

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| <i>In re</i> |) | |
| |) | |
| CTIA Petition for Rulemaking |) | |
| To Establish Fair Location |) | WT Docket No. 01-72 |
| Information Practices |) | |

REPLY COMMENTS OF ELECTRONIC PRIVACY INFORMATION CENTER

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Introduction and Summary

EPIC congratulates CTIA and the industry commenters willing to proactively address the important issue of consumer location privacy. The Wireless Communications and Public Safety Act, Pub. L. 106-81 (WCPSA or “Act”) evidences Congress’ significant concern with consumers’ privacy. The Act requires “express prior authorization” by a consumer to approve “the use or disclosure of or access to” his or her “call location information.” 47 U.S.C. § 222(f).

In these reply comments, EPIC explains why a rulemaking to implement the WCPSA is not premature, and, in fact, is needed because industry commenters do not agree on the meaning of several of the Act’s core terms. In particular, many commenters believe that “express prior authorization” can be “implied” by conduct, which is not the case. In addition, commenters do not agree on what information is included within “call location information.”

EPIC urges the Commission to consider and adopt mandatory rules in addition to safe harbor provisions. The Act is mandatory, and minimum binding rules are necessary to implement it. In these reply comments EPIC explains that neither industry self-regulation nor technology is sufficient to implement the law. Moreover, EPIC asks that the Commission should also ensure that consumers

consent *prior* to the collection of information that will be stored because that information is obtainable by government search warrants and subpoenas. EPIC also requests the Commission ensure that consumers are able to enforce the WCPSA through a simple mechanism.

EPIC strongly opposes industry proposals that the FCC preempt state law. Commercial wireless providers nationwide service provision does not prevent them from complying with state privacy laws any more than another company that provides service in multiple states. Moreover, incomplete location privacy protection may endanger privacy already protected in state law.

Finally, like several industry commenters, EPIC believes the FCC should explore exercising its ancillary jurisdiction to ensure uniform regulation of all location-based services, including those that are not provided by wireless carriers. If the Commission elects not to utilize its jurisdiction over these services, EPIC believes an FCC report or recommendation to Congress regarding the limits of the WCPSA would be extremely helpful. Such a report would be consistent with the Commission's role as an advisor to Congress, and would allow Congress to take action if it saw fit.

I. A Rulemaking is Not Premature.

Commenters from all sectors overwhelmingly supported a rulemaking on the impact of the WCPSA. *See, e.g.*, Ericsson comments at 1; Center for Democracy and Technology ("CDT") comments at 1; Cingular comments at 1. As discussed below, wide disparities in the meaning of the Act among commenters reveal that the Commission's guidance is needed to clarify the Act's terms.

A few commenters suggest that a rulemaking, regardless of whether it produces rules, could inhibit development of new services. *See, e.g.*, Wireless Advertising Association comments at 2; Verizon Wireless comments at 1-2; Sprint PCS comments at 7; PCIA comments at 2. This argument stems from a misunderstanding of the implications of uncertainty in the marketplace. While a

needlessly-elongated proceeding might indeed deter corporations from investing in research and development or from bringing new services to market, certainty about applicable rules and regulations can, in fact, increase the speed with which new products are offered. *See, e.g.*, Cingular comments at 1-2. The industry itself sought this rulemaking in part because it recognized that certainty will aid its business plans, rather than inhibit them. CTIA Petition at 5. In addition, certainty can aid interoperability among services, and thus also increase competition. For example, if all services must abide by the same basic notice and consent process, then corporations can contract among themselves with more certainty, because they will be able to verify that consent for data transfer has been acquired within the dictates of the law.

Some commenters oppose a rulemaking because rules implementing the WCPSA will not necessarily apply to non-carrier location services. They worry that incomplete regulation will confuse consumers. *See, e.g.*, Sprint PCS comments at 18. While consumer confusion may be a valid concern, it is misplaced in this context. Congress has already made the decision to regulate a significant portion of the location-based services industry. Wireless carriers must comply with the Act regardless of FCC action. It is possible, as suggested below, that the FCC will use its ancillary authority to extend the rules to other providers in order to alleviate consumer confusion. Failure to initiate a rulemaking, however, will not do so.

The fact that Congress gave no specific direction for the Commission to adopt rules to implement the WCPSA is no bar to Commission action. *Cf.* Verizon Wireless comments at 7. The Commission is bound to ensure the Act is implemented and enforced, and must take whatever action necessary to do so. In addition, the Commission should not heed scare tactics arguing that to adopt rules pursuant to this provision is risky under the principles enunciated in *U.S. West v. FCC*, 182

F.3d 1224 (10th Cir. 1999) *cert den.* 520 U.S. 1213 (2000). Although the Commission has not yet completed action response to the 10th Circuit's remand, the court's decision found the Commission's rules deficient because the Commission presented insufficient evidence that the harm to privacy was real and regarding how, in particular, the harm would occur. 182 F.3d at 1237-38. This is not an underlying principle of law that will endanger a future, well-supported decision.

