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

In the Matter of	)	
	)	
PhoneCo, LP	)	File No. EB-06-TC-3424
	)	NAL/Acct. No. 200732170046
Apparent Liability for Forfeiture	)	FRN: 0008843955
	)	
	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 30, 2007 **Released: March 30, 2007**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("*NAL*"),[1] we find that PhoneCo, LP ("PhoneCo") apparently willfully or repeatedly violated a Commission order by failing to respond to a directive of the Enforcement Bureau ("Bureau") to provide certain information and documents related to the Bureau's investigations into carrier protection of customer proprietary network information ("CPNI"). Based upon our review of the facts and circumstances surrounding this apparent violation, we find that PhoneCo is apparently liable for a forfeiture in the amount of $4,000.

II. BACKGROUND

2. The Bureau has been investigating the adequacy of procedures implemented by telecommunications carriers to ensure confidentiality of their subscribers' CPNI, based on concerns regarding the apparent availability to third parties of sensitive, personal subscriber information. For example, some companies, known as "data brokers," have advertised the availability of records of wireless subscribers' incoming and outgoing telephone calls for a fee.[2] Data brokers have also advertised the availability of call information that relates to certain landline toll calls.[3]

3. Section 222 imposes the general duty on all telecommunications carriers to protect the

[1] 47 U.S.C. § 503(b)(1). The Commission has the authority under this section of the Communications Act of 1934, as amended (the "Act") to assess a forfeiture against any person who has "willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act …." *See also* 47 U.S.C. § 503(b)(5) (stating that the Commission has the authority under this section of the Act to assess a forfeiture penalty against any person who is not a common carrier so long as (A) such person is first issued a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission nearest to the person's place of residence; and (C) subsequently engages in conduct of the type described in the citation).

[2] *See, e.g.* http://www.epic.org/privacy/iei/.

[3] *See id.*

confidentiality of their subscribers' proprietary information.[4] The Commission has issued rules implementing section 222 of the Act.[5] The Commission required carriers to establish and maintain a system designed to ensure that carriers adequately protected their subscribers' CPNI. Section 64.2009(e) is one such requirement. Pursuant to section 64.2009(e):

> A telecommunications carrier must have an officer, as an agent of the carrier, sign a compliance certificate on an annual basis stating that the officer has personal knowledge that the company has established operating procedures that are adequate to ensure compliance with the rules in this subpart. The carrier must provide a statement accompanying the certificate explaining how its operating procedures ensure that it is or is not in compliance with the rules in this subpart.[6]

4. As part of our inquiry into these issues, the Bureau sent a Letter of Inquiry ("LOI") to PhoneCo dated December 26, 2006, directing it to produce the company's compliance certificates for the previous five (5) years that it had prepared pursuant to section 64.2009(e) of the Commission's rules.[7] PhoneCo however, failed to respond to the Bureau's LOI.

III. DISCUSSION

A. Apparent Violation

5. Under section 503(b)(1) of the Communications Act of 1934, as amended (the "Act"), any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.[8] Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.[9] The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both

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[4] Section 222 of the Act provides that: "Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier." 47 U.S.C § 222.

[5] *In the Matter of 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 Sections 271 and 272 of the Communications Act of 1934, as amended*, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) ("CPNI Order"); *see also In the Matter of 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 Sections 271 and 272 of the Communications Act of 1934, as amended*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409 (1999); *In the Matter of 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 Sections 271 and 272 of the Communications Act of 1934, as amended*; *2000 Biennial Regulatory Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860 (2002).

[6] 47 C.F.R. § 64.2009(e).

[7] Letter from Marcy Greene, Deputy Division Chief, Telecommunications Consumers Division, Enforcement Bureau, to Peni Barfield, CEO, PhoneCo, LP (December 26, 2006) ("Dec. 26 LOI").

[8] 47 U.S.C. § 503(b)(1)(B) and 47 C.F.R. § 1.80(a)(1).

