

September 28, 2016

Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Reilly

Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: WC Docket No. 16-106, *Protecting the Privacy of Customers of Broadband*

Dear Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O'Reilly:

Free Press, 18MillionRising.org, the American Civil Liberties Union, the Benton Foundation,¹ the Center for Democracy and Technology, the Center for Digital Democracy, the Center for Media Justice, Common Sense Kids Action, Consumer Action, the Consumer Federation of America, Consumer Watchdog, the Electronic Privacy Information Center, National Hispanic Media Coalition, New America's Open Technology Institute, Presente.org, Privacy Rights Clearing House, and Public Knowledge (collectively, the "Privacy Advocates") have filed extensively in the above-captioned docket in support of Congress's broadband privacy mandate in Section 222 of the Communications Act. We write again to respond on the record to extraneous issues raised in letters opposing the Commission's implementation of rules responsive to this clear statutory directive.

Two such letters, submitted by advertising industry groups² and broadband industry groups³ to Commerce committee Chairman John Thune and Ranking Member Bill Nelson in advance of that committee's September 15th oversight hearing, opposed the FCC's privacy proposal and called for weaker protections modeled on an FTC-like approach protecting only industry defined "sensitive" data. A third letter, this time

¹ The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. These comments reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

² American Advertising Federation *et al.*, Letter to Chairman John Thune and Ranking Member Bill Nelson, Senate Commerce Committee (Sept. 14, 2016), <https://thedma.org/wp-content/uploads/Industry-Letter-to-the-Senate-Commerce-Committee-re-FCC-Privacy-Proposal....pdf> ("Ad Industry Letter").

³ American Cable Association *et al.*, Letter to Chairman John Thune and Ranking Member Bill Nelson, Senate Commerce Committee (Sept. 14, 2016), [https://www.ustelecom.org/sites/default/files/documents/Association Letter to Hill on Privacy - 9.14.16.pdf](https://www.ustelecom.org/sites/default/files/documents/Association%20Letter%20to%20Hill%20on%20Privacy%20-%209.14.16.pdf) ("Broadband Industry Letter").

submitted in this docket by CTIA,⁴ went to greater lengths to make these same arguments; but essentially re-hashed the same claims made in the letters to the Senate Commerce Committee.

These industry critiques mischaracterize the FTC's comments on the FCC's proposal, misread the law, propose impracticable solutions based on this misreading, and only serve to deny broadband users their statutory right to communications privacy protections under Section 222.

THE FTC SUPPORTS THE BROADBAND PRIVACY PROCEEDING

There is no truth to broadband and advertising industry claims that the FTC somehow opposes the FCC's proposed implementation of the privacy mandates in Section 222 in the Communications Act. As the Open Technology Institute aptly demonstrated in published pieces on this topic, the FTC's comments in this proceeding generally support the FCC's approach and acknowledge the FCC's expertise in telecommunications privacy.⁵ In looking for a dispute where none exists, the Broadband Industry Letter hangs its hat on FTC Chairwoman Ramirez's statement that some discrepancy between the two agencies' approaches is "not optimal." But this ignores the reality of the laws in play as well as the entirety of the FTC's (and its Chairwoman's) comments.

While it would be preferable to have more comprehensive internet privacy statutes on the books, the lack of any such comprehensive law for the so-called "internet ecosystem" does not relieve the FCC of its statutory responsibility to protect broadband users' privacy under Section 222. The Privacy Advocates and other privacy proponents generally agree that Congress ought to pass more comprehensive protections. Yet the Broadband Industry Letter mischaracterizes a similar sentiment expressed by Chairwoman Ramirez as a lack of support for the FCC proposal, when in fact she has stated explicitly that she is "very supportive of the FCC working to enhance consumer privacy in the area of broadband."⁶ The false insinuation that the FTC has disqualifying concerns about the FCC's proposal must be put to rest.

THE FCC MUST ACT BECAUSE IT IS INDISPUTABLY THE PROPER PRIVACY REGULATOR FOR COMMON CARRIERS

The Ad Industry Letter mischaracterizes the law in several ways when it comes to the FCC's authority to promulgate broadband privacy rules. As Free Press and other

⁴ CTIA Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-106 (filed Sept. 16, 2016) ("CTIA Letter").

⁵ Sarah Morris & Eric Null, "Actually, the FTC supports the FCC's broadband privacy proposal," *The Hill* (Sept. 14, 2016), <http://thehill.com/blogs/pundits-blog/technology/295754-actually-the-ftc-supports-the-fccs-broadband-privacy-proposal>.