Some industries' own policies, such as those of the Wireless Advertising Association, show that rules protecting privacy are feasible and need not be onerous. Yet some industry players' comments suggest that they will not necessarily respond in a self-regulatory manner to protect consumer privacy. PCIA comments at 5; Sprint PCS comments at 10 (Sprint PCS may relax its privacy policies). Some commenters go so far as to question whether privacy is an important issue, PCIA comments at 4-5, further indicating that FCC rules are necessary to ensure the Act is implemented and enforced.

Leaving aside the fact that the Commission cannot delimit the law or the public interest by virtue of public opinion, the public remains extremely concerned about privacy, particularly with respect to new technologies. For example, a New York State Senate survey of various public opinion data concluded:

One of the most compelling of the polls on privacy came from a *Wall Street Journal*-NBC poll in the Fall of 1999. Americans were asked what they feared most in the coming century. Answers included terrorism, global warming, overpopulation and numerous other horrible things. *The answer that came in highest (29% of all respondents) was the loss of privacy--no other topic rose above 23%.*

New York State Senate Majority Task Force on the Invasion of Privacy, *Report*, at 12-13 (March

2000) (found at www.senate.state.ny.us) (emphasis added).¹

II. Conflicting Interpretations and Misunderstandings of the Act’s Core Terms Show that a Rulemaking to Clarify its Provisions Is Needed.

It is clear that the standard in WCPSA is substantially higher than that required in the other CPNI provisions, which deal with information other than location data. *Compare* 47 U.S.C. § 222(c)(1) (requiring customer “approval”) *with* 47 U.S.C. § 222(f) (requiring “express prior authorization”); AT&T Wireless comments at 5; CDT comments at 8. Unfortunately, there appears to be some confusion within the industry as to what this higher level of consent means.

Although at first blush, CTIA’s suggestion that consent be “manifest” and “express,” CTIA Petition at 10, may seem to be exacting, some commenters believe the statute to be more flexible than it is. A rulemaking is needed, for example, because some commenters recognize limits on implied consent, while others do not. *See, e.g.*, Nokia comments at 4 (consent can never be implied for the storage or use of stored personally identifiable location information); SiRF at 5-6 (proposed limits on implied consent); RTC comments at 3 (“transactional” consent cannot substitute for “generic” consent); Leap Wireless comments at 5 (a consumer presumably consents when she avails herself of a service that “necessarily” involves the dissemination of location information such as driving directions from MapQuest). EPIC believes the Commission should carefully constrict the circumstances under which implied consent could be utilized, if at all.

The proffered interpretations of implied consent are in some cases based on a Department

¹ A March 2000 BusinessWeek survey found that 57 percent of the American public believe that “the government should pass laws now for how personal information can be collected and used on the Internet,” even when the poll’s respondents were offered the alternative options of allowing industry self-regulation or government-recommended privacy standards. *See* www.businessweek.com/2000/00_12/b3673010.htm.

of Justice advisory opinion about the legality of transmitting location information to emergency services personnel. *See* CTIA Petition at 10, n.24. DOJ’s opinion concludes that consent may be implied by a person’s specific actions. The legal analysis in DOJ’s memo was limited to a particular set of facts and law not applicable in the present context. DOJ considered implied consent within the context of a cell phone user who calls 9-1-1 emergency services. DOJ concluded that such a caller had no expectation of privacy. Mem. Op. at 7-8. It further concluded that, to the extent a caller did have an expectation of privacy, a caller impliedly consented to a search when he or she dialed 9-1-1 because such a call met the test articulated under *McGann v. Northeast Ill. Reg. Commuter*, 8 F.3d 1174 (7thCir. 1993). Mem. Op. at 9-10. A voluntary request for services to a private carrier is not analogous to an emergency request for help to government personnel.

In addition to the meaning of consent and implied consent, commenters do not agree on the meaning of “location information.” While EPIC believes that any information about a customer’s location is covered by the Act, CTIA and some commenters do not believe that information used to complete a call, such as the nearest cell tower, is covered. *See, e.g.*, CTIA Petition at 9, n.22; Leap Wireless comments at 4; Cingular at 2-3. The Commission should address the meaning of “location information” in its rulemaking proceeding.