[9] 47 U.S.C. § 312(f)(1).

sections 312 and 503(b) of the Act[10] and the Commission has so interpreted the term in the section 503(b) context.[11] The Commission also may assess a forfeiture for violations that are merely repeated, and not willful.[12] "Repeated" means that the act was committed or omitted more than once, or lasts more than one day.[13] To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[14] The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has willfully or repeatedly violated the Act or a Commission order or rule.[15]

6. Sections 4(i), 4(j), 218, and 403 of the Act afford the Commission broad authority to investigate the entities it regulates.[16] Section 4(i) authorizes the Commission to "issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions," and section 4(j) states that "the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[17] Section 218 of the Act specifically authorizes the Commission to "obtain from . . . carriers . . . full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created."[18] Section 403 of the Act grants the Commission "full authority and power at any time to institute an inquiry, on its own motion . . . relating to the enforcement of any of the provisions of this Act."[19]

7. We find that PhoneCo apparently violated a Commission order by failing to respond to the Bureau's LOI. As indicated above, the Bureau directed PhoneCo to provide, by January 2, 2007, certain documents and information to enable the Commission to perform its enforcement function and determine whether PhoneCo was in compliance with Commission rules. There is compelling evidence that PhoneCo received the LOI, as demonstrated by confirmation of the facsimile transmissions sent to PhoneCo and its agents on December 26, 2006, and U.S. certified mail return receipt executed by a PhoneCo employee on December 29, 2006, and a U.S. certified mail return receipt executed by PhoneCo's registered agent for service on January 3, 2007. Nevertheless, PhoneCo has not responded to the Bureau's inquiry letter. We conclude that PhoneCo continuing failure to respond to the Bureau's LOI constitutes an apparent willful and repeated violation of a Commission order.

B. Forfeiture Amount

8. Section 503(b)(1) of the Act provides that any person that willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, shall be

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[10] H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

[11] *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*").

[12] *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, ¶ 10 (2001) ("*Callais Cablevision*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage).

[13] *Southern California Broadcasting Co.,* 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision,* 16 FCC Rcd at 1362, ¶ 9.

[14] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

[15] *See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002) ("*SBC Forfeiture Order*").

[16] 47 U.S.C. §§ 154(i), (j), 218, & 403.

[17] 47 U.S.C. § 154(i), (j).

[18] 47 U.S.C. § 218.

[19] 47 U.S.C. § 403; s*ee also* 47 U.S.C. § 154(i), (j).

liable to the United States for a forfeiture penalty.[20] Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to $130,000 for each violation or each day of a continuing violation, up to a statutory maximum of $1,325,000 for a single act or failure to act.[21] Section 1.80 of the Commission's rules and the Commission's *Forfeiture Policy Statement* establish a base forfeiture amount of $3,000 for failure to file required forms or information, and $4,000 for failure to respond to a Commission communication.[22] PhoneCo's failure to respond warrants the base forfeiture amount of $4,000.

9. PhoneCo will have an opportunity to submit further evidence and arguments in response to this NAL to show that no forfeiture should be imposed or that some lesser amount should be assessed.[23]

IV. CONCLUSION AND ORDERING CLAUSES

10. We conclude that PhoneCo, LP apparently willfully or repeatedly violated a Commission order by failing to provide the information and documents the Bureau directed it to provide. Accordingly, a proposed forfeiture is warranted against PhoneCo LP for its apparent willful or repeated violations of our directive.

11. ACCORDINGLY, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended,[24] Section 1.80(f)(4) of the Commission's rules,[25] and authority delegated by Sections 0.111 and 0.311 of the Commission's rules,[26] PHONECO, LP IS LIABLE FOR A MONETARY FORFEITURE in the amount of four thousand dollars ($4,000) for willfully or repeatedly failing to respond fully to the Bureau's Letter of Inquiry.

12. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's Rules, within thirty days of the release date of this NOTICE OF APPARENT LIABILITY, PHONECO, LP SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for payment of the full amount of this NAL under an installment plan should be sent to Chief, Credit and Management Center, 445 12th Street, S.W., Washington, D.C. 20554.

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[20] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(2).

[21] 47 U.S.C. § 503(b)(2)(B); s*ee also* 47 C.F.R. § 1.80(b)(2); *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation,* Order, 19 FCC Rcd 10945 (2004).

[22] 47 C.F.R. § 1.80; *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17114 (1997) ("*Forfeiture Policy Statement*"), *recon. denied* 15 FCC Rcd 303 (1999).

[23] 47 U.S.C. § 503(b)(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

[24] 47 U.S.C. § 503(b).

[25] 47 U.S.C. § 1.80(f)(4).

[26] 47 C.F.R. §§ 0.111, 0.311.

14. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to PHONECO, LP to its address of record.

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith
Chief, Enforcement Bureau