

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
)  
Protecting the Privacy of Customers of ) WC Docket No. 16-106  
Broadband and Other Telecommunications )  
Services )

**JOINT OPPOSITION TO PETITION FOR STAY**

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\*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.

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**OPPOSITION TO PETITION FOR STAY**

Pursuant to 47 C.F.R. § 1.45(d), Consumer Action, Consumer Federation of America, New America’s Open Technology Institute, Benton Foundation, Consumers Union, Center for Democracy and Technology, Center for Digital Democracy, Free Press, Institute for Public Representation (as Counsel for New America’s Open Technology Institute), Public Knowledge, and Privacy Rights Clearinghouse (jointly, “Public Interest Organizations”) file this Opposition to the Joint Petition for Stay of American Cable Association (ACA), the Competitive Carriers Association (CCA), CTIA, ITTA – The Voice of Mid-Sized Communications Companies (ITTA), NCTA – The Internet & Television Association (NCTA), NTCA – The Rural Broadband Association, the United States Telecom Association (USTelecom), the Wireless Internet Service Providers Association (WISPA), and WTA – Advocates for Rural Broadband (together “Joint Petitioners”), submitted on January 27, 2017 (“Joint Petition for Stay”)<sup>1</sup> and respectfully request that the Commission deny the stay to the rules adopted on October 27, 2016 in the above-captioned proceeding,<sup>2</sup> pending resolution of the Petitions for Reconsideration.

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<sup>1</sup> *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Joint Petition for Stay (filed January 27, 2017) (“*Joint Petition for Stay*”).

<sup>2</sup> *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Report and Order, FCC 16-148 (rel. Nov. 2, 2016) (“*Order*”).

## I. Summary

As the Commission has consistently emphasized, a stay is “extraordinary relief” that should not be routinely granted, and parties asking for a stay must show that their case meets the stringent standard established in the Commission’s and the courts’ precedents.<sup>3</sup> Joint Petitioners have failed to show that a stay is warranted on any of the four factors of the Commission’s analysis. Therefore, the stay should be denied.

Staying the broadband privacy rules would harm consumers and other parties, and would therefore not serve the public interest. The rules ensure consumers have meaningful choice, greater transparency, and strong security protections for personal information collected by ISPs. Granting a stay would leave consumers unprotected unless and until new rules are established, during which time ISPs could use the troves of sensitive information they collect without giving their customers a choice about whether or how it can be used or disclosed. Reliance on ISPs’ voluntary privacy policies is ill-advised because there is no enforcement mechanism, nor sufficient market incentive for ISPs to honor their promises. Moreover, if relying on Joint Petitioners’ own logic, granting a stay would harm other parties. Staying the rules would not serve the public interest because individuals are dependent on communications networks and have an interest in protecting the personal information they share.

The economic harms Joint Petitioners describe are not irreparable, but rather are

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<sup>3</sup> See *In the Matter of Arizona Public Service Company and Nextel Communications, Inc.*, WT Docket No. 02-55, Memorandum Opinion and Order, 30 FCC Rcd 3757, 3759, 3760 (2015); *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order Denying Stay Petitions and Petition to Hold in Abeyance, 28 FCC Rcd. 15,927, 15,931, 15,943 (2013); *Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, MB Docket No. 03-185, Second Memorandum Opinion and Order, 28 FCC Rcd. 14,412, 14,415 n.34 (2013); *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, Order, 20 FCC Rcd. 1560, 1563, 1565 (2005); *Establishment of a Class A Television Service*, MM Docket No. 00-10, Order, 16 FCC Rcd. 15,053, 15,054 (2001).

theoretical, grossly exaggerated, or routine costs associated with compliance. Joint Petitioners essentially conclude that providing consumers with more choices is bad for those consumers by speculating that customers will opt-out of ISPs using their information, causing lost profits. Any loss of goodwill is more likely associated with ISPs' own failures in using consumers' information without notice and consent, not sending data breach notifications, or failing to maintain adequate data security measures.

Joint Petitioners are not likely to succeed on the merits. The Commission cannot grant stay motions when the petitioner relies on arguments which have previously been presented and considered by the Commission, as is the case here. Even setting aside Joint Petitioners' procedural deficiencies, the Commission has the legal authority to adopt these rules under Section 222. Congress specifically authorized the Commission to protect the privacy of all data that *all* telecommunications carriers — explicitly including ISPs — collect from their customers. The *Order* also does not violate the First Amendment rights of ISPs, because the rules do not prohibit or disfavor certain activities based on their content. Moreover, the rules are reasonable and proportional to the Commission's interest and therefore satisfy the *Central Hudson* test.