III. The Commission Should Propose, and Eventually Adopt, Mandatory Rules and Should Provide a Simple Means to Enforce its Rules and the Act.

The Commission should adopt rules establishing reasonable requirements. CTIA suggests that the Commission consider only safe harbor rules. EPIC opposes safe harbor regulations adopted in isolation. The WCPSA is mandatory, and the Commission should adopt mandatory minimum rules to implement it. While one reason to commence a rulemaking is to provide the commercial sector with certainty, the paramount reason should be to ensure the will of Congress is carried out

by protecting consumers' privacy. As a minimum threshold, EPIC suggests that consent must be specific as to the third party that can receive the information and the purpose for which that information will be used by that party. The Commission should also seek comment on how long consent should last and what records of consent a carrier should maintain. EPIC suggests the Commission propose rules that require a carrier to keep a record of consent for as long as the permission is valid. EPIC requests the Commission to seek comment on this and other specific suggestions.

EPIC recognizes that customers should be able to grant varying levels of consent--some consumers will want to grant blanket permission for some types of services offered by some carriers, while others will desire a higher degree of control over individual disclosures. *See, e.g.*, Leap Wireless comments at 6. EPIC suggests that the level of notice and consent be linked to the type of consent being obtained. More extensive permission should require more extensive notice and consent.

EPIC also recognizes that control of location information can be an important factor in the ability of the development of new location-based services. EPIC does not support overly-restrictive consent mechanisms that would allow a wireless network owner to favor its vertically-integrated service providers to the detriment of consumers and competition. As long as they provide the express authorization required by statute, consumers should be able to acquire location-based services from third-party providers without any more difficulty than they can obtain service from their telecommunications provider.

As part of its rulemaking, the Commission should address consumers' ability to enforce the WCPSA via Section 208 of the Communications Act, 47 U.S.C. § 208. Consumers should have

a simple process by which to enforce their rights under the law if carriers do not comply with it.

IV. The Commission Should Take Action With Respect to the Collection of Stored Information.

EPIC agrees that any location information that will be stored should not be *collected* without customers' "express prior authorization." 47 U.S.C. § 222(f); *see* SiRF comments at 8, 9. Disclosure and consent is important because stored location data could later be accessed by law enforcement or others via the legal process. The likelihood that someone's electronic records might later be accessed pursuant to a warrant or subpoena are not remote. *See* Will Rodger, *USA Today*, at 1A (July 28, 2000) (describing study showing 800% increase in law enforcement demands for subscriber information from ISPs).

Commission action is needed because the statute's meaning apparently is subject to varying interpretations within the industry. For example, Leap Wireless contends the statute does not require consent prior to collection. Leap Wireless comments at 3-4. However, the statute could be interpreted to allow collection only of information appurtenant to the provision of telecommunications services, not location-based services. CPNI is limited to that made available to the carrier "solely by virtue of the carrier-customer relationship." 47 U.S.C. § 222(h)(1)(A). In addition this information is described in Section 222(c)(1) as information obtained "by virtue of ... provision of a telecommunications service" 47 U.S.C. § 222(c)(1). Although the Commission has found that CMRS providers may use CPNI to market information services and customer premises equipment (CPE) to their customers, *CPNI Reconsideration Order*, 14 FCC Rcd 14,409 at 14,432, ¶ 42 (1999), EPIC believes that exception does not apply to location-based services and that the already-questionable exception should not be extended. *See CPNI Reconsideration Order*, Dissents of Commissioners Furchtgott-Roth and Tristani, 14 FCC Rcd at 14,516-22.

V. The Commission Should Facilitate Privacy-Friendly Technologies, but They Alone Provide Inadequate Protection to Consumers.

EPIC supports the development and use of technology described in the record that allows users to maintain control of location information. Location Privacy Association comments at 4-5 (describing GPS device that transmits information to service provider without location knowledge being obtained by wireless provider); Grayson Wireless comments at 2-3 (similar technology for compliance with FCC's E911 rules); XNS Public Trust Org. at 3 (technology in the future will likely bypass network owner); EPIC notes that, for example, services like Leap Wireless's Cricket service could be quite beneficial to users. Leap comments at 3-4. Presumably, when offering a "phone-in-a-box" service, the service provider would not need to know the identity of the service user, or collect any personally-identifiable information. Such a technology would offer anonymous cell phone use, a significant benefit to customers seeking to limit the collection of their location data.

