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

In the Matter of	)	
	)	
Protecting the Privacy of Customers of Broadband and Other Telecommunications Services	)	WC Docket No. 16-106
	)	

Reply Comments of WTA – Advocates for Rural Broadband

WTA – Advocates for Rural Broadband[1] hereby submits reply comments in response to petitions for reconsideration and oppositions regarding the Commission's Broadband Privacy Order.[2] Because every dollar spent on unnecessary or unjustified regulatory hurdles is a dollar diverted from the broadband deployment and adoption efforts for rural carriers, WTA urges the Commission to reconsider various rules that are unduly burdensome for carriers and provide little, if any, consumer benefit.

I. The Commission Failed to Meaningfully Consider Arguments that Section 222 Rules May Lawfully Apply Only to Customer Proprietary Network Information of Existing Customers.

Several petitioners show that Section 222(a) does not provide general regulatory authority to adopt rules regarding a newly defined category of customer proprietary information ("CPI") above and beyond specific authority in Section 222(c) regarding CPNI.[3] WTA urges grant of such petitions and recalibration of rules to exclude information that does not fit the

[1] WTA – Advocates for Rural Broadband is a national trade association representing more than 325 rural telecommunications providers offering voice, broadband and video services in rural America. WTA members serve some of the most rural and hard-to-serve communities in the country and are providers of last resort to those communities. The average member has fewer than 25 employees, many of whom "wear multiple hats.

[2] Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Report and Order, FCC 16-148 (rel. Nov. 2, 2016) ("*Order*").

[3] *See* WISPA at 12-16; USTelecom at 22-24; ACA at 9.

statutory definition of CPNI, such as personally identifiable information ("PII") and other information that is not "made available to the carrier by the customer solely by virtue of the carrier-customer relationship."[4] Oppositions filed in response to the petitions erroneously assert that the Commission "fully considered" petitioners' arguments and "must" dismiss attempts to revive such arguments.[5]

It is settled law that "an agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious."[6] In this proceeding, the Commission failed to address meaningfully (in some instances, entirely) facts regarding the legislative history and statutory context of Section 222.[7] Accordingly, the Commission's conclusion regarding the scope of Section 222's protections were arbitrary and capricious and must be reconsidered.

Specifically, Verizon highlighted the *Dole Food Co. v. Patrickson* principle of statutory interpretation,[8] but a review of the Order reveals that the Commission failed to consider that argument altogether. Rather, than address these arguments, the Commission opined that

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[4] 47 USC § 222(h)(1)(A).

[5] Opposition of Center for Democracy and Technology at 5-7; Opposition of New America's Open Technology Institute at 1 (stating that "Petitioners merely repeat statutory and constitutional arguments already considered and rejected by the Commission" and should be dismissed). Contrary to Opponents assertion that Commission's rules dictate that the petitions *must* be dismissed, the Commission's rules merely permit the Bureau (rather than the Commission) to dismiss the petitions in question. Moreover, because the Commission acted arbitrarily and capriciously in failing to fully consider arguments regarding legislative history and the use of PII by Congress as a term of art in other statutes, consideration of such arguments on reconsideration is required in the public interest. *See* 47 CFR § 1.429(b)(3).

[6] *See BNSF Ry. Co. v. Surface Transp. Bd.*, 741 F.3d 163, 168 (D.C. Cir. 2014) (quoting *PSEG Energy Resources & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011)).

[7] *Cf.* Opposition of Free Press at 5 (stating that "[e]ven a cursory reading of the record in this proceeding and the final Privacy Order shows that none of the Petitioner's arguments raised again on reconsideration were left unexamined by the Commission.")

[8] *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003). *See also* Comments of Verizon at 53-54, 58 (filed May 27, 2016) (arguing that the Commission's conclusion that "Section 222(a) reaches beyond CPNI . . . cannot be squared with . . . Congress's repeated decision to use the phrase 'personally identifiable information' when it intended to protect such information, including elsewhere in the Communications Act" and that Congress's failure to do so indicates that Section 222 is limited to CPNI).

"[p]rotecting personally identifiable information is at the heart of most privacy regimes"[9] and asserted that inclusion of the term of art in other portions of the Communications Act provide support for this conclusion.[10] WTA agrees that "had Congress intended proprietary information regarding customers to include PII, it would have used the term PII as it did in other statutes."[11] The Commission's unsupported conclusion that Section 222(a) includes protections for PII has a dramatically expansive effect on the application of the Commission's Section 222 rules by carriers and as a result substantially decreases the ability, and increases the cost for carriers to comply. Because the Commission failed entirely—let alone meaningfully—to address these arguments,[12] it must reconsider its conclusion that Section 222(a) authorizes the Commission to regulate the collection, use and protection of telecommunications customers' PII.

