STATEMENT
OF
THE HON. ROBERT M. MCDOWELL
SENIOR FELLOW
HUDSON INSTITUTE

"PROTECTING CUSTOMER PROPRIETARY NETWORK INFORMATION IN THE INTERNET AGE"

BEFORE THE
U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
UNITED STATES HOUSE OF REPRESENTATIVES

JULY 11, 2018

HUDSON INSTITUTE
1201 PENNSYLVANIA AVENUE, N.W.
SUITE 400
WASHINGTON, DC 20004

Executive Summary

The story of the evolution of the Federal Communications Commission's rules governing "customer proprietary network information," or "CPNI," dates back to 1980, before the break-up of the AT&T "Ma Bell" phone monopoly when analog voice calls traveled over circuit-switched copper wires. Marty Cooper's cellular telephone invention was in its commercial infancy, and the Internet was an obscure computer-to-computer communications tool enjoyed by only a few thousand academics and government officials.

The FCC has modified its CPNI rules many times over the ensuing decades, with Congress last providing direction 22 years ago with the Telecommunications Act of 1996, specifically Section 222.[1] The FCC subsequently adopted rules to implement Section 222 on several occasions. When I served as commissioner, in 2007 I worked on a bipartisan basis with my colleagues on a partial restructuring of our CPNI rules.

Since then, dramatic changes have occurred in the telecommunications, media and technology ("TMT") marketplace. The maturation of the Internet ecosphere, especially the mobile Internet, has produced consumer benefits that were unimaginable 22 years ago. The mobile Net has also sparked trillions in American economic growth. While brilliant engineers and intrepid entrepreneurs invented new tools that have dramatically altered and improved our daily lives, business models have converged. Section 222, however, has remained the same despite these new market realities. Only telecommunications carriers must live under this law governed by the FCC while the rest of the players in the dynamic Internet ecosphere operate under privacy standards administered by the Federal Trade Commission. This has created a legal and regulatory asymmetry in the diverse Internet market.

Only Congress has the authority to modernize and harmonize privacy and consumer protection laws to reflect the realities of the rapidly-changing 21st Century Internet marketplace.

***

[1] Cable companies must protect customers' video viewing data under Section 631, a section that is similar in spirit to Section 222. 47 U.S.C. § 551.

CPNI and the 21st Century Digital Marketplace

Chairman Blackburn, Ranking Member Doyle, and distinguished Members of the Subcommittee, thank you for having me testify before you today. My name is Robert McDowell. I served as a commissioner of the Federal Communications Commission (FCC) from June 1, 2006, to May 17, 2013. I am a partner at Cooley LLP as well as co-leader of its global communications practice. I am also a Senior Fellow at the Hudson Institute. I testify today in my own capacity. The views expressed today are purely my own.

During my seven years at the FCC, we repeatedly examined issues related to "customer proprietary network information, or "CPNI,"[2] including adopting major reforms in 2007. As I said in 2007, the FCC's CPNI policies must "strike a careful balance," protecting consumers while "guard[ing] against imposing over-reaching and unnecessary" requirements on carriers.[3] The history of CPNI at the FCC reflects the struggle to maintain that balance in a changing communications environment. The Federal Trade Commission ("FTC") has been addressing the same issues for services under its jurisdiction, which include all services other than common carriage.

---

[2] Section 222 of the Communications Act of 1934 defines CPNI as:

> (A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and
>
> (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;
>
> except that such term does not include subscriber list information.

47 U.S.C. § 222(h)(1).

[3] 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, CC Docket No. 96-115 and WC Docket No. 04-36, April 2, 2007. 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, CC Docket No. 96-115, WC Docket No. 04-36, 22 FCC Rcd 6927 (2007).

Today, broadband Internet access services providers are once again subject to the same privacy regime as "edge" providers under the purview of the expert agency for privacy policy: the Federal Trade Commission. If a broadband provider has a corporate affiliation with a telecommunications carrier, then the carrier side of the business must also abide by the FCC's CPNI rules that protect sensitive information such as call records. Similarly, cable providers must protect video viewing information pursuant to Section 631.[4] Edge providers do not have these dual sets of regulations to govern their behavior or protect sensitive consumer data. Thus, as the telecommunications, media and technology ("TMT") marketplace converges, a legacy legal and regulatory asymmetry still exists that only Congress can reconcile. America's public policy has evolved to create a regulatory regime that does not focus as much on the *sensitivity* of the data that is collected, but, rather, it focuses more on what kind of market player collects the data. This approach can be more confusing for consumers and companies alike than would having one set of technology-neutral rules that apply consistently across all platforms.

The FCC first adopted rules concerning customer proprietary network information ("CPNI") in 1980 as part of its *Computer Inquiries.* Those proceedings created a framework to permit AT&T, the regional Bell operating companies, and GTE to provide what were then known as "enhanced services" (and now are called "information services") in competition with companies that did not provide telephone service. As the FCC explained in 1998, those rules were intended to "prohibit" the use of "CPNI obtained from . . . provision of regulated services to gain a competitive advantage in the unregulated CPE and enhanced services markets." Even then, the FCC also recognized that the rules would "protect legitimate customer expectations of confidentiality[.]"[5] The original rules

[4] 47 U.S.C. § 551.

[5] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; and Implementation of the Non-Accounting Safeguards of*

prohibited the *regulated* businesses of the Bell companies and AT&T from providing CPNI to their *unregulated* affiliates unless the information was available to the public. The FCC also adopted a parallel rule to prevent the Bell companies and GTE from sharing CPNI with their wireless affiliates.

