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Data Center
Missouri Public
Service Commission



Robin Carnahan
Secretary of State

**Administrative Rules Division
Rulemaking Transmittal Receipt**

Rule ID: 8850
Date Printed: 6/24/2008
Rule Number: 4 CSR 240-33.160
Rulemaking Type: Final Order Amendment
Date Submitted to Administrative Rules Division: 6/24/2008
Date Submitted to Joint Committee on Administrative Rules: 5/21/2008

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Included with Rulemaking:

Cover Letter

6/24/2008

Print Close

Robin Carnahan

Secretary of State
Administrative Rules Division

RULE TRANSMITTAL

Administrative Rules Stamp

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SECRETARY OF STATE
ADMINISTRATIVE RULES

Rule Number 4 CSR 240-33.160

Use a "SEPARATE" rule transmittal sheet for EACH individual rulemaking.

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TYPE OF RULEMAKING ACTION TO BE TAKEN

☐ Emergency rulemaking, include effective date

☐ Proposed Rulemaking

☐ Withdrawal ☐ Rule Action Notice ☐ In Addition ☐ Rule Under Consideration

☒ Order of Rulemaking

Effective Date for the Order

☒ Statutory 30 days OR Specific date

Does the Order of Rulemaking contain changes to the rule text? ☐ NO

☒ YES—LIST THE SECTIONS WITH CHANGES, including any deleted rule text:
(1), (3), (4), (5), (7)

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Fairness Board (DED) Stamp

JCAR Stamp

JOINT COMMITTEE ON
MAY 21 2008
ADMINISTRATIVE RULES



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June 24, 2008

Honorable Robin Carnahan
Secretary of State
Administrative Rules Division
600 West Main Street
Jefferson City, Missouri 65101

Dear Secretary Carnahan:

Re: **4 CSR 240-33.160 Customer Proprietary Network Information.**

CERTIFICATION OF ADMINISTRATIVE RULE

I do hereby certify that the attached is an accurate and complete copy of the order of rulemaking lawfully submitted by the Missouri Public Service Commission for filing on this 24th day of June, 2008.

Statutory Authority: Sections 386.040, 386.250, 392.185(9), 392.470, RSMo 2000.

If there are any questions regarding the content of this order of rulemaking, please contact:

Colleen M. Dale, Secretary
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BY THE COMMISSION

Colleen M. Dale
Secretary
Missouri Public Service Commission

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Title 4 – DEPARTMENT OF ECONOMIC DEVELOPMENT
Division 240 – Public Service Commission
Chapter 33 – Service and Billing Practices for Telecommunications Companies

JUN 24 2008

SECRETARY OF STATE
ADMINISTRATIVE RULES

ORDER OF RULEMAKING

By the authority vested in the Public Service Commission under sections 386.250, 393.140, 392.185(9), 392.470, RSMo 2000, the commission amends a rule as follows:

4 CSR 240-33.160 is amended.

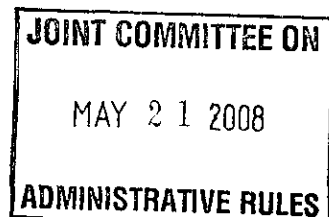
A notice of proposed rulemaking containing the text of the proposed amendment was published in the *Missouri Register* on March 3, 2008 (33 MoReg 522). This proposed amendment will become effective thirty (30) days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: The public comment period ended April 2, 2008 and a public hearing on the proposed amendment was held April 3, 2008. Timely written comments were received from Missouri Telecommunications Industry Association ("MTIA"), AT&T Companies, Missouri Cable Telecommunications Association ("MCTA"), XO Communications Services, Inc., MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services, Inc. d/b/a Verizon Business Services (collectively "Verizon"), and the Staff of the Missouri Public Service Commission ("Staff"). MCTA concurred with and adopted all comments of MTIA. At the hearing, Walt Cecil, Natelle Dietrich, John VanEschen and Shelley Syler Brueggemann testified on behalf of Staff, Leo Bub testified on behalf of AT&T, and John Idoux testified on behalf of Embarq. The testimony and comments generally supported the adoption of the amendments with certain modifications and both opponents and supporters of the amendments made specific recommendations for changes in the language and operation of the rule. Comments were made by XO concerning rule provisions that are not subject of this rulemaking proceeding; they are not addressed in this order.