## **II. The Commission Should Deny the Joint Petition for Stay.**

### **A. Staying the Broadband Privacy Rules Would Harm Other Parties.**

#### **1. Granting A Stay Would Harm Consumers.**

Staying the broadband privacy rules pending action on reconsideration would significantly harm consumers. The broadband privacy rules ensure that broadband customers have meaningful choice, greater transparency, and strong security protections for information collected by ISPs. Many of the provisions adopted in the 2016 Privacy Order have been in effect

for a month already, while the rest will take effect at different times over the next 11 months.<sup>4</sup>

A stay of the rules would mean that consumers would have essentially no protections unless and until the Commission either denies reconsideration, as Public Interest Organizations will urge the Commission to do, or if it grants reconsideration, until it can complete one or more rounds of rulemaking to adopt different rules. As a practical matter, this means that consumers will lack meaningful privacy protections for a significant period of time.<sup>5</sup>

Joint Petitioners do not dispute that they have access to vast troves of their customers' private information.<sup>6</sup> Providers collect information from all the adults, children, and guests that access the internet through their network.<sup>7</sup> This includes sensitive internet browsing information, including but not limited to financial and health information, Social Security numbers, information pertaining to children, when consumers are online, where they are physically located while online, how long they stay online, the devices being used to access the internet, the websites visited, and the applications used.<sup>8</sup> As the ISPs note, "most consumers access the internet via multiple devices and over multiple networks operated by multiple broadband providers," but this does not aid their argument; it simply means that every ISP requesting this stay has a expansive window into the lives of Americans across the country.<sup>9</sup> With this

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<sup>4</sup> *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Public Notice, Wireline Competition Bureau Announces Effective Dates of the Broadband Policy Rules (Dec. 14, 2016) ("the data security obligations (new section 64.2005) will be effective on March 2, 2017 . . . the new breach-notification requirements (new section 64.2006) will become effective the later of PRA approval or June 2, 2017 (6 months after Federal Register publication) and the notice and customer approval provisions (new sections 64.2003, 64.2004, and 64.2011(b)) will become effective the later of PRA approval or December 4, 2017 (12 months after Federal Register publication).").

<sup>5</sup> Although federal law would still require that ISPs protect consumer information, the FCC's rules are necessary to implement this legal requirement and provide guidance to both the industry and the public.

<sup>6</sup> *Joint Petition for Stay* at 15 (ISPs have...“visibility into broadband customer data...”).

<sup>7</sup> *See Order* ¶ 44.

<sup>8</sup> *Order* ¶ 9.

<sup>9</sup> *Joint Petition for Stay* at 16.

information, ISPs can create comprehensive customer profiles that can be used to manipulate or even discriminate against consumers. In addition, if the FCC stayed the data security and breach notification requirements, consumers would be harmed because they will not be able to exercise effective options to protect their private information.

## 2. Granting A Stay Could Leave Consumers with No Redress When ISPs Misuse Customer Information.

In deciding whether to stay the rules, the Commission must consider how a stay would interact with the Ninth Circuit’s decision in *FTC v. AT&T Mobility*. There, the court interpreted a provision in the Federal Trade Commission Act that denies the FTC jurisdiction over common carriers. Thus, “[t]his leaves the Federal Communication Commission as the only federal agency with robust authority to regulate ISPs and other telecommunications carriers in their treatment of sensitive customer information obtained through the provision of BIAS and other telecommunications services.”<sup>10</sup>

The Commission should reject Joint Petitioners’ claim that their compliance with other laws and their own voluntary privacy policies provides sufficient protection for consumers.<sup>11</sup> As discussed above, because of the Ninth Circuit decision, the FTC cannot require ISPs to comply with their voluntary privacy policies. Moreover, contrary to their assertion,<sup>12</sup> ISPs lack the market incentives to protect customer information. Verizon’s purchase of AOL demonstrates that ISPs want to monetize customer data by making it actionable for third party advertisers as well

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<sup>10</sup> *Order* ¶ 358.

<sup>11</sup> Joint Petitioners claim that “while ISPs have not been subject to specific implementing rules for nearly two years now, they have complied with the Commission’s interim guidance, other applicable federal and state privacy, data security, and breach notification laws, and their own privacy policies, with scant evidence of harm to consumers.” *Joint Petition for Stay* at 8.

