

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

In the Matter of )
Request by Cellular Telecommunications and )
Internet Association to Commence Rulemaking to )
Establish Fair Location Information Practices )
WT Docket No. 01-72

ORDER

Adopted: July 8, 2002

Released: July 24, 2002

By the Commission: Commissioner Copps dissenting and issuing a statement.

I. INTRODUCTION

1. In this Order, we decline to commence a rulemaking to adopt rules to implement the wireless location information privacy amendments to Section 222 of the Communications Act of 1934 (the Act), as amended, which were enacted by Congress as part of the Wireless Communications and Public Safety Act of 1999 (911 Act). As recognized by the 911 Act, the privacy of information concerning consumers' location while using mobile wireless services is critically important. Because the statute imposes clear legal obligations and protections for consumers and because we do not wish to artificially constrain the still-developing market for location-based services, we determine that the better course is to vigorously enforce the law as written, without further clarification of the statutory provisions by rule. We will continue to monitor these important issues and initiate a rulemaking proceeding only when the need to do so has been clearly demonstrated. Accordingly, we deny the petition for rulemaking filed by the Cellular Telecommunications and Internet Association (CTIA).

II. BACKGROUND

2. As part of the 911 Act, Congress amended the framework established in Section 222 of the Act that governs a telecommunication carrier's use and disclosure of customer proprietary network information (CPNI). Specifically, Congress amended the definition of CPNI at Section 222(h) to include "location" among a customer's information that carriers are required to protect under the privacy provisions of Section 222. In addition, it added Section 222(f) to restrict carriers' authority to access,

1 Communications Act of 1934, as amended, 47 U.S.C. §§ 222(f), (h) (the Act).

2 Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, enacted Oct. 26, 1999, 113 Stat. 1286 (911 Act), at Section 5.

3 Petition of the Cellular Telecommunications Industry Association for a Rulemaking to Establish Fair Location Information Practices, filed November 22, 2000 (CTIA Petition). Subsequently, CTIA was renamed the Cellular Telecommunications and Internet Association, which name is used in this proceeding.

4 47 U.S.C. § 222(h)(1)(A).

use, or disclose wireless location information “without the express prior authorization of the customer,” except in three specifically established emergency situations.<sup>5</sup> Although this Commission adopted Orders to implement certain other provisions of the 911 Act,<sup>6</sup> we deferred consideration of the Section 222 amendments.<sup>7</sup>

3. On November 22, 2000, CTIA filed a petition requesting that the Commission initiate a rulemaking proceeding to adopt the proposed location information privacy principles -- covering the issues of notice, consent, security and integrity of information, and technology neutrality -- that had been approved unanimously by the CTIA Board of Directors.<sup>8</sup> CTIA urged the Commission to conduct a rulemaking separate from its general CPNI proceeding, based on CTIA’s assessment that the location privacy question is uniquely a wireless concern, which would interest a broad range of commenters that otherwise would have no interest in the general CPNI rulemaking.<sup>9</sup> On March 16, 2001, the Wireless Telecommunications Bureau issued a Public Notice seeking comment on whether to initiate a rulemaking proceeding for the purposes requested by CTIA.<sup>10</sup> Twenty-four parties filed comments and 17 parties filed reply comments.<sup>11</sup>

4. On September 7, 2001, this Commission reopened its general CPNI proceeding and requested comment on proposals to modify its CPNI rules implementing the customer approval requirements in Section 222(c)(1) of the Act that had been vacated by the United States Court of Appeals for the Tenth Circuit.<sup>12</sup> We noted the recent amendments of the 911 Act to Section 222 and sought limited comment on what effect the new customer authorization requirements of Section 222(f) may have on the interpretation of Section 222(c)(1) and the customer approval requirements that are the subject of the proposed modifications in that proceeding.<sup>13</sup> We also sought comment on the utility of other regulatory models in

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<sup>5</sup> 47 U.S.C. §§ 222(f), (d)(4).

<sup>6</sup> Implementation of the 911 Act and The Use of N11 Codes and Other Abbreviated Dialing Arrangements, WT Docket No. 00-110 and CC Docket No. 92-105, Fourth Report and Order and Third Notice of Proposed Rulemaking in CC Docket No. 92-105 and Notice of Proposed Rulemaking in WT Docket No. 00-110, 15 FCC Rcd 17079 (2000) (*911 Act NPRM*); Fifth Report and Order in CC Docket No. 92-105, First Report and Order in WT Docket No. 00-110, and Memorandum Opinion and Order on Reconsideration in CC Docket No. 92-105 and WT Docket No. 00-110, FCC 01-351, released December 11, 2001 (*911 Act First Report and Order*).

