

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, to formally apply Telecommunications customer privacy rules to wireless carriers; and to amend customer privacy rule language to include mobile phones with advanced computing ability and connectivity.

Rulemaking 12-

**JOINT PETITION OF CONSUMER FEDERATION OF CALIFORNIA,
THE UTILITY REFORM NETWORK, AND PRIVACY RIGHTS
CLEARINGHOUSE TO INIATE A PROCEEDING TO REVIEW THE
PRIVACY PRACTICES OF TELEPHONE CORPORATIONS,
INCLUDING WIRELESS CARRIERS.**

Nicole A. Blake
Staff Attorney
Consumer Federation of California
1107 9th Street, Suite 625
Sacramento, CA 95814
Phone: (916) 498-9608
Fax: (916) 498-9611
E-mail: blake@consumercal.org

William R. Nusbaum
Managing Attorney
TURN
115 Sansome Street, Suite 900
San Francisco, CA 94104
Ph. (415) 929-8876
Fax: (415) 929-1132
E-mail: bnusbaum@turn.org

Beth Givens
Director
Privacy Rights Clearinghouse
3108 - 5th Ave., Suite A
San Diego, CA 92103
Ph: (619) 298-3396
E-mail: bethg@privacyrights.org

TABLE OF CONTENTS

I. SUMMARY OF POSITION 2

II. INTRODUCTION 2

III. RECENT CUSTOMER PRIVACY ISSUES TRIGGERING THE NEED FOR THE COMMISSION TO PROTECT WIRELESS CUSTOMERS AGAINST POTENTIAL PRIVACY VIOLATIONS..... 6

IV. CPUC’s JURISDICTION TO PROTECT WIRELESS PHONE CUSTOMERS..... 8

A. COMMISSION’S HISTORY ESTABLISHING CONSUMER PROTECTION RULES FOR WIRELESS CARRIERS..... 9

a. A Commission Report recognized customer privacy rights were necessary for all telephone customers, including wireless customers..... 9

b. The Commission’s “Consumer Protection Initiative” for telephone customers includes wireless customers..... 9

i. Consumer Protection Initiative: Consumer Bill of Rights..... 10

ii. Consumer Protection Initiative: CPUC’s limited English proficiency case to protect telecommunications customers 12

iii. Service Quality Standards Proceeding. 12

B. THE PUBLIC UTILITIES CODE PROVIDES AUTHORITY OVER PRIVACY PRACTICES OF TELEPHONE CORPORATIONS, INCLUDING WIRELESS CARRIERS..... 12

V. CONCLUSION AND COMMISSION NEXT STEPS. 13

I. SUMMARY OF POSITION

Pursuant to section 1708.5, Consumer Federation of California (“CFC”), The Utility Reform Network (“TURN”), and The Privacy Rights Clearinghouse (“PRC”), submit this petition requesting the California Public Utilities Commission (“CPUC” or “Commission”) to initiate a proceeding to review the privacy practices of Telephone Corporations, including wireless service providers (“wireless carriers or mobile carriers”) and develop wireless privacy standards with requisite enforcement mechanisms, to which wireless phone carriers and 3rd parties who gain access to wireless customer information must comply.

CFC is a non-profit advocacy organization committed to providing a voice for consumers. CFC considers the impact of public policy on the quality and cost of goods and services as well as its effects on hard working people. The Consumer Federation of California is joined in this petition by two additional California nonprofit organizations, The Utility Reform Network and the Privacy Rights Clearinghouse. TURN is a non-profit consumer advocacy organization with a long history of championing the cleanest energy and highest-quality telephone services at the lowest prices possible for residential customers, low-income households, and small businesses throughout California. The Privacy Rights Clearinghouse is a nonprofit organization with a two-part mission: consumer education and advocacy. The PRC was established in 1992 and is located in San Diego, CA.

II. INTRODUCTION

Mobile phones and the technological capabilities of mobile phones have undergone a profound transformation in recent years. Phones have evolved at such a rapid pace that laws created to regulate the communications industry should be reformed to keep up with

technological advances. Phone communications are not confined to oral communication. People can now communicate using written text messages, using an application in their “Smartphone” to facilitate communication with other parties, and facilitating telephone communication through the internet. Although there are many benefits of using a mobile phone, there are also many concerns regarding consumer protection, especially customer privacy.

Consumers’ concerns about cell phone privacy have been compounded since the introduction of the Smartphone. Smartphones also enable individuals to engage in written communication as well as internet access. And they allow individuals to download third-party applications (“apps” or “applications”). Apps can capture a customer’s personal information as well the user’s location.