Although "[t]here must be a time when the Commission's determinations are final,"[13] the Commission must comply with the due process requirements of the Administrative Procedure Act.[14] Contrary to the assertion that "the Commission risks encouraging other petitioners to merely repeat presented arguments in the future, leading to more unnecessary work for the Commission[,]"[15] granting the petitions opposing the inclusion of PII within the scope of Section

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[9] *Order* at ¶88, n. 211 (citing statutes and rules implementing the Satellite and Cable Privacy Acts, Video Privacy Protection Act, Driver's Privacy Protection Act, Health Insurance Portability and Accountability Act, Gramm-Leach-Bliley Act, Fair Credit Reporting Act, Fair and Accurate Credit Transactions Act, Privacy Act, Family Educational Rights and Privacy Act, the Telephone Consumer Protection Act, Children's Online Privacy Protection Act, and CAN-SPAM Act of 2003 which protect PII in some fashion).

[10] *Order* at n. 210 (noting that the Act protects PII of cable and satellite video subscribers).

[11] *See* Association of National Advertisers, *et al*., at 8.

[12] Commissioner O'Rielly's dissenting statement properly addresses these arguments which weigh against the Commission's conclusion that PII is lawfully within the scope of Section 222 protections.

[13] Opposition of Public Knowledge, *et al.*, at 2.

[14] *See* 5 U.S.C. § 553(c) (requiring agency "consideration of the relevant matter presented").

[15] Opposition of Public Knowledge, *et al*., at 2.

222 will in fact encourage full consideration of arguments raised in this and future proceedings. Failure to address valid and relevant legal arguments in the record surely qualifies as a material omission.[16] WTA therefore urges the Commission to grant reconsideration of the scope of information protected within Section 222 and to exclude PII.[17]

Similarly, the Commission arbitrarily and capriciously included "applicants for service" within the scope of the customer protections of Section 222. To the extent that the Commission is concerned about the sensitivity of personal information such as Social Security numbers and financial information provided prior to the initiation of a customer relationship, the Commission omitted meaningful consideration of existing state and other laws regarding sensitive personal information.[18] Accordingly, consumers do not "lack basic privacy protections when they share any confidential information in order to apply for a telecommunications service."[19] At a minimum, the Commission must provide clarification of the point at which a prospective customer is deemed to be an "applicant" for service.[20] For example, under the Commission's interpretation of CPI that does not include a data linkage requirement included in some state

[16] *Cf. Id.* at 3 (alleging that petitioners do not identify a "material error or omission in the original order").

[17] WTA notes that many state privacy and data security laws require carriers and other businesses to implement protections for the most sensitive PII such as Social Security Numbers and financial account information. Accordingly, removing PII from the scope of the Commission's Section 222 would not adversely affect consumers.

[18] *See* NTCA Comments at 14 (filed May 27, 2016) (citing prior Commission definitions of "customer" and Section 222(h)(1)(A) and noting that local standards are sufficient to ensure proper treatment of prospective customer information); CCA Comments at 37 (filed May 27, 016) (noting that carriers are bound by state consumer protection rules).

[19] *Order* at ¶ 42. Interestingly, the Commission goes on to assert that carriers "can and should adopt data minimization practices . . . in a manner consistent with any other applicable legal obligations." Because many state laws already provide protection for the most sensitive personal and financial information of *residents of the state* generally, existing regimes demonstrate that the Commission's rules need not apply to applicants for those consumers to have basic privacy protections.

[20] *See* Cincinnati Bell Comments at 8 (filed May 27, 2016) (stating that the Commission should clarify that "customer" is only intended to include consumers who actually submit information as part of an application process and noting the disparity in rules between broadband and edge providers providing online services).

laws, would providing a physical address on a carrier's website to determine if service is available at that site implicate Section 222, particularly considering that the carrier's website may likely have access to the IP address used by the customer to access the site? In combination with the inclusion of PII within the scope of Section 222, applicability of the rules to prospective customers imposes an unnecessary additional burden on carriers without any tangible benefit to consumers.[21]

II. The Commission Should Grant Petitions Seeking Rules Which Permit First-Party Marketing by Telecommunications Carriers and Their Affiliate(s) With Inferred Consent.

