47 C.F.R. § 1.1914.