Amid all these new ways of communicating come potential ways to invade a customer’s privacy. Mobile carriers as well as application developers can collect, store, and use a customer’s personal information, sometimes without their knowledge and willing consent. Personal information can also be sold to third-party marketers.

A 2010 study by Bucknell University revealed that apps can transmit the “Unique Device Identifier” (UDID) of iPhones, making it possible for customer information to be tracked.¹ The study found that 68% of the applications evaluated in this study do in fact transmit the UDID back to a remote server, owned either by the application developer or an advertising partner. Further, 18% of the applications evaluated transmitted what appeared to be encrypted

¹ iPhone Applications & Privacy Issues: An Analysis of Application Transmission of iPhone Unique Device Identifiers (UDIDs) (2010), found at <http://cryptocomb.org/Iphone%20UDIDS.pdf> at 4 and 5.

information, and only 14% do not transmit the UDID back to the remote server.² The purpose of this study was to reveal how technically possible it is for customer information such as browsing patterns, location, and app usage to be sold to unintended 3rd parties such as advertisers, spouses, divorce lawyers, debt collectors, etc.³

In a separate study by the *Wall Street Journal* which examined 101 popular Smartphone applications for iPhone and Android operating systems, 56 were found to be transmitting the device's unique serial number without the user's consent; 47 transmitted the phone's location; and five sent age, gender and other personal information. Additionally, 45 of the tested applications did not even provide any form of privacy policy for the user.⁴ Privacy policies may be created voluntarily by a mobile carrier or app developer; however there is no firm regulation to enforce privacy violations, and there is no meaningful penalty if a mobile carrier or app developer decides *not* to ask for a customer's consent before using their information.

The Carrier IQ controversy demonstrates a recent example of a mobile carrier and third-party company using customers' personal information absent their knowing and willing consent. This controversy has, once again, caused significant concern among consumers about whether their privacy is adequately protected when using a wireless phone.⁵

² iPhone Applications & Privacy Issues: An Analysis of Application Transmission of iPhone Unique Device Identifiers (UDIDs) (2010), found at <http://cryptocomb.org/Iphone%20UDIDS.pdf> at 4.

³ iPhone Applications & Privacy Issues article at 14.

⁴ "Your Apps are Watching You," found at <http://online.wsj.com/article/SB10001424052748704694004576020083703574602.html>

⁵ "Carrier IQ: Which carrier is the biggest user?," found at http://www.washingtonpost.com/business/technology/carrier-iq-which-wireless-carrier-is-the-biggest-user/2011/12/16/gIQAY3LkyO_story.html; "Carrier IQ: Motorola and T-mobile detail use," found at http://www.washingtonpost.com/business/technology/carrier-iq-motorola-t-mobile-detail-use/2011/12/21/gIQAAHN9O_story.html; "AT&T, Sprint, Samsung and HTC detail Carrier IQ installations," found at <http://www.theverge.com/2011/12/15/2639904/att-sprint-samsung-htc-carrier-iq-details>.

Wireless carriers, including AT&T, T-Mobile, and Sprint, contracted with Carrier IQ, a mobile software company, to install software that collects and tracks customer data, presumably for diagnostic purposes.⁶ This software is installed on hundreds of millions of cell phones, in many cases as an aftermarket product, without customers' knowledge or consent. The software runs automatically when the phone is on, and has the ability to record location, phone numbers called, application downloads, when text messages are sent or received, recording audio, changing audio settings, and changing network connectivity. There is debate whether Carrier IQ is installed for purposes of reading the contents of text messages or logging keystrokes. However, there is some evidence that the software is capable of collecting this information. According to a recent article, Carrier IQ also admitted that a previously undiscovered "bug" had actually been capturing and sending the contents of users' SMS (text) messages to wireless companies, albeit in a "non-human readable format."⁷ The ability to collect this data presents significant security and privacy issues. Presumably, wireless carriers who contracted with Carrier IQ to install this software in phones did not disclose this software to customers in mobile services terms and conditions. Wireless carriers claim that the software is used to troubleshoot phone problems quickly and efficiently. The issue, however, lies with the *potential* to invade a person's privacy without any regulations in place to prevent it.