⁶ 2016 Aspen Forum - Luncheon Keynote by Chairwoman Edith Ramirez, (August 22, 2016), https://www.youtube.com/watch?feature=player_detailpage&v=6ndhzxz-d9g.

commenters have written, Section 222 represents an unambiguous directive from Congress requiring telecommunications carriers to protect CPNI and other proprietary information. It provides the FCC with ample authority to adopt rules implementing this statute, and generally to require customers’ “opt-in,” affirmative approval before carriers may use such information for purposes other than the provision of broadband service.⁷ The Ad Industry Letter insists that the FCC lacks congressional authority to promulgate these rules, and so ignores the plain reading of Section 222, as well as broadband ISPs classification as telecommunications carriers now upheld by the DC Circuit.⁸

An unrelated court case does even more to point out the flaws of the Ad Industry Letter’s claim that the FTC’s section 5 authority is sufficient to protect internet users’ privacy from broadband carriers. As the 9th Circuit recently suggested, the FTC may not have the jurisdiction to police any practices of common carriers like AT&T – no matter whether the FCC classifies broadband internet access as a common carrier service.⁹ This decision may be subject to further appeals, but in the meantime this much is clear: the FCC certainly does have the authority to protect internet users from unjust and unreasonable practices by common carriers even if the FTC does not, and under Section 222 and other statutes the FCC can promulgate privacy rules protecting the customers of such carriers.

A SENSITIVE/NON-SENSITIVE DISTINCTION IS NOT GROUNDED IN CONTROLLING COMMUNICATIONS LAW AND IS IMPRACTICABLE IN THE TELECOMMUNICATIONS CONTEXT

The Broadband Industry Letter continues down the improper path taken by advocates like Professor Laurence Tribe,¹⁰ who have repeatedly demanded that the FCC promulgate rules providing different levels of protection for different kinds of data – by, for instance, requiring opt-in consent only for so-called “sensitive” data. These advocates variously suggest that this heretofore undefined by the FCC category of information might include financial data, health data, children’s information, or geo-location data. They suggest a different, lower standard of protection for the remaining universe of consumer proprietary network information. This scheme is not only contrary to the statute, but also impracticable, and designed to undermine the FCC’s proceeding.

First, as we have previously stated, Section 222 makes no such distinction and plainly states that “[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers.”¹¹ The Broadband Industry Letter

⁷ Free Press Letter to Chairman Tom Wheeler, GN Docket No. 14-28 (Mar. 14, 2016).

⁸ *See* U.S. Telecom Ass’n v. FCC, No. 15-1063 (D.C. Cir. June 14, 2016).

⁹ *FTC v. AT&T Mobility*, No. 15-16585 (9th Cir. Aug. 29, 2016).

¹⁰ Laurence Tribe, “Supplemental White Paper: A Response to Arguments That the Commission’s Proposed Broadband Privacy Rules Would be Consistent with the First Amendment,” WC Docket No. 16-106 (filed Sept. 13, 2016) (“Tribe Comments”).

¹¹ 47 U.S.C. §222(a).

insists on creating tiers of sensitivity in a statute that affords protection for all proprietary information.

Second, segregating “sensitive” from “non-sensitive” information through the course of a customer’s use of a telecommunications service would be as impracticable in the broadband context as it is in the telephone context. Telecommunications carriers rightly do not suggest that they be allowed to record the numbers that a customer dials, or surveil the content of telephone calls for marketing purposes, and then decide after the fact what of that information is too sensitive to collect or share. As gatekeepers to the internet, ISPs necessarily have a view into the websites we visit and our unencrypted communications over their networks. Visiting any number of websites can and does give away information on their customers’ “sensitive” financial or health status. When the children in a household use the internet, the entirety of those communications would be “sensitive” under the ISPs’ unwieldy proposals. Yet, an adult using the same device would have far fewer protections. In none of their filings has the industry properly discussed the practicalities of such a scheme; specified precisely what kinds of non-sensitive information they seek to collect and use freely; indicated whether that category might include visits to certain websites or specific communications; or stipulated how that information could be segregated out of the course of all other communications traveling over their networks.

In his most recent filing, Professor Tribe at least draws an imagined “sensitive/non-sensitive” distinction – but it is one that would undermine the whole proceeding. Tribe categorizes social security numbers as an example of sensitive information, but not the websites broadband customers visit, arguing that an “IP address...is essentially public data.”¹² Clearly, the privacy concern here is not merely the IP address visited, but the fact that a particular individual has visited it. Many of the websites we visit unambiguously pertain to a person’s health or financial information. Under Professor Tribe’s formulation, visits to a healthcare provider’s website over the internet might not be subject to the same protection as one’s social security number, whereas the same information shared over the phone would be. And while we’re on the subject of Tribe’s inherently self-contradictory construct, telephone numbers are “essentially public” too. The fact a caller has dialed a particular number, to a friend, a doctor, or a crisis hotline, is the private information.

