

Decision **PROPOSED DECISION OF COMMISSIONER FERRON**
(Mailed 5/8/2013)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition to Adopt, Amend, or Repeal a
Regulation Pursuant to Pub. Util. Code
Section 1708.5.

Petition 12-11-006
(Filed November 8, 2012)

**DECISION DENYING PETITION FOR RULEMAKING
AND CLOSING PROCEEDING****1. Summary**

This decision denies the Petition for Rulemaking filed by the Consumer Federation of California, The Utility Reform Network, and Privacy Rights Clearinghouse requesting that the Commission open a new rulemaking to review the privacy practices of telecommunications carriers and to develop wireless privacy standards. The Petition for Rulemaking identifies potential concerns related to the collection and use of personal information by telecommunications corporations, including companies that provide wireless telecommunications services, and suggests that existing laws and policies at the state and federal level fail to offer adequate protection for customer information. Given the lack of documented examples of actual breaches of customer privacy by telecommunications corporations, as well as the existence of a variety of laws and regulations governing the treatment of potentially sensitive customer information by businesses in general and telecommunications providers in particular, it is not clear that a review of telecommunications company privacy practices in California is needed at this time. As a result, the Commission

declines to initiate a Rulemaking, and the Petition is denied without prejudice. Because of the importance of information privacy to California consumers, however, we intend to monitor the issues raised in this Petition and, if there appears to be a need for additional privacy rules in the future, we could open a Rulemaking at that time.

2. Petition

The “Joint Petition Of Consumer Federation Of California, The Utility Reform Network, And Privacy Rights Clearinghouse To Initiate A Proceeding To Review The Privacy Practices Of Telephone Corporations, Including Wireless Carriers; And To Develop Wireless Privacy Standards” (the Petition) was filed on November 8, 2012. In this Petition, the Consumer Federation of California, The Utility Reform Network (TURN), and Privacy Rights Clearinghouse (PRC) (collectively, the petitioners) request that the Commission initiate a new rulemaking to review the customer information that telephone corporations collect or have access to, along with those companies’ practices in handling and using that information once it is collected. The petitioners further ask that the Commission develop standards for the collection, handling, and sharing of customer information to ensure that customers are aware of what information may be collected and how that information may be used, and to protect the privacy of customers’ information. In addition, the Petition appears to suggest that third parties under contract with telecommunications providers, as well as other third parties that use the phone as a platform (apparently, developers and distributors of phone applications or “apps”), should be subject to privacy rules developed by the Commission.

In support of their request for a rulemaking, the petitioners note that the technologies supporting telecommunications services have been developing

rapidly in recent years, and that the rules that are currently in place may benefit from a review and possible updates to ensure their relevance to current communications technologies. Discussion in the Petition focuses predominantly on concerns about the potential for violations of consumers' privacy by wireless telecommunications carriers and third parties that offer applications that operate on a wireless platform. The petitioners' recommendation for a rulemaking also urges an examination of the privacy practices and rules applicable to wireline carriers.

3. Responses to the Petition

The Commission received opening comments on this Petition from CTIA – the Wireless Association (CTIA) and Pacific Bell Telephone Company dba AT&T California, New Cingular Wireless LLC and affiliated companies (together, AT&T). MetroPCS California Inc. (MetroPCS) and the petitioners filed replies to these comments. AT&T, MetroPCS, and CTIA (collectively, the Opposing Parties) argue that the Commission should deny the petition. The Opposing Parties argue against opening a rulemaking on telecommunications companies' privacy practices on both procedural and substantive grounds. The Opposing Parties assert, among other things, that the Petition is procedurally deficient because it attempts to reach non-regulated services and providers, and because it fails to state a clear justification for new rules or a specific wording for those rules. In addition, the Opposing Parties make substantive arguments against opening a rulemaking. Overall, the Opposing Parties argue that existing laws and policies already protect the privacy of customer information and that additional rules governing the privacy of information available to telecommunications carriers (wireless or wireline) are unnecessary.

The Opposing Parties further suggest that the Commission's authority over wireless carriers is limited, and report that carriers already have their own internal privacy policies in place and disclose them to the public, in conformance with California State law. The Opposing Parties also cite existing privacy laws and policies that they assert are applicable to wireline carriers, such as those governing customer proprietary network information (CPNI), which the Opposing Parties believe do not need to be revised and obviate the need for more rules.