Wireless applications such as mobile banking and "e-wallet" also constitute an area of concern when it comes to consumer privacy. These mobile monetary applications collect

⁶ Verizon claims to have never used the software. "Verizon, no Carrier IQ, no way," found at <http://gigaom.com/2011/12/01/verizon-no-carrieriq-no-way/>. However, a recent article stated that Verizon may be installing another type of software that uses customer information presumably for diagnostic purposes. "Verizon adding remote diagnostic tool to devices; no Carrier IQ spying features included," found at <http://www.bgr.com/2012/03/20/verizon-adding-carrier-iq-like-remote-diagnostics-tool-to-various-devices/>.
⁷ "Lawmakers call for a Carrier IQ hearing," found at <http://idealab.talkingpointsmemo.com/2012/01/lawmakers-call-for-carrier-iq-hearing.php>.

sensitive financial information from customers in order to carry out banking and purchase transactions through a Smartphone. Although considered a convenient service to customers, financial applications can also make customer information vulnerable to phishing attacks and other security breaches. Wireless banking and the ability to make purchases via a Smartphone highlight another example of how a person's privacy can be invaded with no significant regulations in place to prevent a breach.

The question then is what can California do at the state level to help prevent potential telecommunication privacy violations?

The CPUC has jurisdiction to protect both wireless and landline customers' privacy. The Commission's ability to formally assert this jurisdiction and review the privacy practices of the telecommunications industry, including wireless carriers, is consistent with both state and federal laws. Currently, the Commission has already exercised its jurisdiction over wireless phone carriers in a set of consumer protection issues.⁸ The Commission has the ability to further apply its jurisdiction over wireless carriers when it comes to protecting customer privacy.

III. RECENT CUSTOMER PRIVACY ISSUES TRIGGERING THE NEED FOR THE COMMISSION TO PROTECT WIRELESS CUSTOMERS AGAINST POTENTIAL PRIVACY VIOLATIONS.

Currently, programs downloaded and installed onto a Smartphone might be accompanied by a voluntary presentation of a company privacy policy followed by a customer's possible ability to either opt-in or out of this program. If a company chooses to institute a privacy

⁸ See R.00-02-004, *Order Instituting Rulemaking on the Commission's own motion to establish consumer rights and consumer protection rules applicable to all telecommunications utilities*; See R. 07-01-021, *Order Instituting Rulemaking to address the needs of telecommunications customers who have limited English proficiency*. See also, cramming rules in D.10-10-034 in R.00-02-004; and service quality rules D.09-07-019 In R.02-12-004

policy and communicate this privacy policy to a customer downloading an app, this policy is usually long and difficult to read. According to a recent study by AdaptivMobile, 75% of “[Smartphone] users agree to but do not read the often-lengthy terms and conditions of the apps they download.”⁹ Embedded in often lengthy privacy policies are clauses which usually state that the apps will access personal data.¹⁰ In addition, many Smartphone users are not aware that downloading an app will put their privacy at risk. According to a recent survey, 65% of Iphone users do not know that downloading an application may compromise their privacy¹¹

Notwithstanding the fundamental flaws of individual, company-initiated privacy policies, there are some situations where both companies and phone carriers do not even communicate a privacy policy to customers nor give them the ability to opt-in or out of a particular program. The Carrier IQ software installed in many phones is an example of the latter.

When mobile carriers first contracted with Carrier IQ to install the Carrier IQ software, the program ran automatically, in most cases without knowledge or permission from the customer.¹² This tracking software was installed for seemingly diagnostic purposes. However, nothing is preventing carriers or companies contracting with carriers from using customer information for other purposes. Since recent media attention surrounding Carrier IQ, wireless carrier Sprint voluntarily removed the software.¹³ While this is a positive development, it is clear from the Carrier IQ situation that leaving privacy protection in the hands of companies is not good

⁹ “Mobile Security and Privacy Breaches ‘Totally Unacceptable’ To Customers: Survey Says,” found at http://www.huffingtonpost.com/2011/11/29/mobile-security-and-privacy-breaches_n_1117879.html

¹⁰ Id.

¹¹ Id.

¹² Senator Franken Demands Answers from Company accused of secretly logging location and Privacy Information, found at http://www.franken.senate.gov/?p=press_release&id=1868.

¹³ “Sprint to remove Carrier IQ software from its phones,” found at <http://www.intomobile.com/2012/01/18/sprint-remove-carrier-iq-software-its-phones/>.

public policy. Companies associated with Smartphones may voluntarily institute a privacy policy, or wireless carriers may voluntarily remove software if there is media attention surrounding privacy concerns; however, there are no measures in place to prevent companies from committing future privacy violations. Regulations must be instituted on the state level to protect California consumers.