COMMENT: Staff generally supports the proposed amendments, with only a few suggested revisions as described below, and recommends the Commission approve these revisions in order to more closely align the current Missouri customer proprietary network information ("CPNI") rules with the FCC's recent rule modifications to secure CPNI.

AT&T maintains that the federal rules provide sufficient protection and therefore separate state CPNI rules are unnecessary. However, AT&T concedes that the FCC does allow states to create rules that protect CPNI, as long as they do not conflict with federal requirements.

RESPONSE: No change is required by this comment.



COMMENT: XO raises general concerns with the current language of 4 CSR 240-33.160(3)(A)1, 2, and 3, as beyond the FCC's rules and would impair XO's Indirect Channel. However, as Staff notes in its comments, telecommunications companies are already required to comply with these provisions. Staff also points out that the few changes made to the language of Missouri's existing CPNI rule are to comport with FCC rule modifications to limit release to joint venture partners and independent contractors.

RESPONSE: No change is required by this comment.

COMMENT: The proposed amendment defines breach as "(C) Breach has occurred when a person, without authorization or exceeding authorization, has gained access to, used, or disclosed CPNI." AT&T and MTIA raise concern about the deletion or omission of the word "intentionally" in the Commission's proposed definition from the FCC rule's definition of breach, at 47 CFR §64.2011(e). They assert that this creates inconsistent standards and, as a result, an employee's inadvertent access or access beyond their authority would be considered a reportable breach under Missouri's rules, but not the FCC's rules. AT&T also comments that deletion of the word "intentionally" significantly expands the scope of what constitutes a breach and materially changes the FCC's intent. Finally, AT&T asserts that this change will require carriers to develop and implement special procedures to report the inadvertent errors that occasionally occur, incurring significant time and cost, while increasing Staff's burden to manage such new reports.

Staff commented that all improper disclosures, even if unintentionally released, could nonetheless result in harm to customers and therefore the Commission has an interest in being informed of such breaches. However, Staff, at the hearing, decided not to further oppose insertion of the word "intentionally" to conform to the FCC's definition of breach.

RESPONSE AND EXPLANATION OF CHANGE: As the Commission will require annual reporting instead of requiring a report after a breach occurs, the proposed definition of breach will not be included.

COMMENT: The internal reference to "(1)(J)" be changed to "(1)(K)" to correctly reflect the renumbering of the sections as a result of the rulemaking.

RESPONSE: With the removal of the definition of breach, this change is no longer necessary.

COMMENT: Staff comments that the FCC recently limited the release of CPNI to a company's joint venture partners or independent contractors if the customer provides affirmative express consent or opt-in consent, necessitating similar language in Missouri's rule. Staff makes specific language modifications to section (3)(A)1.

MTIA proposes that this section should be revised differently to conform with the FCC rule and state, at the end of the first sentence, "for the purpose of marketing communications related services to that customer." MTIA points out that telecommunications companies use joint venture partners and independent contractors for a variety of reasons including but not limited to provisioning, billing and customer service functions, where the FCC rules do not apply. MTIA asserts that 47 U.S.C. § 222 states that nothing in the federal CPNI statute prohibits a telecommunications carrier

from using CPNI to initiate, render, bill and collect for telecommunications services and therefore, this revision will bring Missouri's rule into alignment with federal law and FCC rules.

Verizon further comments that requiring opt-in consent before sharing CPNI with joint venture partners and independent contractors violates the First Amendment; and even if protecting CPNI from this type of sharing was a legitimate concern this is not the most restrictive means.

Staff agrees clarification is needed and proposes using the language of Section 222 of the Telecommunications Act.

XO suggests that the rules' proposed language concerns confidentiality agreements and contracts with agents, affiliates, independent contractors and third party vendors, which are over and above the FCC's rules. However, Staff notes that XO is already required to comply with these and the FCC's provisions.

RESPONSE AND EXPLANATION OF CHANGE: This section will be modified by incorporating the language of Section 222 of the Telecommunications Act as more fully set forth below.

COMMENT: Staff notes that a reference to the new authentication procedures, found in the proposed rule at 4 CSR 240-33.160(5), which must be met prior to CPNI disclosure to a customer, was added to this section. AT&T commented that the added phrase is misplaced, while XO stated the language was also confusing and potentially misleading. Staff suggests that the language be changed from "and subject to" to "or following" ... "appropriate authentication procedures as described in Section (5) below."

RESPONSE AND EXPLANATION OF CHANGE: This change will be made as set forth below.