3.1. Procedural Arguments against Granting the Petition

First, the Opposing Parties argue that the Petition fails to meet the requirements of Rule 6.3.¹ AT&T asserts specifically that the Petition focuses on privacy of information accessible to wireless carriers and does not provide any justification for a review of wireline providers' privacy practices.² CTIA and MetroPCS argue that the Petition as a whole fails to meet the requirements of Rule 6.3 because, in requesting a review of third-party practices with respect to customer information, it fails to limit its request to entities under the Commission's jurisdiction.³ In addition, CTIA argues that the Petition does not comply with the rule because it does not recommend specific wording for new rules.⁴ MetroPCS argues that the Petition does not "concisely state the

¹ All references to Rules in this document are to the Commission's Rules of Practice and Procedure.

² AT&T Opening Comments filed December 10, 2012 at 4.

³ MetroPCS Reply Comments filed December 20, 2012 at 4 and CTIA Opening Comments filed December 10, 2012 at 3.

⁴ CTIA Opening Comments at 3.

justification for the requested relief,” stating that it does not include any evidence that current privacy rules are inadequate or could lead to customer harm.⁵

3.2. Substantive Arguments against a Rulemaking

AT&T argues that the Commission does not have the authority to regulate third-party software developers that create “apps” or other software that may be used on what it refers to as “handheld computing devices”⁶ (and the petitioners call “smart phones”). AT&T asserts that the Commission’s ability to regulate wireless carriers is limited, specifically noting that the Federal Communications Commission (FCC) has classified wireless broadband services as information services.⁷ In its discussion, AT&T appears to classify most activities customers may undertake on smart phones as “wireless broadband services” that should be considered interstate information services under the jurisdiction of the FCC.⁸ In support of this position, AT&T cites to the FCC Wireless Broadband Order’s⁹ description of “wireless broadband Internet access service” as “a service that uses spectrum, wireless facilities and wireless technologies to provide subscribers with high-speed (broadband) Internet access capabilities.”¹⁰

⁵ MetroPCS at 2-3.

⁶ AT&T Opening Comments, December 10, 2012 at 1.

⁷ AT&T Opening Comments at 2.

⁸ AT&T Opening Comments at 2.

⁹ *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Dkt. No. WT 07-53, *Declaratory Ruling*, 22 FCC Rcd. 5901, 40 Communications Reg. (P&F) 942, FCC 07-30 (rel. Mar. 23, 2007).

¹⁰ WT Dkt. No. WT07-53.

In addition, the Opposing Parties argue that there are already rules and policies in place to protect customer information collected by telecommunications carriers, so additional rules are not needed. For example, CTIA cites Section 222 of the Federal Communications Act, which requires carriers to protect the confidentiality of CPNI.¹¹ CTIA also argues that the Federal Trade Commission (FTC) has the authority under Section 5 of the FTC Act and the Children's Online Privacy Protection Act to take action against unfair or deceptive business practices and ensure privacy of information about children, and that it can use this authority to protect customer information or take action against companies that violate their own posted privacy policies.¹² CTIA also notes that California law requires mobile carriers and app developers to post privacy policies, and that, like the FTC, the California Attorney General's office may act to enforce those policies if they are not followed.¹³

4. Discussion

As noted above, both the State of California and the federal government have enacted laws and policies that protect the privacy of consumers' personal information. The Commission recognizes the importance of protecting the privacy of customer information, and is addressing issues related to the privacy of energy user data in the ongoing Smart Grid proceeding, Rulemaking 08-12-009. That proceeding is exploring the balance between making information (generally aggregated or de-identified) available for various

¹¹ CTIA at 4-7.

¹² CTIA at 8.

¹³ CTIA at 9.

legitimate purposes (for example, for research on energy usage patterns, to support Commission programs such as energy efficiency, and/or to support technological innovation that may facilitate reaching Commission or state policy goals) and protecting individuals' right to control the use of potentially sensitive information that could potentially be matched to an individual.

As noted by the Opposing Parties, there are currently federal and state laws and rules governing the protection and use of CPNI. Relevant laws include 47 USC Section 222 (Section 222 of the Federal Communications Act), which defines CPNI as "information that relates to the quantity, technical configuration, types destination, location, and amount of use of a telecommunications service . . . that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship."¹⁴ Under this federal law, CPNI also includes "information contained in bills pertaining to telephone exchange service... received by a customer of a carrier," other than subscriber information.¹⁵ Similarly, the Public Utilities Code of the State of California prohibits telecommunications carriers from disclosing customer information including calling patterns, financial information, and purchased services.¹⁶ A variety of California privacy and consumer protection laws apply to all telecommunications corporations, including wireless carriers. Similarly, federal CPNI protections apply to all telecommunications carriers, including wireless.

¹⁴ 47 USC Section 222(h)(1)(A).

¹⁵ 47 USC Section 222(h)(1)(B).

¹⁶ Public Utilities Code Section 2891.