Petitioners also seek reconsideration of the notice and consent regime established for certain first-party marketing activities. The *Order* concludes that Section 222 permits first-party marketing of services to which a customer subscribes, and services necessary to, or used in, those services, in addition to services commonly bundled together with the subscriber's telecommunications service, customer premises equipment, and services formerly known as "adjunct-to-basic services."[22] The rules require opt-out for the use of non-sensitive CPI for marketing purposes, and opt-in for use of sensitive CPI. The Commission asserts that such a restriction is "consistent with Commission precedent and FTC Staff comments."[23] However, the Commission's inclusion of publicly available information such as name, address and phone number within the scope of Section 222 arbitrarily and capriciously restricts the ability of carriers to engage in general marketing activities without getting prior consent from customers. [24]

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[21] *See* NTCA Comments at 14 (noting use of PII in online applications for services beyond the Commission's jurisdiction).

[22] *Order* at ¶ 204.

[23] *Id.* at ¶ 199.

[24] Further highlighting the arbitrary nature of this restriction, carriers may continue to purchase consumer data from third-party sources and engage in marketing using such information because it was not obtained in the context of the customer-carrier relationship as required to be within the scope of Section 222.

USTelecom urges the Commission to revise its rules "to extend inferred consent to the marketing of all products and services offered by broadband providers and affiliates as long as the affiliated relationship is clear to consumers."[25] CTIA requests a similar standard for ISPs and suggests that "if such marketing exceeds the scope of Section 222(c), the Commission should exercise its forbearance authority.[26] American Cable Association asserts that the Commission's restrictions on first-party marketing will inhibit broadband investment, thereby undermining a central justification for the new rules.[27] Opponents baldly assert that the rules do not restrict first-party marketing of bundled services.[28]

The Order fails to acknowledge the Commission's departure from its prior policy that "under Section 222 and the Commission's rules, a carrier could contact all of its customers or all of its former customers, for marketing purposes, by using a customer list that contains each customer's name, address, and telephone number, *so long as it does not use CPNI to select a subset of customers from that list*."[29] Indeed, the Order omits any reference to the Commission's prior treatment of non-targeted first-party marketing..[30] The Order also omits any consideration of arguments in the record regarding first-party marketing that is *not* targeted to specific

[25] USTelecom at 14.

[26] CTIA at 8-9 (urging the FCC to follow the Federal Trade Commission's approach to first-party marketing that limits affirmative consent for first-party marketing to circumstances "where a company's business model is designed to target consumers based on sensitive data").

[27] ACA at 17.

[28] Opposition of Center for Democracy and Technology at 15.

[29] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Order,, 13 FCC Rcd 12390, 12395-97, ¶¶ 8-9 (1998). *See also Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, et al*., CC Docket No. 96-115, et al., Order on Reconsideration and Petition for Forbearance, 14 FCC Rcd 14409, 14487-88, ¶¶ 146-47 (1999) (adopting the Common Carrier Bureau's reasoning and conclusion that to prohibit carriers from using their own customer lists without additional targeting would be anomalous to the intent of Section 222).

[30] *Order* at ¶ 99.

customers but rather marketed to all current, former and potential customers.[31] The Commission's inclusion of PII such as name, address and phone number within the scope of non-sensitive CPI in combination with the Order's lack of clear guidance regarding the categories of service that are "commonly bundled" create an unreasonable burden for providers – particularly smaller providers – seeking to develop and market innovative services to their customers.[32] For these reasons, adoption of the Commission's rule regarding limitations on first-party marketing must be reconsidered.

III. The Commission Should Recalibrate its Breach Notification Rules to Reduce Arbitrary and Burdensome Notifications.

The record also demonstrates that the Order adopted data security and breach notification requirements that are unduly burdensome. These rules require carriers to notify their customers and the Commission of a breach "unless a carrier can reasonably determine that no harm to customers is reasonably likely to occur as a result of the breach."[33] The rules presume that any breach involving sensitive customer proprietary information ("CPI") would require notification.[34] The Order also explains that the Commission will interpret "consumer harm" broadly to include identity theft, financial loss, reputational damage, personal embarrassment, or loss of control over the exposure of intimate personal details.[35] Several petitioners note the

[31] *See* Letter from Patricia Cave, WTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-106 (filed Aug. 22, 2016). *See also* NCTA Comments at 14 (filed May 27, 2016); CTIA Comments at 45.