<sup>7</sup> *911 Act NPRM*, 15 FCC Rcd at 17082 (para. 7).

<sup>8</sup> CTIA Petition at 2.

<sup>9</sup> *Id.*, at 7-8, citing Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (*CPNI Order*), adopting Subpart U of Part 64 of the Commission’s Rules, 47 C.F.R. §§ 64.2000, et seq.

<sup>10</sup> Wireless Telecommunications Bureau Seeks Comment on Request to Commence Rulemaking to Establish Fair Location Information Practices, WT Docket No. 01-72, Public Notice, DA 01-696 (rel. March 16, 2001) (Public Notice).

<sup>11</sup> Appendix A.

<sup>12</sup> Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-149, Clarification Order and Second Further Notice of Proposed Rulemaking, FCC 01-247, released September 7, 2001 (*CPNI Clarification Order and Second FNPRM*).

<sup>13</sup> *Id.*, at 11-12 (para. 22 n. 55).

implementing Section 222(c)(1).<sup>14</sup>

### III. DISCUSSION

5. Based on the record before us, we decline to commence a rulemaking proceeding to implement the 911 Act's amendments at Sections 222(f) and (h) of the Act. In evaluating our course of action, we note that Congress directed that carriers obtain a customer's "express prior authorization" before using or disclosing wireless location information,<sup>15</sup> and thus made clear the authorization process for a key element of consumer privacy. We find Section 222(f)'s requirement of "express prior authorization" leaves no doubt that a customer must explicitly articulate approval before a carrier can use that customer's location information.<sup>16</sup> Thus, no rules are necessary because the statutory language is unambiguous, imposing clear legal obligations and protections for consumers. Moreover, unlike many other statutory enactments, Congress did not direct us to undertake a rulemaking, and the amendments enacted at Sections 222(f) and (h) of the Act do not require specific Commission action.<sup>17</sup> Without some showing that Section 222(f), as read in conjunction with the broader provisions of Section 222, is inadequate to protect consumers, we conclude that any action by the Commission is unnecessary. Telecommunications carriers, of course, are bound by the requirements of Sections 222(f) and (h) upon passage of the 911 Act and those statutory duties exist whether or not there are any more detailed implementing rules. We are prepared to vigorously enforce the law as written, while monitoring whether further Commission action is necessary. We believe handling the information in accordance with the statute provides adequate consumer protection against intrusion of consumers' privacy.<sup>18</sup>

6. In addition, commercial wireless location-based services are in a developmental stage and are just beginning to emerge, as CTIA and other parties acknowledge.<sup>19</sup> Indeed, CTIA and parties supporting its petition seek a rulemaking at this time because the services are new and not yet established. They contend that adopting rules would promote the acceptance of new services and uses by consumers and encourage industry by establishing a clear framework for industry to design the services and consumers to predict how their location information will be handled.<sup>20</sup>

7. We find, however, that precisely because of the nascent state of these services, we do not wish inadvertently to constrain technology or consumer choices via our rules. At this point, any commercial location-based services being offered are clearly at an early stage and the full nature and extent of the

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<sup>14</sup> *Id.*, at 8-9 (para. 16 n. 36).

<sup>15</sup> 47 U.S.C. § 222(f).

<sup>16</sup> As spelled out in the legislative history, the statute "require[s] [a] user's express prior authorization before location information can be used for commercial purposes." H.R. Rep. No. 106-25, 106 Cong., 1<sup>st</sup> Sess., at 15 (1999). Section 222(f)'s requirement of "express prior authorization" thus cannot be satisfied by a customer's silence in response to a carrier's notice of intent to use location information.

<sup>17</sup> *See, e.g.*, CDT Comments at 6, Nextel Reply Comments at 3, Verizon Comments at 8.

<sup>18</sup> We disagree with Cingular's view that the Commission must conduct a rulemaking and that "[T]he question presented by the Public Notice is whether the Commission should address location information amendments in the separate proceeding proposed by CTIA or in the existing CPNI docket." Cingular Reply Comments at 1-2. Neither the original CPNI statutory provisions nor the legislation adopting the location information amendments direct the Commission to conduct a rulemaking proceeding. Cingular does not cite any authority in support of its argument to the contrary.

<sup>19</sup> CTIA Petition at 1-5, CTIA Reply Comments at 2-3, AT&T Comments at 3-4, Verizon Comments at 7.

