

August 30, 2017

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Restoring Internet Freedom, WC Docket No. 17-108

Dear Chairman Pai,

We, the undersigned privacy and consumer rights groups, take this opportunity to comment on the Federal Communications Commission's ("FCC or the "Commission") above-captioned proceeding. We are strongly concerned that the Commission's proposal to return broadband privacy jurisdiction back to the Federal Trade Commission ("FTC") would leave consumers with inadequate privacy protections on broadband networks.

The Commission has long recognized that broadband is the essential communications service of the 21st century.¹ Americans rely on broadband for basic communications, education, employment, healthcare, news and information, and civic engagement.² Because broadband is so critical to everyday life, consumers expect and deserve adequate protections when accessing these networks including a standard level of privacy. In its *2015 Open Internet Order*, the FCC applied section 222 of the Telecommunications Act of 1996 to broadband networks ensure the privacy of customer information on broadband networks is protected.³ As discussed below,

¹ See e.g., *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 F.C.C. Rcd. 1375. 1378 para. 2 (2015) ("*2015 Broadband Progress Report*").

² See *id.*

³ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 F.C.C. Rcd. 5601, 5616, para. 5 ("*2015 Open Internet Order*"); 47 U.S.C. § 222.

section 222 gives the Commission the appropriate statutory framework to protect consumer broadband privacy given the unique role broadband service providers have in the internet ecosystem. The record in this proceeding also demonstrates that the Commission’s proposal to return broadband privacy jurisdiction to the FTC would leave consumers with inadequate privacy protections on broadband networks. The FTC’s lack of rulemaking authority combined with the constraints of section 5 make it insufficient to protect consumer broadband privacy.

I. The Commission’s Authority To Protect Consumer Privacy on Communications Networks is Found in Title II.

Section 222 requires telecommunications carriers to protect customer proprietary network information (“CPNI”).⁴ The legislative history of section 222 makes clear that Congress intended to protect the privacy of consumers on telecommunications networks. The Conference Report reconciling the House and Senate versions of the 1996 Act outlined three fundamental principles of section 222: “(1) the right of consumers to know the specific information that is being collected about them; (2) the right of consumers to have proper notice that such information is being used for other purposes; (3) and the right of consumers to stop the reuse or sale of that information.”⁵ These principles indicate that Congress sought to ensure protecting consumer privacy was a primary goal of section 222.⁶

The plain language of section 222 further solidifies why the statute serves as the best framework to protect consumer privacy on communications networks. Section 222(a) begins with a general duty of all telecommunications carriers to protect the “proprietary information” of

⁴ See generally 47 U.S.C. § 222.

⁵ See Telecommunications Act of 1996, S .Rep. No. 104-230, at 204 (1996) (“Conference Report”).

⁶ See *id.* at 205 (“In general, the new section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI.”).

customers and other carriers.⁷ The inclusion of the word “customer” in the language preserves Congress’ intention that carriers must protect their subscribers’ information.⁸ Further, section 222(c) restricts telecommunications carriers’ use of CPNI, a more specific class of proprietary information, without customer approval.⁹ The statutory language under this subsection does not limit CPNI to telephone services; instead, it is expanded to include all telecommunications services.¹⁰ This allows the Commission to take a technology-neutral approach in determining what constitutes CPNI. Indeed, the FCC has refined its criteria for CPNI as technology has evolved and consumers had a reasonable expectation their privacy would be protected on these communications networks.¹¹ Taking section 222(a) and 222(c) together has the effect of expanding the authority and flexibility of the FCC to create rules to protect the privacy of subscribers to telecommunications services.

II. The Commission Has Found Broadband Networks Have a Unique Position in the Internet Ecosystem.

Based on the legislative history and statutory language, section 222 provides the appropriate framework to protect consumer privacy on broadband networks given their unique role in the internet ecosystem. In its *2016 Broadband Privacy Order*, the Commission concluded that broadband service providers enjoy a unique window into sensitive customer data.¹²

⁷ 47 U.S.C. § 222(a).