IV. CPUC's JURISDICTION TO PROTECT WIRELESS PHONE CUSTOMERS.

Federal law does not preclude Commission authority over wireless service providers regarding consumer protection. The Federal Telecommunications Acts bars, in most cases, state regulation of mobile entry and phone rates. However, the Federal Telecommunications Act 47 U.S.C. §332 (3) (A) does not preclude a state from regulating "other" mobile phone terms and conditions:

(3) State preemption.

(A) Notwithstanding sections 2(b) and 221(b) [47 USCS §§ 152(b) and 221(b)], no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

As many aspects of the telecommunications industry were deregulated, the Commission was hesitant to use its jurisdiction over wireless carriers and instead chose to generally limit its jurisdiction to landline service. However, the Commission has applied its jurisdiction over wireless carriers in recent years, resulting in certain consumer protections for wireless customers. It is now time for the Commission to address the extremely critical privacy issue.

A. COMMISSION’S HISTORY ESTABLISHING CONSUMER PROTECTION RULES FOR WIRELESS CARRIERS.

a. A Commission Report recognized customer privacy rights were necessary for all telephone customers, including wireless customers.

The issue of customer privacy rules extending to all telephone providers including wireless providers is not new. In 2000 the Commission issued a staff report entitled *Telecommunications Division Staff Report and Recommendations: Consumer Protections for a Competitive Telecommunications Industry* which included recommendations to the Commission. Among these recommendations was the establishment of customer rights, forming consumer protection rules consistent with these rights, and applying these consumer protection rules to wireless carriers. The Staff Report included customer privacy as a right and recommended that customer privacy be enforced through the formation of consumer protection rules. The Staff Report further recommended that customer privacy rules be applied to wireless carriers.¹⁴

b. The Commission’s “Consumer Protection Initiative” for telephone customers includes wireless customers.

On March 2, 2006, the CPUC adopted a Telecommunications Consumer Protection Initiative to empower consumers and prevent fraud in the rapidly changing telecommunications industry. This initiative was borne out of D. 06-03-013 which resulted in the adoption of a Consumer Bill of Rights. The initiative resulted in instituting a multilingual consumer education program called “CalPhoneInfo,” which is a

¹⁴ *Telecommunications Division Staff Report and Recommendations*, found at http://docs.cpuc.ca.gov/published/REPORT/3012.htm#P178_36553 ; Order Instituting Rulemaking 00-02-004 at pages 3-4.

digital platform to help educate and inform consumers. The initiative also created a Consumer Fraud Unit to enforce regulations¹⁵.

i. Consumer Protection Initiative: Consumer Bill of Rights.

The “other terms and conditions of commercial mobile services” stated in the Federal Telecommunications Act includes consumer protection. The Commission has regulated consumer protection in R. 00-02-004, which was a Rulemaking to establish consumer rights and consumer protection rules applicable to all telecommunications utilities, including wireless carriers. Decision 06-03-013 in R. 00-02-004 reaffirmed the Commission’s authority to regulate consumer protection matters for both wireline and wireless carriers¹⁶:

The Commission has broad statutory and constitutional authority, pursuant to Public Utilities Code § 701 and California Constitution, Article 12, § 6, to regulate both wireline and wireless carriers with regard to consumer protection matters. In addition to this broad authority, there are countless statutes, regulations, and rules that provide for specific regulatory authority of carriers. It is clear that the Commission has jurisdiction to regulate consumer protection in telecommunications to the extent that the Commission is not preempted by the 1996 Telecommunications Act, 47 U.S.C. 332 § (c)(3). The 1996 Telecommunications Act affirms that States may regulate wireless carriers to the extent that State requirements concern public safety and welfare, quality of telecommunications services, and consumer protection. (47 U.S.C., § 253 of the Telecommunications Act of 1996.)

In Decision (D.) 06-03-013, also known as the “Consumer Protection Initiative,” the Commission adopted revised General Order (GO) 168. Among other things, GO 168 included a cramming rule, which established that: (1) telephone companies may only bill

¹⁵ General Order 168.

¹⁶ D.06-03-013 Commissioner Bohn’s Concurrence on the Consumer Bill of Rights Decision at page 1, footnote 1.

subscribers for authorized charges; (2) the burden is on telephone companies to establish authorization of a disputed charge; and (3) prior to establishing this authorization, the carrier must treat a charge as if it were unauthorized and may not require the subscriber to make any payment of the disputed charge.¹⁷ The Commission also emphasized that carriers are the responsible party for all charges placed on their bills and for policing their bills.¹⁸

In addition, Decision 10-10-034 within R. 00-002-004 further regulated wireless carriers by establishing cramming reporting requirements. Among the reporting requirements were “all wireless Billing Telephone Corporations shall create a calendar month summary report every quarter listing refunds made to Subscribers with California area codes for charges originated by Service Providers.” The reporting requirements also included a penalty provision should telephone corporations not comply with the reporting requirements¹⁹:

14. Effect of Failure to Supply Reports:

Any Billing Telephone Corporation that fails to submit its reports in a complete and timely fashion is subject to citation by the Director of the Consumer Protection and Safety Division as follows:

- a. Up to 30 days late, a citation requiring payment of \$500 to the General Fund,
- b. 30 to 60 days late, a citation requiring payment of \$5,000 to the General Fund, and

¹⁷ Cal. P.U.C. General Order 168 at 23.