<sup>20</sup> CTIA Petition at 4-5, CTIA Reply Comments at 4, Cingular Comments at 1-2, CDT Comments at 7-8.

commercial services that will be offered is unknown.<sup>21</sup> In addition, the Commission's rules mandating the transmission of a caller's location with all wireless 911 calls only became effective October 1, 2001, and the service is beginning to be rolled out in a few specific areas.<sup>22</sup> Carriers offering location-capable handsets are allowed until December 31, 2005, to ensure that 95% of their subscribers have location-capable handsets. Carriers who deploy a network-based E911 system also will have a phase-in period, following the receipt of requests to deploy by public safety answering points (PSAPs). Full deployment of wireless E911 services will take several years, as carriers phase in location-capable handsets and upgrade their network infrastructure to provide location information. Similarly, we would expect the deployment of commercial-based services to occur over a period of time. Given this environment, we believe a rulemaking is unnecessary and potentially counterproductive. We conclude that the statute itself provides sufficient clarity regarding the privacy protections to be afforded this information to guide the development of new services.

8. Furthermore, we note that, assuming the Commission were to find CTIA's proposed privacy principles to be a reasonable approach, it is unclear whether the adoption of these principles as formal rules would serve a useful purpose at this time. CTIA explains that the proposed privacy principles are based on well-known and generally accepted fair information practices addressed in guidelines established by the Federal Trade Commission (FTC) that industry may voluntarily adopt.<sup>23</sup> Indeed, most of the commenters state that they follow these principles already in their treatment of consumer information and include their own policies as examples of how the privacy principles proposed by CTIA for Commission rules have been adopted by their organizations.<sup>24</sup>

9. Given the clear direction provided in the statutory language and the nascent state of location-based services that are just now being deployed, we find that a rulemaking proceeding to implement Section 222(f) is neither necessary nor appropriate. We will continue to monitor location privacy issues as these services are deployed and will take regulatory action if the need is clearly demonstrated. In consideration of these circumstances, we deny the Petition for Rulemaking.<sup>25</sup>

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<sup>21</sup> For example, AT&T states that newly available applications include technologies that allow subscribers to access driving directions, local news or weather, and concierge services, but that a wide range of location-related services will be developed that are unimagined today (AT&T Comments at 3-4). EPIC states that the devices and services that will make use of location data will be varied and complex, ranging from hand-held personal digital assistants to automotive navigational systems (EPIC Comments at 3). Also see, e.g., Nextel Reply Comments at 3-4.

<sup>22</sup> Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, RM-8143, Fourth Memorandum Opinion and Order, 15 FCC Rcd 17442 (2000), adopting amended 47 C.F.R. § 20.18(g).

<sup>23</sup> CTIA Petition at 8, citing *Privacy Online: Fair Information Practices in the Electronic Marketplace, A Report to Congress*, Federal Trade Commission (May 2000), at 3-4; CTIA Reply Comments at 9, n 34; and, e.g. WAA Comments, Attachment at 4; CDT Comments at 6 n. 13; and Dobson Comments at 5.

<sup>24</sup> These include the comments of carriers (Dobson Comments at 3-4, Sprint Comments at 10 n. 13, Verizon Comments at 4-5), developers and manufacturers of location information technology (TruePosition Comments at 7 n. 9; WLIA Comments at 4-6 and Attachments 1 and 2; and, in the design of privacy features in the equipment itself, Grayson Comments at 1-3, LPA Comments at 4-5, and TruePosition Comments at 5-7), third-party providers of wireless location-based services and their associations (AAA Reply Comments at 4-9, ITS America Reply Comments at 7-8 and Appendix A, NetCoalition Reply Comments at 2, and OnStar Reply Comments at 1), and associations promoting electronic advertising among carriers and non-carriers (DMA Comments at 2-4, WAA Comments at 2 and Attachment).

<sup>25</sup> As a result, we also deny the requests to expand the proposed rulemaking, as follows: (1) as requested by NENA, the Texas 911 Agencies, and Intrado (formerly SCC) to include clarification of the additional amendments in Section 222 of the 911 Act enacted at Section 222(d)(4) and Section 222(g) of the Act (NENA Reply Comments at 2-4, Texas 911 Agencies Comments at 2-4, SCC Comments at 4, 47 U.S.C. §§ 222(d)(4) and (g)), and (2) as

(continued....)

**IV. ORDERING CLAUSES**

10. Accordingly, **IT IS ORDERED** that the Petition of the Cellular Telecommunications and Internet Association for a Rulemaking to Establish Fair Location Information Practices, filed by the Cellular Telecommunications and Internet Association on November 22, 2000, **IS DENIED**.

