

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”¹ 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.”²

I agree with the majority’s determination that “the statute imposes clear legal obligations and protections for consumers,”³ 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.”⁴ 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.’”⁵ 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.

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

¹ 47 U.S.C. § 222(f).

² 47 U.S.C. § 222(f).

³ *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*”).

⁴ *Fair Location Information Practices Order* at ¶ 5.

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

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.”⁶ CTIA recognized that “[w]ith informed customer consent, the promise of location-sensitive wireless services will be realized.”⁷

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.”⁸ 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.⁹ 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.¹⁰ 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.”¹¹ 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.”¹² 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.

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

⁶ CTIA Petition at 3.

⁷ CTIA Petition at 3.

⁸ EPIC Reply Comments at 10.

⁹ Leap Comments at 3-4; cf. EPIC Reply Comments at 10.

¹⁰ Leap Comments at 5; cf. Nokia Comments at 4.

¹¹ Cingular Comments at 2-3.

¹² *Fair Location Information Practices Order* at ¶ 7.

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.