⁸ See H.R. Rep. No. 104-204 at 91 (describing 47 U.S.C. 222(e)).

⁹ See 47 U.S.C. § 222(c).

¹⁰ *Id.*

¹¹ See, e.g., *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115, WC Docket No. 04-36, 22 F.C.C. Rcd. 6927, 6956-57 n.170 (2007) (“As we have in the past we limit our extension of the rules to interconnected VoIP service providers because we continue to believe that consumers have a reasonable expectation that such services are replacements for ‘regular telephone’ service.”) (“*2007 CPNI Order*”).

¹² See *Protecting the Privacy of Customers of Broadband and other Telecommunications Services*, Report and Order, WC Docket No. 16-106, 31 F.C.C. Rcd. 13911, 13920, para. 30

Broadband service providers have access to enormous quantities of internet data that their subscribers transmit. While Internet traffic splinters among providers at the edge, all data - sensitive, non-sensitive, and everything in between - must pass through the hands of a broadband service provider. This type of unfettered access allows a broadband service provider to paint a detailed composite portrait of a user's life from basic header information such as IP addresses, ports and timing.¹³ Further, the Commission has consistently found that broadband providers hold a 'gatekeeper' position in the internet ecosystem.¹⁴ Their role as gatekeepers not only enhances their ability to access consumer information but also makes their relationship with their customers unique. Consumers pay a fee to access broadband networks and in return do not expect that their personal information will be used as an additional revenue stream.¹⁵ The lack of competition in the broadband marketplace also means most consumers have limited choices between providers.¹⁶ Therefore, most consumers cannot change providers if they are unhappy with their current providers' privacy practices. Overall, the Commission has found the nature of broadband networks to be similar to other telecommunications services—they “have the ability

(2016) (stating that “the record is clear that [broadband service] providers' gatekeeper position allows them to see every packet that a consumer sends and receives over the Internet while on the network, including, absent encryption, its contents.”) (“*2016 Broadband Privacy Order*”).

¹³ See, e.g., Tech. Analysis Branch, Office of the Privacy Comm'r of Can., *What an IP Address Can Reveal About You* (2013), at 4 (noting the wide range of information that may be discerned from an IP address).

¹⁴ See *2016 Broadband Privacy Order*, 31 F.C.C. Rcd. at 1319, para. 28 (“Based on our review of the record, we reaffirm our earlier finding that a broadband provider ‘sits at a privileged place in the network, the bottleneck between the customer and rest of the internet’ - a position that we have referred to as a gatekeeper.”).

¹⁵ See *id.* at 13923, para. 36, n.53.

¹⁶ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended*, 2016 Broadband Progress Report, GN Docket no. 15-191, 31 F.C.C. Rcd. 699, 702, para. 6 (2016) (finding that “only 38 percent of Americans have more than one choice of providers for fixed advanced telecommunications capability.”) (“*2016 Broadband Progress Report*”).

to collect information from consumers who are merely using the networks as conduits to move information from one place to another without change in the form or content.”¹⁷ Consumers expect adequate privacy protections when accessing broadband networks, and section 222 provides the Commission with the appropriate framework to do this.

III. The Record Demonstrates Consumers Would Have Inadequate Privacy Protections if the FTC Retained Jurisdiction Over Broadband Privacy.

In classifying broadband as a Title I information service, the Commission proposes to return authority to the FTC to police the practices of broadband service providers.¹⁸ The Commission relies simply on the fact that the FTC has “decades of experience and expertise” as a consumer privacy agency.¹⁹ However, the record demonstrates that consumers would have inadequate privacy protections if the FTC retained jurisdiction over broadband privacy. Several commenters correctly point out the FTC’s lack of rulemaking authority combined with the limits of its section 5 authority under the Federal Trade Commission Act make it insufficient to protect consumer privacy on broadband networks.²⁰ The FTC is constrained by the limits of section 5 to apply the same, general “unfair and deceptive standard” to all online privacy issues. As commenters explain, the limits of section 5 authority allow the FTC to pursue enforcement actions only after consumers have been harmed and their privacy has been compromised in some

¹⁷ *2016 Broadband Privacy Order*, 31 F.C.C. Rcd. 1317 para. 21; *see also* 47 U.S.C. 153(50).