11. In addition, **IT IS ORDERED** that WT Docket No. 01-72 **IS TERMINATED**.

12. This action is taken pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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requested by ITS America and USDOT to include clarification of the existing exception at Section 222(c)(3) of the Act for the aggregation of CPNI (ITS America Reply Comments at 5-7, USDOT Reply Comments at 2-3, 47 U.S.C. § 222(c)(3)).

## APPENDIX A

**Comments:**

Arizona Committee Against Domestic Violence  
 AT&T Wireless Services, Inc.  
 Center for Democracy and Technology  
 Cingular Wireless LLC  
 Direct Marketing Association  
 Dobson Communications Corporation  
 Electronic Privacy Information Center  
 Ericsson Inc.  
 Grayson Wireless, a division of Allen Telecom Inc.  
 Leap Wireless International, Inc.  
 Location Privacy Association  
 Nokia Inc.  
 Personal Communications Industry Association  
 Rural Telecommunications Group  
 SCC Communications Corp. (renamed Intrado)  
 SiRF Technology, Inc.  
 Sprint Spectrum, L.P., d/b/a Sprint PCS  
 Texas Commission on State Emergency Communications  
 and Texas Emergency Communication Districts  
 TruePosition, Inc.  
 Verizon Wireless  
 Wireless Advertising Association  
 Wireless Consumers Alliance  
 Wireless Location Industry Association  
 XNS Public Trust Organization

**Abbreviation**

ACADV  
 AT&T  
 CDT  
 Cingular  
 DMA  
 Dobson  
 EPIC  
 Ericsson  
 Grayson  
 Leap  
 LPA  
 Nokia  
 PCIA  
 RTG  
 SCC  
 Sirf  
 Sprint PCS  
 Texas 911 Agencies  
 TruePosition  
 Verizon  
 WAA  
 WCA  
 WLIA  
 XNSORG

**Reply Comments:**

American Automobile Association  
 Cellular Telecommunications & Internet Association  
 CDT  
 Cingular  
 EPIC  
 Intelligent Transportation Society of America  
 LPA  
 National Emergency Number Association  
 NetCoalition  
 Nextel Communications, Inc.  
 OnStar Corporation  
 SiRF  
 Sprint  
 United States Cellular Corporation  
 VoiceStream Wireless Corporation  
 United States Department of Transportation  
 WLIA

AAA  
 CTIA  
 ITS America  
 NENA  
 NetCoalition  
 Nextel  
 OnStar  
 USCC  
 VoiceStream  
 USDOT

**STATEMENT OF COMMISSIONER**  
**MICHAEL J. COPPS**  
**Dissenting**

*RE: Request by the Cellular Telecommunications and Internet Association to Commence Rulemaking to Establish Fair Location Information Practices.*

Congress gave the Commission responsibility to protect “call location information concerning the user of a commercial mobile service”<sup>26</sup> in the Wireless Communications and Public Safety Act of 1999 (the “911 Act”). The bill recognized that the protection of one’s physical location is extremely important, and that wireless consumers should have the power to control its sale and distribution. Congress stated that “without the express prior authorization of the customer, a customer shall not be considered to have approved the use or disclosure of or access to . . . call location information concerning the user of a commercial mobile service.”<sup>27</sup>

I agree with the majority’s determination that “the statute imposes clear legal obligations and protections for consumers,”<sup>28</sup> and that “Section 222(f)’s requirement of ‘express prior authorization’ leaves no doubt that a customer must explicitly articulate approval before a carrier can use that customer’s location information.”<sup>29</sup> In other words, it is clear that Congress insisted on an opt-in requirement. I disagree, however, that this clarity of purpose renders Commission rules unnecessary. This is because serious definitional questions and disagreement between commenters about how this protection will function remain unaddressed. Given this confusion, our failure to act will result in American’s privacy being threatened and adoption of location-enabled devices and E911 phones being slowed.

CTIA, laudably, petitioned the Commission to begin a rulemaking proceeding to create clear rules. It is rare for an organization representing a part of the telecommunications industry to request that the Commission initiate a rulemaking imposing rules on that industry. The fact that CTIA, and many industry members, strongly advocate for rules should be a strong signal that the statute’s plain language has not resolved all questions related to fair information practices for location information.

CTIA believes, as do I, that location-based services hold great promise for American wireless consumers. Our E911 rules, for example, depend on location information. But E911 is only the beginning. Driving directions, weather alerts, traffic updates, concierge services, and a host of Internet-related tools are enabled when customers can pinpoint and opt in to share their location. However, as CTIA recognized, “legitimate privacy concerns abound over fears of ‘location-based applications that allow [service providers] to track where users are and send them alerts about sales on travel or personal goods.’”<sup>30</sup> I believe fears of more invasive and dangerous misuses of location information also are legitimate. The combination of these fears has the potential to undermine consumer confidence in, and use of, location services, or to expose consumers to both annoyances and dangers, if left unaddressed.