COMMENT: AT&T proposes the language in this section be revised to better mirror the FCC's rules and include within the body of subsection (5)(A)1.A., and subsection (A)1.A.(III), the language "based on a customer-initiated telephone contact." Verizon suggests this subsection be amended to make it clear that this requirement only applies to inbound calls, consistent with the FCC rules; while Verizon recommends that subsection (A)1.A.(II) of the rule be amended to clarify that any CPNI can be sent to the customer's address or telephone number of record.

Within subsection (5)(A)2.A., Verizon proposes to add the word "online" to read as follows: "A telecommunications company shall authenticate a customer without the use of readily available biographical information or account information prior to allowing customer online access to CPNI related to a telecommunications service account."

Staff does not recommend any changes to this section because the language suggested by AT&T and Verizon is already included as headings to the subsections. RESPONSE: No change will be made as a result of this comment.

COMMENT: AT&T notes a typographical error in (5)(C)1.C., where the word "to" should be changed to the word "or." Staff and others agree with this edit.

RESPONSE: This change will be made as set forth below.

COMMENT: AT&T comments that the proposed breach notification in section (8) appears to conflict with the new FCC requirement that carriers notify certain law enforcement agencies of breaches and prohibits carriers from publicly disclosing such breaches until at least seven business days after that notification, to avoid impeding an investigation or national security. AT&T asserts that the FCC itself is not to receive notice of such breaches and suggests that this section be deleted. AT&T proposes amending this section's language to require notification of CPNI breaches concurrent with carrier notification to customers.

MTIA asserts that this subsection be deleted in its entirety because it conflicts with provisions in the FCC rule requiring initial and exclusive notification to the FBI and USSS, along with the ability to prohibit disclosure during the relevant investigation. MTIA further suggests that, at the very least, the rule be amended to include a secure notification process and treat notifications as Highly Confidential under Commission rules to prevent disclosure prohibited by the FCC's rule. XO suggested the Commission require notice of CPNI breaches on the same schedule as the FCC rules, and allow more than seven days to report breaches.

In response to these comments, Staff suggests that the language be revised to require notification of breach no later than fourteen days, under a highly confidential designation, to the Commission via electronic mail sent to specific Commission Staff. Other commenters agreed that this would satisfy their concerns.

RESPONSE AND EXPLANATION OF CHANGE: Having reviewed the comments and testimony concerning the difficulties inherent in the requirement that carriers notify the Commission after each breach, the Commission believes that a single annual report of compliance with this rule is more appropriate and cost-effective for those carriers who will be subject to this rule. Therefore, the entire proposed section (8) on breaches is deleted, and an annual report requirement is included in new section (7)(F).

4 CSR 240-33.160 Customer Proprietary Network Information

PURPOSE: This amendment modifies the procedures by which telecommunications companies may use, disclose, or permit access to customer proprietary network information consistent with recent federal modifications. The proposed amendment also adds a reporting requirement for telecommunications companies to file with the Missouri Public Service Commission an annual report regarding CPNI procedures, compliance, company action against data brokers, and a summary of customer complaints concerning unauthorized release of CPNI.

(3) Approval Required for Use of CPNI.

(A) Use of Opt-Out and Opt-In Approval Process.

1. A telecommunications company shall obtain opt-in approval from a customer before disclosing that customer's CPNI to the telecommunications company joint venture partners or independent contractors. Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers,

either directly or indirectly through its agents to initiate, render, bill and collect for telecommunications services. Any disclosure to joint venture partners and independent contractors for purposes other than those specifically listed above shall be subject to the safeguards set forth in paragraph (3)(A)3 below.

(4) Customer Notification Requirements.

(C) Content of Notice. Customer notification must provide sufficient information to enable the customer to make an informed decision as to whether to permit a carrier to use, disclose, or permit access to, the customer's CPNI.

8. A telecommunications company also may state in the notification that it may be compelled to disclose CPNI to any person upon affirmative written request by the customer or following the appropriate authentication procedures as described in Section (5) below.

(5) Requirements Specific to Customer-Initiated Contacts

(C) Notification of Account Changes

1. Telecommunications companies shall notify customers immediately whenever a password, customer response to a back-up means of authentication for lost or forgotten passwords, online account, or address of record is created or changed.

C. Notification shall not reveal the changed information or be sent to the new account information.

(7) Safeguards Required for Use of Customer Proprietary Network Information.