¹⁸ *See 2017 NPRM*, 32 F.C.C. Rcd. at 4456-57 paras. 66-67.

¹⁹ *See id.* at 4457, para. 67.

²⁰ *See, e.g.*, Amended Comments of the Center for Democracy and Technology, WC Docket No. 17-108, at 14-17 (filed July 19, 2017) (“CDT Comments”); Comments of Free Press, WC Docket No. 17-108, at 73 (filed July 17, 2017) (“Free Press Comments”); Comments of the Electronic Information Privacy Center, WC Docket No. 17-108, at 3-6 (filed July 17, 2017) (“EPIC Comments”); Comments of the Electronic Frontier Foundation on Notice of Proposed Rulemaking, WC Docket No. 17-108, at 26-28 (filed July 17, 2017) (“EFF Comments”); Comments of Ranking Member Frank Pallone, Jr. et al, WC Docket No. 17-108, at 8 (filed July 17, 2017) (“Pallone et al Comments”).

way.²¹ Further, section 5 requires the FTC to conduct a cost-benefit analysis prior to pursuing an enforcement action. This analysis treats consumer privacy as a “commodity to be balanced against other considerations rather than a fundamental right.”²² Consequently, the FTC’s enforcement actions usually involve broken privacy promises²³ or determining whether companies’ are adhering to general industry practices rather than what practices would best protect consumers.²⁴ Consumers expect adequate privacy protections when accessing broadband networks. Unfortunately, enforcement actions without the ability to adopt bright line rules are not enough to protect consumer broadband privacy.

Commenters who believe the FTC is better suited to oversee broadband privacy misconstrue the role of the FTC and FCC in protecting consumer privacy. Some commenters assert that the FTC’s technology-neutral approach to privacy is better for consumers because it places all online entities under the same framework.²⁵ This argument fails to consider that not all online entities are the same. As the FCC has already concluded, broadband service providers hold a unique position in the internet ecosystem that sets them apart from other online entities.²⁶ Broadband service providers have access to enormous quantities of internet data that their

²¹ See CDT Comments at 15-16; EPIC Comments at 4; Pallone et al Comments at 8; PK and Common Cause Comments at 93-94.

²² CDT Comments at 15.

²³ See FTC, Enforcing Privacy Promises, available at <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/enforcing-privacy-promises>.

²⁴ See Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 *Collum. L. Rev.* 583, 627-43 (2014).

²⁵ Comments of Verizon, WC Docket No. 17-108, at 23-24 (filed July 17, 2017) (“Verizon Comments”); Comments of Cox Communications, Inc., WC Docket No. 17-108, at 4 (filed July 17, 2017) (“Cox Comments”); Comments of American Cable Association, WC Docket No. 17-108, at 70 (filed July 17, 2017) (“ACA Comments”).

²⁶ See *Protecting the Privacy of Customers of Broadband and other Telecommunications Services*, Report and Order, WC Docket No. 16-106, 31 F.C.C. Rcd. 13911, 13920, para. 30 (2016) (stating that “the record is clear that [broadband service] providers’ gatekeeper position allows them to see every packet that a consumer sends and receives over the Internet while on the network, including, absent encryption, its contents.”).