¹⁸ D.06-03-013 at 5.

¹⁹ Decision 10-10-034 attachment A at 13.

c. No less than 10 days before issuing a citation, the Director shall give the Billing Telephone Corporation or Billing Agent notice of the impending citation and an opportunity to submit the report.

ii. Consumer Protection Initiative: CPUC's limited English proficiency case to protect telecommunications customers

The Consumer Protection Initiative also resulted in D. 07-07-043 which established "In-language" rules and enforcement efforts to protect Limited English speakers against abuse or fraud. These rules extended to wireless service providers and customers.

iii. Service Quality Standards Proceeding.

In D. 09-07-019 of R. 02-12-004, the Commission required wireless carriers to disclose coverage maps at point of sale so that consumers could be better informed when selecting a particular wireless plan whether service quality is satisfactory in the area where the consumer needs service²⁰.

B. THE PUBLIC UTILITIES CODE PROVIDES AUTHORITY OVER PRIVACY PRACTICES OF TELEPHONE CORPORATIONS, INCLUDING WIRELESS CARRIERS.

The Commission has established that wireless carriers are "telephone corporations" and therefore public utilities under Public Utilities Code Sections 216, 233 and 234.²¹ In addition, California Constitution §6 and P.U. Code § 701 also give the Commission broad authority to

²⁰ D. 09-07-019 at 75.

²¹ OII. 11-06-009 at 3. "Public Utilities Code section 216 defines "public utility" to include "telephone corporation"; section 234 defines "telephone corporation" to include any corporation controlling, operating, or managing a "telephone line" for compensation; and section 233 defines "telephone line" to include any "fixtures" or "personal property" operated or managed "in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires.""; D. 06-03-013 at pages 36 and 37.

regulate carriers with respect to consumer protection matters. Finally, §451 of the Public Utilities Code states that “[e]very public utility shall furnish and maintain such adequate, efficient, just, and reasonable service... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.”²² Protecting customer privacy is part and parcel of reasonable service and is essential to maintaining the health, welfare, and safety of *all* telephone customers.

V. CONCLUSION AND COMMISSION NEXT STEPS.

The Commission has updated other consumer protection rules to include mobile service carriers; it is time that the Commission updates its antiquated privacy regulations to also reflect the rapidly changing telecommunications industry. Existing phone privacy rules have not been updated since the mid-1980s, and essentially apply to landline service only. As such, these rules are no longer appropriate for today’s regulatory market. Regulations also need to be established with an awareness that the telecommunications market is constantly changing and that regulations should be updated periodically to contemplate these changes. It is clear that the Commission has jurisdiction to employ consumer protection rules that protect wireless customer privacy.

As such, the Commission should initiate a proceeding to: 1) evaluate the privacy practices of both wireless and wireline carriers, and within this proceeding; 2) create a set of privacy standards for wireless carriers and third parties who gain access to wireless customers’ personal information; 3) these wireless privacy standards should both reflect the rapid pace of telecommunications technology and anticipate

²² Cal. P.U.C. Code § 451.

technological advances in the future; and 4) devise a set of penalty mechanisms with “teeth,” should carriers fail to adhere to these standards.

Dated:

Respectfully Submitted,

By: _____/s/_____

Nicole A. Blake, Staff Attorney
Consumer Federation of California
1107 9th Street, Ste. 625
Sacramento, CA 95814
Phone: (916) 498-9608
Fax: (916) 498-9611
E-mail: blake@consumercal.org

William R. Nusbaum
Managing Attorney
TURN
115 Sansome Street, Suite 900
San Francisco, CA 94104
Ph. (415) 929-8876
Fax: (415) 929-1132
E-mail: bnusbaum@turn.org

Beth Givens
Director
Privacy Rights Clearinghouse
3108 - 5th Ave., Suite A
San Diego, CA 92103
Ph: (619) 298-3396
E-mail: bethg@privacyrights.org