(F) A telecommunications company shall have an officer, as an agent of the company, sign and file with the Commission a compliance certificate on an annual basis. The officer shall state in the certification that he or she has personal knowledge that the company has established operating procedures that are adequate to ensure compliance with the rules in this section. The company shall 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 section. In addition, the company shall include an explanation of any actions taken against any individual or entity that unlawfully obtains, uses, discloses or sells CPNI and a summary of all customer complaints received in the past year concerning the unauthorized release of CPNI. This filing must be made annually with the Commission on or before March 1, for data pertaining to the previous calendar year.

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of a Proposed Rulemaking)
to Amend 4 CSR 240-33.160, Customer)
Proprietary Network Information)

Case No. TX-2008-0090

**OPINION OF COMMISSIONER ROBERT M. CLAYTON III,
CONCURRING, IN PART, AND DISSENTING, IN PART**

This Commissioner believes protecting telephone customers' private calling and billing information, known as "customer proprietary network information," (CPNI) is of the utmost importance. The Commission's CPNI rules addressing the unauthorized release of private information, whether intentional or by mistake, need to be regularly evaluated and updated to firmly assert the Commission's jurisdiction to protect consumers. Telecommunications companies must be held to a high standard in protecting their customers and those who violate Commission rules should be penalized as authorized by law. The Commission has before it an updated rule, including provisions for Commission notification in the event of a breach of confidential information to third parties. This Commissioner supports the adoption of the final rule but believes the Commission should have rejected the proposed amendment which effectively abandons the Commission's role in privacy enforcement at the time of known breaches of confidentiality.

A meaningful CPNI rule should include a section dealing with Commission notification of breaches of customers' CPNI. The rule proposed by staff contained such a provision that would have required telecommunications

companies to notify the Commission within 14 days of the breach. A breach has occurred when a person, without authorization or exceeding authorization, has intentionally gained access to, used or disclosed CPNI. The abandoned language merely required inexpensive electronic notification of Commission staff of inappropriate releases of customers' CPNI. The information would have been deemed highly confidential while staff evaluated whether the telecommunications carrier was complying with the Commission's CPNI rules and determining whether the Commission should take any enforcement action, such as a complaint. Assuming this is purely a law enforcement matter ignores the actions or omissions of the carriers. The Commission must hold the carriers to the highest standards, and the circumstances involving a breach require the Commission to review the carriers' practices.

The alternate language adopted by the majority in place of direct notification is inadequate for the Commission to improve customer protections. First, rather than notify the Commission upon individual breaches of security, the substitute language requires only that the carrier annually file a report of compliance with the Commission. Second, notifications of breach will be made in an untimely manner. Reports are due once a year on March 1st and, if a breach occurs on March 2nd of the same year, the Commission will be unaware of the breach until the next filing, one year later. Timely Commission notification is necessary for timely corrective action.

Further, the mandated report lacks specific reporting requirements. While the report requires that an officer certify that the company has procedures that

"are adequate" to comply with this rule and state how the procedures ensure compliance with the rule, very little detail is required to support the conclusory statements. Specifically related to "breaches," the annual report requires the company to generally disclose instances of an individual or entity that unlawfully obtained, used, disclosed or sold CPNI. The report requires general disclosure of whether customers did or did not have complaints about the release of unauthorized CPNI, although the report does not address the issue when customers are not aware of the breach. General observations will not give the Commission staff sufficient detail to identify good or bad practices.

The public expects that the Commission will be aware of this information and will use it to evaluate and improve the carriers' best practices. While this Commissioner has confidence that law enforcement will address some instances of privacy breaches, this Commission should not rely exclusively on Washington when protecting the public interest.

In conclusion, it has been argued that with the recent passage of HB1779 in the General Assembly, these rules will have no effect on the largest telecommunications carriers in the state and that this will be an unfair burden on the remaining operators. While this Commissioner agrees that the three largest ILECs and many CLECs may avoid all state mandates on privacy, this Commission must move forward with constructive policy in the public interest. State regulation of telecommunications may return in the future, and the Commission must have its rules in place should that ever occur. Commission waivers can address issues of unfairness and instances of undue burden or cost.

This Commissioner supports the remaining provisions of the rule and concurs, in part, however, for the foregoing reasons, this Commission dissents, in part.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert M. Clayton III", written over a horizontal line.

Robert M. Clayton III, Commissioner

Dated this 20th day of May 2008,
At Jefferson City