subscribers transmit. The nature of broadband networks is precisely why the FCC is better equipped to retain jurisdiction over broadband privacy. The FCC also has a thorough understanding of how broadband networks operate through a number of broadband-oriented programs the agency has put in place.²⁷ The FCC has decades of sector-specific experience protecting the privacy of consumers on communications networks. The Commission has used its authority under section 222 to protect CPNI on telephone networks for the past twenty years. Further, the Commission has updated its CPNI rules to reflect changes in communications technology. As a result, the Commission now has CPNI rules to protect consumer privacy on mobile phones and interconnected Voice over IP (VoIP).²⁸ In addition to section 222, Congress gave the FCC additional sources of authority to protect consumer privacy on communications networks. Under section 631 of the Cable Communications Policy Act of 1984, the Commission has the authority to protect the privacy of cable subscribers.²⁹ Title III of the Communications Act gives the FCC broad authority to regulate wireless services, which can include the authority to protect the privacy of mobile subscribers.³⁰ These authorities highlight the agency's decades of experience protecting consumer privacy on communications networks. By giving the FTC exclusive jurisdiction to protect consumer broadband privacy, the FCC would not only turn a blind eye to its own expertise on communications networks but would also rob consumers of the sole privacy cop on the beat with that expertise.

²⁷ See, e.g., FCC, *Connecting America: The National Broadband Plan* (Mar. 17, 2010), <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf> (“*National Broadband Plan*”); *Connect America Fund et al*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 et al, 26 F.C.C. Rcd. 17663 (2011) (“*Universal Service Transformation Order*”); *Lifeline and Link Up Reform and Modernization et al*, Third report and Order, Further Report and Order, and Order on Reconsideration, WC Docket Nos. 11-42, 09-197, 10-90, 31 F.C.C. Rcd. 3962 (2016) (“*Lifeline Modernization Order*”).

²⁸ See *2007 CPNI Order*, 22 F.C.C. Rcd. at 6956 para. 54.

²⁹ See Cable Communications Policy Act of 1984 § 631, 47 U.S.C. § 551.

³⁰ See 47 U.S.C. § 303(b).

The FCC notes that its broadband privacy rules adopted pursuant to the *2016 Broadband Privacy Order* were repealed under the Congressional Review Act, preventing the agency from adopting substantially similar rules in the future.³¹ Although this is the case, Title II still provides the Commission with the statutory framework to enforce broadband privacy protections.

Consumers can file complaints before the FCC citing egregious behavior by their broadband service provider's use over their data in violation of section 222. Therefore, the Commission can bring enforcement actions against broadband service providers. Indeed, the FCC has used its enforcement authority in the past pursuant to section 222 when communications providers failed to protect their subscribers personal and sensitive information.³² The FCC has also issued general guidance informing broadband service providers that they should take reasonable good faith steps to protect consumer privacy.³³ Commissioner Clyburn has specifically called for the FCC to issue more detailed guidance outlining what privacy practices broadband service providers should adhere to under section 222.³⁴ Taken together, these regulatory tools equate to what the FTC would be able to do at best if it retained broadband privacy jurisdiction. However, the FCC still has the authority to promulgate new broadband privacy rules in the future—an authority the FTC clearly lacks.

IV. Conclusion

³¹ See *id.* at para. 66.

³² See, e.g., *TerraCom, Inc. and YourTel America, Inc., Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-TCD-13-00009175, 29 F.C.C. Rcd. 13325 (2014).

³³ See *Enforcement Bureau Guidance: Broadband Providers Should Take reasonable Good Faith Steps To Protect Consumer Privacy*, Public Notice, 30 F.C.C. Rcd. 4849 (2015).

³⁴ See *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Order, Statement of Commissioner Clyburn, WC Docket No. 16-106, CC Docket No. 96-115, FCC 17-82, at 13 (Commissioner Clyburn notes the FCC “even without rules the Commission could adopt enforcement guidance or a policy statement using the voluntary code of conduct which broadband providers seeking reconsideration were willing to agree.”).

For the above stated reasons, the FCC should retain its jurisdiction over broadband privacy.

Respectfully submitted,

American Civil Liberties Union

Consumer Action

Center for Digital Democracy

Center for Democracy and Technology

Consumer Federation of America

Consumer Federation of California

Consumer Watchdog

Media Alliance

Privacy Rights Clearinghouse

Public Knowledge

U.S. PIRG