<sup>12</sup> *Joint Petition for Stay* at 3.

as use it for their own marketing purposes.<sup>13</sup> Given the large amounts of money to be made from using consumer data for targeted advertising, the economic incentives actually run the other way. Further, if the rules are stayed and ultimately repealed, ISPs will have even less of an incentive to maintain voluntary privacy protections. Caution during the rulemaking process helped the ISPs to advance their arguments against more restrictive rules. With no rules and no proceeding to create rules, there is no specter of new regulations to discourage ISPs from weakening their privacy policies and practices.

### 3. By Joint Petitioners' Own Logic, Granting A Stay Would Harm Other Parties.

As Public Interest Organizations have argued previously, it would not serve the public interest for the FCC to replicate the FTC's approach.<sup>14</sup> The FTC's "privacy framework" does not mandate any substantive protections for consumers and the FTC lacks the authority to prescribe rules. It can only act where companies fail to comply with their voluntary privacy promises or fail to take reasonable steps to secure customer information. Therefore, sector-specific privacy rules are appropriate.

It is nonetheless worth pointing out Joint Petitioners' paradoxical assertion that granting a stay would not harm any other parties when, by their own logic, doing so would harm edge providers. Joint Petitioners vociferously argue that the asymmetry created by Commission's privacy rules puts ISPs at a competitive disadvantage vis-à-vis edge providers.<sup>15</sup> They claim that

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<sup>13</sup> See Kate Kaye, *Key Verizon Data Becomes Available to AOL Advertisers, Slowly* (Mar. 21, 2016), <http://adage.com/article/datadriven-marketing/key-verizon-data-aol-advertisers/303186/>.

<sup>14</sup> See, e.g., *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Ex Parte, American Civil Liberties Union, Benton Foundation, Center for Democracy & Technology, Center for Digital Democracy, Color Of Change, Consumer Action, Consumer Federation of America, Electronic Frontier Foundation, Free Press, New America's Open Technology Institute, Public Knowledge 5-6 (Oct. 20, 2016).

<sup>15</sup> *Joint Petition for Stay* at 17.



staying the rules would “restore the proven and effective approach of protecti[ng] consumers’ privacy rights through the consistent and uniform application of a single set of privacy obligations applicable across the internet to all companies that come into contact with broadband consumer data.”<sup>16</sup>

This claim is based on the false premise that if the rules were stayed, then ISPs would be subject to the FTC’s privacy regime. But as discussed above, this is not true due to the Ninth Circuit decision. Meanwhile, edge providers would continue to be subject to the FTC’s privacy framework. If it were true, as Joint Petitioners suggest, that different regulatory standards for different types of entities inherently create competitive disadvantages, granting a stay would necessarily harm edge providers. Public Interest Organizations do not concede that this is true, as explained above.

Nevertheless, granting a stay would cause harm to the Public Interest Organizations and their members, as well as to other parties, including even the edge providers if the Joint Petitioners’ logic is to be believed. Where other parties would be so harmed by staying the rules, a stay would not serve the public interest.<sup>17</sup>

### **B. Staying the Broadband Privacy Rules Would Not Serve the Public Interest.**

Maintaining rules that protect consumer privacy serves the public interest. Individuals’ interest in protecting their personal identity and information is of great public concern.<sup>18</sup> “[T]he

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<sup>16</sup> *Joint Petition for Stay* at 3.

<sup>17</sup> *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, *Order Denying Stay Petitions*, 30 FCC Rcd. 4681, 4696-97 (2015) (“*Order Denying Stay Petitions*”).

<sup>18</sup> *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Schultz*, No. 01-0402, 2001 WL 1681973, at \*4 (D.D.C. Feb. 26, 2001) (referring to “the misuse of confidential information [which will] result in lost trust and confidence between [a corporation] and [its] clients, the loss of goodwill, and the loss of reputation” as a “grave harm” and finding that “an injunction is important in promoting the public interest because it protects the confidentiality of . . . consumer information”); *McVeigh v. Cohen*, 983 F.Supp. 215, 221-22 (D.D.C.1998) (“Certainly, the public has an inherent interest in the preservation of privacy rights”).

importance of an individual's privacy interest is not diminished because the value attached to it is intangible as compared to economic.”<sup>19</sup> In fact, this privacy interest is more suitable for protection in part because it is difficult to assign economic value to the intangible harm caused by infringement of the interest.<sup>20</sup>

The Commission has found a “strong public interest in protecting consumers' privacy interests when they use communications services. Consumers are uniquely dependent on telecommunications networks to communicate some of their most personal information.”<sup>21</sup> ISPs use consumers’ web browsing history and application history to determine very personal information about the consumer’s life. This information can be used to discriminate against, embarrass, or intimidate individuals. Because this information cannot be made private again once it is known, it can also result in psychological harm.<sup>22</sup> Nothing in the Joint Petition for Stay suggests that the Commission’s public interest findings were unwarranted.