[32] For example, many telephone companies and broadband providers have explored entry into the home security services market. It is unclear what threshold must be met before such services may be considered "commonly bundled" with telecommunications services.

[33] *Order* at ¶ 263. *See also* 47 CFR 64.2006(a).

[34] *Order* at ¶ 267. The Commission defines "sensitive CPI" to include financial information, health information, information pertaining to children, Social Security numbers, precise geo-location information, content of communications, call detail information, and web browsing and application usage history, and their functional equivalents. 47 CFR 64.2002(n).

[35] *Order* at ¶ 266.

practical difficulties associated with the Commission's "harm" trigger and request the Commission to redefine "harm" to be more clear and to focus upon substantial injuries.[36] As the American Cable Association notes, harm is defined by the Commission so broadly "as to be essentially unbounded."[37] Although the Commission asserts that its harm-based trigger reduces compliance burdens associated with issuing notifications for inconsequential events,[38] the rules as structured will very likely result in a substantially increased number of unnecessary breach notifications, particularly by small providers.[39] Although the Commission states that the "harm-based trigger . . . relieves a provider from notifying its customers and government agencies of breaches that result from minor mistakes that create no risk of harm to the affected customers[,]"[40] such a statement presumes that carriers can successfully develop and implement workable business principles for evaluating the "likelihood" of harms specified by the Commission in its rules. On the contrary, the harm trigger as currently crafted will be nearly impossible for small carriers to administer effectively without providing notifications in most instances.

Although the likelihood of identity theft or financial loss may be easy to determine, in order to fully implement the harm trigger, carriers must interpret and adopt policies to guide the assessment of reputational damage, personal embarrassment, and perceived loss of control over the exposure of intimate personal details. Whether or not a breach is reasonably likely to result in non-financial harms will be particularly difficult for small carriers to determine, leading to

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[36] USTelecom at 19.

[37] ACA at 17.

[38] Broadband Privacy Order Final Regulatory Flexibility Analysis, Appendix B, ¶ 71.

[39] ACA at 17 (stating that the Commission's harm-based data breach notification rule is so vague that it will invariably lead to over-notification by providers and notice fatigue for customers).

[40] *Order* at ¶ 272.

increased reliance on attorneys and consultants on one hand and widespread use of "notice-by-default" procedures to ensure that carriers are not subject to enforcement actions for failing to accurately assess the likelihood of harm.[41] Similarly, small providers will struggle with the presumption of harm associated with a breach of sensitive CPI and default to notifying affected customers and the Commission. Indeed, the Commission all but directs such a result in clarifying that "[w]here a carrier's investigation of a breach leaves it *uncertain* whether a breach *may have resulted in customer harm*, the obligation to notify remains."[42] In combination with the Commission's guidance which appears to require a heightened level of certainty that no harm will result, small carriers have little option but to err on the side of notification for every alleged breach -- leading to more costs for unnecessary notification[43] and additional records that must be kept and ultimately protected under the Commission's data security standard. Furthermore, in contrast to the fact that many state laws require notification of a breach only in circumstances when combinations of certain data points are alleged to have been accessed without authorization, the Commission's rules make the exposure of a single piece of data a likely breach that must be investigated through application of the harm trigger. Such a policy, in combination with the sheer scope of the rules and broadly defined harm trigger increases the regulatory burden particularly for small carriers.

Finally, WTA also agrees that the clock for providing notification to the Commission should start upon the determination of harm, not discovery of the breach[44] given the complexity of navigating the scope of the Commission's rules for small carriers. In order to reduce the

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[41] *See* ACA at 17; CCA at 19.

[42] *Order* at ¶ 265 (emphasis added)

[43] *See* CCA at 19 (asserting that the breach notification rules will create an over-notification problem).

[44] *See* NCTA at 23-24.

likelihood of consumer notice-fatigue and unnecessary burdens on carriers, the Commission should recalibrate the rules to exclude circumstances and categories of harm that are difficult to impossible for small carriers to meaningfully implement.

IV. Conclusion

For the foregoing reasons, the Commission should grant the petitions and reconsider portions of its telecommunications privacy framework to more closely hue to the Commission's regulatory authority, to reduce burdens on providers, and protect consumers from notice-fatigue.

Respectfully Submitted,

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