An FCC order issued in 2007¹⁷ requires carriers to (among other things) take specific actions to protect CPNI from unauthorized disclosure, notify customers of instances of unauthorized disclosure, and require carriers to obtain opt-in consent from a customer before disclosing a customer's CPNI to a carrier's joint venture partners or independent contractors for marketing. In that order, the FCC agreed with "commenters that assert that [the FCC] should allow states to also create rules protecting CPNI," acknowledging that states are not pre-empted from enacting their own privacy rules.¹⁸

In addition, the State of California requires most providers of mobile and on-line services to develop and make available to customers their own privacy policies, which specify what information they collect and how it may be used. Like other businesses, mobile and on-line services associated with telecommunications corporations are bound by the requirement to provide and abide by such privacy policies. In addition, certain agencies, including the FTC at the federal level and the California State Attorney General's Office, have authority under existing anti-fraud laws and other policies to investigate breaches of and to enforce compliance with companies' privacy policies.¹⁹

Based on the record of this proceeding and this review of existing restrictions on telecommunications carriers' use of customer information, it is not

¹⁷ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115; WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6929 (2007)("EPIC CPNI Order").

¹⁸ *EPIC CPNI Order*, 22 FCC Rcd 6957-6958.

¹⁹ For example, the FTC under 15 U.S.C. § 45 and the California State Attorney General's Office under Cal. Bus. & Prof. Code §§ 22575-79.

clear that additional rules are needed to ensure appropriate treatment of sensitive customer information by telecommunications corporations. Much of the discussion in the petition focuses on third-party applications, which appear to be governed by existing state laws and policies that require development and disclosure of privacy policies, and are primarily enforced by entities other than this Commission. The petition does not clearly identify the types of information the petitioners believe are accessible to or collected by telecommunications corporations that are not currently protected by CPNI and other existing privacy protections. Similarly, the petition does not provide information on the circumstances under which petitioners believe that such information is being used or distributed in a way that violates customer privacy and causes harm. In the absence of clearer documentation of gaps in existing privacy laws and regulations, as well as examples of actual instances of harm from such privacy violations, we decline to open a rulemaking to review telecommunications corporations' privacy practices at this time.

Because of the rapid changes in communications-related technologies and the services facilitated by those technologies, however, we recognize the possibility that concerns related to telecommunications corporations' privacy practices may arise that are not adequately addressed through existing privacy laws and policies. As a result, we intend to track developments related to the treatment of customer information in the telecommunications industry, and we will reassess the need for a rulemaking on these issues, as appropriate, based on new information. We encourage parties to inform us of relevant developments that suggest the need for greater scrutiny of telecommunications privacy practices, including any instances in which customer information is collected or used inappropriately by wireless or other carriers. In particular, parties should

bring to the Commission's attention any instances in which telecommunications providers, including wireless providers, release information in violation of existing privacy laws and policies, or treat sensitive customer information in a way that violates customers' privacy and could lead to harm. If we find persuasive indications of specific problems, it may be appropriate to open a rulemaking on these issues in the future.

5. Comments on Proposed Decision

The proposed decision of the assigned Commissioner in this matter was mailed to parties in accordance with Pub. Util. Code § 311, and comments were allowed in accordance with Rule 14.3 of the Commission's Rules of Practice and Procedure. The petitioners filed timely comments on the proposed decision on May 28, 2013, and CTIA filed timely reply comments on June 3, 2013. In their opening comments, the petitioners state that they strongly oppose the proposed decision, and reiterate many of the arguments contained in the original petition for opening a rulemaking. In reply comments, CTIA expresses support for the proposed decision and urges the Commission to adopt it without modification. No substantive changes have been made to the decision based on these comments.

6. Assignment of Proceeding

Mark J. Ferron is the assigned Commissioner and Jessica T. Hecht is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Both the state of California and the federal government have existing laws and policies that protect the privacy of consumers' personal information.
2. Federal CPNI privacy protections apply to wireline, wireless, and other carriers.

3. The state of California has privacy and consumer protection laws and regulations that apply to telecommunications carriers.

4. The petition does not provide clear documentation of gaps in existing privacy laws and regulations or examples of actual instances of harm from privacy violations by telecommunications corporations.

5. Because of the rapid changes in communications-related technologies and the services facilitated by those technologies, concerns related to telecommunications corporations' privacy practices may arise that are not adequately addressed through existing privacy laws and policies.

Conclusions of Law

1. States are not pre-empted from enacting their own privacy rules for telecommunications corporations.

2. It is reasonable to track developments related to the treatment of customer information in the telecommunications industry and reassess the need for a rulemaking on these issues as appropriate based on new information.

O R D E R

IT IS ORDERED that:

1. Petition 12-11-006 is denied without prejudice.
2. Petition 12-11-006 is closed.

This order is effective today.

Dated _____, at San Francisco, California.