Protection for CPNI was added to the Communications Act of 1934 in the Telecommunications Act of 1996 under a new Section 222. That section now sets the basic framework for handling customer-specific information generated by telecommunications providers. Under that framework, carriers are required to protect the confidentiality of CPNI. They can use CPNI to provide and bill for services, to prevent fraud, and to aid 911 operators and other public safety agencies. With customer permission, carriers can use CPNI to market other services. Carriers also can use aggregated CPNI that does not identify individual customers for marketing and can use customer names, addresses, and telephone numbers to create telephone directories, including Yellow Pages directories.

The FCC adopted rules to implement Section 222 in several orders from 1996 to 1998. Those rules divided services offered by carriers into several categories, with different levels of customer approval required for different services. Customer approval was not required to use CPNI to market services within the categories of telecommunications services the customer already was purchasing from the company, such as local exchange service or wireless service. Express customer approval was required for any other use of CPNI to market information services or other telecommunications services to that customer. The FCC also adopted rules to limit how carriers could use information they obtained when their customers were switching to other carriers.

Sections 271 and 272 of the Communications Act of 1934, as amended, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8070 (1998).

In 1999, the U.S. Court of Appeals for the Tenth Circuit overturned the requirement that telecommunications carriers obtain express consent for use of CPNI.[6] The FCC responded in 2002. The Commission decided to allow carriers to use notice and "opt-out" consent prior to using CPNI to market "communications-related services" – local telephone service, long distance service, wireless service, Internet access, and customer-premises equipment – but continued to require affirmative customer consent before a carrier could disclose CPNI to unrelated third parties or to carrier affiliates that provide non-communications services.

The FCC revisited CPNI issues again in 2007,[7] when I was serving as a Commissioner, to address a surge in fraudulent access to CPNI and to bring interconnected voice-over-IP services ("VoIP," or services that act like traditional telephone services, with dialable telephone numbers) under the umbrella of the rules. The new rules required carriers to authenticate their customers before providing access to CPNI, with different requirements for in-person, telephone, and online access; and adopted a new obligation to report unauthorized access to customer information to the FBI, Secret Service, and affected customers. The rules tightened the limits on when carriers could provide CPNI to contractors and joint venture partners and required notice to customers when changes in account information occur. The new rules also required carriers to report annually on their efforts to protect CPNI, on customer complaints about unauthorized access, and any actions taken against data brokers.

None of these rules applied to Internet access services, or to any other information service (such as voice mail or email), which traditionally had been subject to the FTC's privacy regime. This changed in February 2015, when the FCC adopted an order that declared, for the first time, that

---

[6] *U. S. West, Inc. v. FCC,* 182 F.3d 1224 (10th Cir. 1999), *cert. denied,* 530 U.S. 1213 (June 5, 2000).

[7] *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, CC Docket No. 96-115, WC Docket No. 04-36, 22 FCC Rcd 6927 (2007).

broadband Internet access services would be regulated under Title II of the Communications Act of 1934 as common carriage services. One consequence of that decision was to subject broadband Internet access services to a host of common carrier obligations, including the CPNI requirements in Section 222, and to remove broadband providers from the FTC's authority. The FTC retained jurisdiction over other information services, such as "edge providers" that offer video, apps, gaming and some forms of voice communications.

In 2016, the FCC proposed to apply the existing CPNI rules (with some adaptations) to broadband Internet access services.[8] Late in the year, however, it decided instead to adopt a wholesale revision of the CPNI rules that used the sensitivity of customer information to determine how that information would be treated. Under that approach, opt-in approval from the customer was required before a carrier or broadband provider could use or share the most sensitive information, such financial, health, and precise geo-location information.[9] Opt-out approval was required for "non-sensitive information," and no approval was required for a carrier or broadband provider to use or share information that had been exempted from approval requirements by Section 222. The order also modified the data breach notification requirements to treat larger breaches differently than smaller breaches; prohibited providers from requiring customers to agree to use of their data as a condition of obtaining service; and permitted agreements between service providers and enterprise customers that did not comply with the rules. Again, only broadband service providers had to comply with these standards, not any other part of the Internet ecosphere, such as "edge" providers.

[8] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Notice of Proposed Rulemaking, 31 FCC Rcd 2500 (2016).

[9] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Report and Order, 31 FCC Rcd 13911 (2016).

Congress overturned the 2016 rules under the Congressional Review Act in April 2017, and the FCC released an order reinstating the prior rules and noting that broadband Internet access remained subject to Section 222 in June 2017. In December 2017, the FCC reversed its 2016 decision to treat broadband Internet access as a common carrier service. As a result, broadband Internet access service, like any information service, no longer is subject to the FCC's CPNI requirements, and the 2007 rules continue to apply to telecommunications service and interconnected voice over IP service. Broadband Internet access service is once again subject to the FTC's privacy rules, however, providing consumers with the formidable protections of that agency.

Conclusion

The FCC and Congress have addressed CPNI issues repeatedly since the first rules were adopted in 1980. The rules have evolved as the industry and customer expectations have changed, and periodic re-examination of the rules to maintain the balance between customer privacy and legitimate business interests is appropriate. In the current environment, the FCC has jurisdiction over privacy for traditional telecommunications services and interconnected voice-over-IP services, while the FTC has jurisdiction over privacy for broadband Internet access and all other information services. Legacy laws, however, have created a legal and regulatory asymmetry just as markets are witnessing dramatic convergence and experimentation. Only Congress has the authority to modernize privacy and consumer protection laws to reflect the realities of the 21st Century Internet marketplace. I respectfully suggest that Congress examine a modernized and harmonized privacy framework that is technology neutral and which focuses on the sensitivity of the data versus the type of entity holding the data.

Thank you again for inviting me to appear before you today, and I look forward to your questions.