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<sup>26</sup> 47 U.S.C. § 222(f).

<sup>27</sup> 47 U.S.C. § 222(f).

<sup>28</sup> *In the Matter of Request by the Cellular Telecommunications and Internet Association to Commence Rulemaking to Establish Fair Location Information Practices, Order*, WT Doc. No. 01-72, at ¶ 1 (“*Fair Location Information Practices Order*”).

<sup>29</sup> *Fair Location Information Practices Order* at ¶ 5.

<sup>30</sup> Petition of the Cellular Telecommunications Industry Association for a Rulemaking to Establish Fair Location Information Practices, filed November 22, 2000 (“CTIA Petition”) at 5.

Therefore, both as a good corporate citizen and looking out for its members bottom lines, CTIA requested that the Commission “promulgate rules to ensure that mobile customers (1) are well informed of location information collection and use practices prior to collection; (2) have a meaningful opportunity to consent to the collection and use of this information for location-based services; and (3) are assured of the security and integrity of any collected location information.”<sup>31</sup> CTIA recognized that “[w]ith informed customer consent, the promise of location-sensitive wireless services will be realized.”<sup>32</sup>

The Electronic Privacy Information Center (“EPIC”) raises another compelling justification for Commission action. As EPIC explains, and the record bears out, “Commission action is needed because the statute’s meaning apparently is subject to varying interpretations within the industry.”<sup>33</sup> While Congress’s intent is clear that express opt-in consent is needed before using, permitting, or disclosing access to location information, many other issues needed to implement this mandate are murky. For example, some commenters believe that the statute does not require any consent prior to the *collection* of location information, while others believe it requires consumers to opt-in before location information is even collected.<sup>34</sup> Some commenters believe the statute allows “implied consent,” meaning that location information can be collected without an opt-in in certain circumstances, while others believe consent can never be implied.<sup>35</sup> Even the definition of “location information” is debated by commenters. Cingular believes that the location of the nearest cell tower to a customer is not “location information.”<sup>36</sup> But Congress did not define “location information,” and without Commission action, consumers and carriers will not know what is contained in this opaque term until the question is subject to court action that follows a potential privacy violation.

Does the majority’s inaction in this proceeding mean that they expect to deal with these critical issues in individual, piecemeal decisions after consumer privacy has been violated? We cannot afford this dangerous course. The good news is that we can avoid it by promulgating clear rules.

The level of confusion and disagreement created by this action has great potential to undermine customer use of location services, as well as carrier and equipment maker investment in location technologies. Customers will shy away from services if they think that the privacy of something as sensitive as their location is up for grabs. And carriers and equipment makers will avoid being burned by consumer fear and will thus under-invest in location devices.

So why does the majority not provide clarity through clear Commission rules? Because they “do not wish inadvertently to constrain technology or consumer choices.”<sup>37</sup> I believe that the absence of clarity will do more to constrain technology and consumer choices than Commission action ever would. If this were not the case, wouldn’t the usually regulation-wary wireless industry oppose rather than strongly support rules since it has the most to gain here? If the Commission were to put in some sweat now, and provide clear and technology-neutral rules, we would do both consumers and the wireless industry a great service. We should do this *before* location technology investments are made, so that industry isn’t forced to retool later, at far more expense. We should do so before consumers make up their minds about whether they trust location practices, rather than fighting an uphill battle to regain consumer confidence after it has been lost.

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<sup>31</sup> CTIA Petition at 3.

<sup>32</sup> CTIA Petition at 3.

<sup>33</sup> EPIC Reply Comments at 10.

<sup>34</sup> Leap Comments at 3-4; cf. EPIC Reply Comments at 10.

<sup>35</sup> Leap Comments at 5; cf. Nokia Comments at 4.

<sup>36</sup> Cingular Comments at 2-3.

<sup>37</sup> *Fair Location Information Practices Order* at ¶ 7.



For these reasons, I support CTIA's Petition for Rulemaking. The Commission should issue a Notice of Proposed Rulemaking that proposes rules to implement Congress's mandate, and asks for comment on CTIA's proposal, on the proposals made by EPIC, and on the many ambiguities identified by commenters in the proceeding thus far. Instead, the majority chooses to do nothing – inaction – a course that is anti-privacy, anti-consumer, and will slow the growth of the wireless industry. Therefore, I must respectfully dissent.