For all these reasons, Congress was right to unambiguously protect all CPNI and proprietary information of telecommunications customers. Artificial distinctions in this context undermine effective privacy protections.

CONGRESS AND THE FCC HAVE SUFFICIENTLY ARTICULATED HARMS CUSTOMERS FACE ABSENT 222 PROTECTIONS

The Advertising Industry Letter suggests that the FCC has failed to articulate the harms consumers face without control over their data. First, the determination that

¹²Tribe Comments at 9.

telecommunications customers' proprietary information ought to be protected was a decision made by Congress. As Public Knowledge has demonstrated, Congress passed Section 222 both to encourage competition and protect privacy.¹³

Yet the FCC itself cites studies in the NPRM here, showing that the majority of adults are concerned about having control over their personal information.¹⁴ And it has clearly explained that ISPs, as gatekeepers to the internet, have “access to very sensitive and very personal information that could threaten a person’s financial security, reveal embarrassing or even harmful details of medical history, or disclose to prying eyes the intimate details of interests, physical presence, or fears.”¹⁵ Apparently, the harms from surrendering one’s privacy without consent are apparent to everyone except those companies who seek to capitalize on the use of such data without consent.

AVAILING ONESELF OF A STATUTORY RIGHT OUGHT NOT TO BE CONTINGENT ON ABILITY TO PAY

The Broadband Industry Letter argues again in favor of pay-for-privacy schemes that make the protections afforded to broadband customers in Section 222 subject to a customer’s willingness and ability to pay for it. While the use of some “edge” services is indeed conditioned on a customer’s assent to such sharing and use of their data, information services are not subject to Section 222. In following its duty to implement the applicable statute with respect to telecommunications carriers, including broadband providers, the FCC must not uncarefully allow certain statutory duties that telecommunications providers owe their customers to be conditioned on ability to pay for that right.

THERE IS NO EVIDENCE TO SUGGEST BROADBAND PRIVACY RULES WOULD DECREASE INVESTMENT OR INCREASE COSTS FOR CONSUMERS

As the FCC rightly noted in the NPRM at issue here, “consumers need not choose between continued broadband investment and deployment, on the one hand, and

¹³ Harold Feld *et al.*, Public Knowledge, “Protecting Privacy, Promoting Competition: A Framework for Updating the Federal Communications Commission Privacy Rules for the Digital World,” Public Knowledge, at ___ (Feb. 16, 2016), <https://www.publicknowledge.org/documents/protecting-privacy-promoting-competition-white-paper> (“Protecting consumer privacy, in the view of the House Report, was no longer a happy afterthought. Protecting consumer privacy should instead become the primary goal of CPNI and an independent goal of the Communications Act and the Federal Communications Commission.”).

¹⁴ *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, 31 FCC Rcd 2500, ¶ 129 (2016) (“NPRM”).

¹⁵ *Id.* ¶ 2

protection of their privacy and data security on the other.”¹⁶ The broadband industry made similar claims about decreases in investment during reclassification, and none of their unfounded arguments or doomsday claims came to pass.¹⁷ Nor is there any credible evidence to suggest that internet users will enjoy lower prices for broadband service if and only if ISPs are allowed to monetize their personal information, because in the absence of competition or other reasons to cut their prices and invest in their networks, ISPs will simply pass any additional revenues and dividends on to their own investors.

For all the handwringing surrounding this broadband privacy proceeding, we once again must remind the industry that the proceeding does not ban sharing the information of customers who consent to their ISPs using it for marketing purposes. It merely proposes that ISPs be required to ask their customers if they consent to that sharing first – obtaining consent as telecommunications carriers have been required to do for decades. Internet users demand and deserve the right to control how their proprietary information is used and shared by broadband providers, just as users of other telecommunications services do.

Sincerely,

18millionrising.org
American Civil Liberties Union
Benton Foundation¹⁸
Center for Democracy and Technology
Center for Digital Democracy
Center for Media Justice
Common Sense Kids Action
Consumer Action
Consumer Federation of America
Consumer Watchdog
Electronic Privacy Information Center
Free Press
National Hispanic Media Coalition
New America’s Open Technology Institute
Presente.org
Privacy Rights Clearinghouse
Public Knowledge

¹⁶ *Id.* ¶ 11 (“The largest investment ever in wireline networks came during those years in which DSL Internet access services were regulated under Title II.”).

¹⁷ *See, e.g.*, Free Press Letter to Ms. Marlene Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (Mar. 30, 2016).

¹⁸ *See, fn. 1.*