But technology cannot be the sole tool for privacy protection. PCIA, for example, argues that no regulations are needed because new "PETS" (privacy-enhancing technologies) are likely to be sufficient. PCIA comments at 6-7. EPIC has demonstrated the deficiencies of some of these technologies. For example, P3P does not adequately implement the Fair Information Practices, which are the basis of CTIA's proposal. See EPIC and Junkbusters, *Pretty Poor Privacy: An Assessment of P3P and Internet Privacy* (June 2000) (found at <http://www.epic.org/Reports/prettypoorprivacy.html>). The Commission cannot rely on technology to implement the law and protect consumer privacy.

VI. The Commission Should Not Weaken Protections Provided by the WCPSA and Elsewhere.

EPIC agrees with commenters who argue that CMRS providers may not use relationships

with third parties to avoid compliance with the WCPSA. *See, e.g.*, SiRF at 3. The Commission should prevent carriers from contracting out the location-collection function to avoid Section 222. Evidence of the need for Commission action is found in the comments of those parties who seek regulations that would absolve themselves of all third party behavior. Leap Wireless comments at 6 (providers cannot be held responsible for whether third parties keep location information private or secure); Cingular comments at 4 (carriers cannot be held liable or penalized for breaches of their security systems if they have exercised reasonable care).

Many commenters suggest the Commission preempt state privacy laws. *See, e.g.*, Sprint PCS comments at 14-16. EPIC strongly opposes preemption. EPIC (along with a broad-based coalition of consumer organizations) subscribes to the “Privacy Pledge” which favors “a solid foundation of federal privacy safeguards that permit the private sector and states to implement supplementary protections as needed.” *See* <http://www.privacypledge.org>. As Verizon Wireless suggests, Commission action may well improve uniformity by causing state courts to develop, for example, a rebuttable presumption against carrier liability if a carrier can show it complied with FCC rules. Verizon Wireless comments at 10. But this should be the choice of the States, not the FCC.

The principles behind commercial wireless providers’ exemption from traditional state telecommunications regulation does not apply to state privacy protections. State privacy laws apply to many nationwide companies that are not in a different position from commercial wireless providers. Commercial wireless providers’ status as a nationwide service providers does not prevent them from complying with state privacy laws any more than other companies that provide service in multiple states. As CDT notes, incomplete protection for location privacy may endanger privacy already protected in state law. CDT comments at 4-5 (location can reveal whether someone attended

a particular health clinic or government buildings).

At a minimum, there is no reason for the Commission to go farther in preempting state law in this proceeding than it did in the prior CPNI proceedings. In those proceedings, the Commission determined it would preempt state law only on a case-by-case basis. *CPNI Reconsideration Order*, 14 FCC Rcd 14,409 at 14,465-66, ¶ 112.

VII. EPIC Supports Rules that Apply to Non-carrier Services Providers, Via FCC Rules, FTC Rules, or Through Additional Legislation.

Many commenters discuss location-based services that will not be provided directly by wireless carriers, and will not provide location information to wireless carriers. Many of these commenters ask that the Commission’s privacy rules or principles to apply to all of these service providers. *See, e.g.*, CDT comments at 2 (discussing automated tollbooth services); Ericsson comments at 3 (suggestion that “overlay” providers be subject to the same privacy principles that apply to carriers); Leap Wireless comments at 7 (privacy principles should apply to other location based service providers in addition to wireless carriers); Verizon Wireless comments at 10 (avoid rules that place CMRS providers at a competitive disadvantage). EPIC supports the establishment of privacy protections for consumers for *all* location services. The Commission has exerted its ancillary authority over communications-related services before, and it is very likely that such a finding could be made here—particularly for any service that uses Commission-licensed communications. *U.S. v. Southwestern Cable*, 392 U.S. 157 (1968); *Computer and Communications Industry Assoc. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

If the Commission elects not to use its jurisdiction over these services, EPIC supports a joint effort by the Commission and the Federal Trade Commission. *See* Verizon Wireless comments at 10. Joint action by the FTC and the FCC would ensure consistent guidelines or regulations

protecting location privacy for those service providers deemed to fall outside the scope of the WCPSA. Even if neither agency adopts rules, EPIC supports Sprint PCS's suggestion that the FCC co-host a public workshop or forum on location privacy. *See* Sprint PCS comments at 20.

EPIC strongly urges FCC to issue report or recommendation to Congress regarding the limits of the WCPSA. Such a report would be consistent with the Commission's role as an advisor to Congress. If the Commission developed conclusions about the need for consistent regulation of carrier-based and non-carrier-based location services (either on its own or jointly with the FTC) it should make those findings known to Congress so that Congress may consider and act upon them.

Conclusion

EPIC urges the Commission to speedily undertake and complete a rulemaking on the protections granted to location privacy under the WCPSA. Such a rulemaking will not only protect consumers, but is also consistent with encouraging the responsible development of these new services.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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