The Commission should also reject Joint Petitioners’ claim that a stay would not cause harm because it would merely retain the “status quo.”<sup>23</sup> Maintaining the status quo is not in the public interest where, as here, the Commission has already identified the need for broadband privacy rules, adopted rules, and the rules have begun to take effect.

Finally, as to the rules relating to public notice and consent that will not take effect until December 2017, granting a stay now would be premature.<sup>24</sup> Even taking into account the

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<sup>19</sup> *Raymen v. United Senior Ass'n, Inc.*, No. CIV.A.05-486(RBW), 2005 WL 607916, at \*4 (D.D.C. Mar. 16, 2005).

<sup>20</sup> *See Raymen*, 2005 WL 607916, at \*4.

<sup>21</sup> *Order Denying Stay Petitions* at 4697 (quoting *Nat’l Cable & Tel. Ass’n v. FCC*, 555 F.3d 996, 1001 (D.C. Cir. 2009)).

<sup>22</sup> *Raymen*, 2005 WL 607916, at \*4 (discussing irreparable effects of the misappropriation of a non-public figure’s personal identity and information).

<sup>23</sup> *Joint Petition for Stay* at 31.

<sup>24</sup> Small ISPs have an additional year. *Order* ¶ 312.

necessary lead time to put these procedures in place, the Commission should be able to decide whether to reconsider its rules well before the most ISPs will likely incur significant expenses. On the other hand, if the rules were to be stayed now and later upheld, the ISPs would claim they need more time to comply, and the public would be harmed as a result.

### **C. Joint Petitioners Failed to Show Irreparable Harm.**

Joint Petitioners' blanket conclusory statements are insufficient to meet the standard for showing irreparable harm.<sup>25</sup> "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."<sup>26</sup> The simple fact that the government passed regulations that impose certain costs is not irreparable injury.<sup>27</sup> Irreparable harm has to be "both certain and great; it must be actual and not theoretical."<sup>28</sup> The harm must also be imminent.<sup>29</sup> This is an "exacting standard" that Joint Petitioners fail to meet.<sup>30</sup>

Joint Petitioners provide no concrete evidence of harm but simply rehash the same economic arguments that they made in the rulemaking, which the Commission has already

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<sup>25</sup> *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Order, 27 FCC Rcd 10217, 10220 (2012) ("Amendment to Part 76 Rules") (citing *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) and *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

<sup>26</sup> See *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>27</sup> *Order Denying Stay Petitions* at 4690. "[E]conomic loss does not, by itself, constitute irreparable harm unless it threatens the very existence of the movant's business." *Amendment to Part 76 Rules* at 10227-28; *In the Matter of Connect America Fund*, WC Docket Nos. 10-90, 05-337, Order, 27 FCC Rcd 7158, 7160 (2012) (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

<sup>28</sup> *In the Matter of Echostar Satellite Operating Company Application for Special Temporary Authority Related to Moving the EchoStar 6 Satellite from the 77° W.L. Orbital Location to the 96.2° W.L. Orbital Location, and to Operate at the 96.2° W.L. Orbital Location*, Memorandum Opinion and Order, 28 FCC Rcd. 5475, 5480 (2013) (quoting *Wisconsin Gas Co.*, 758 F.2d at 674).

<sup>29</sup> *Amendment to Part 76 Rules* at 10227-28.

<sup>30</sup> *Amendment to Part 76 Rules* at 10228; see also *Bristol-Myers Squibb Co. v. Shalala*, 923 F. Supp. 212, 220 (D.D.C. 1996) (referring to it as "a very high standard.").

considered and rejected. The Commission’s sound practice has been to reject requests for a stay where a party primarily relies on the same claims it raised before.<sup>31</sup>

In any event, the economic harms described by Joint Petitioners are either theoretical, grossly exaggerated, or routine costs associated with compliance. For example, Joint Petitioners claim that implementing an opt-in mechanism would be prohibitively expensive for them, but it is unlikely to be significantly expensive to switch from the opt-out regime they claim to already use.<sup>32</sup> They also suggest that providing privacy options, such as those available on edge platforms, would be too costly.<sup>33</sup> At the same time, Joint Petitioners argue that many ISPs already implement greater protection of private information.<sup>34</sup>

Joint Petitioners’ claims of lost profits are speculative at best, and inconsistent with free market principles. Joint Petitioners state that constraints on data-driven marketing increase marketing costs and produces waste,<sup>35</sup> but they assume -- without support -- that customers will not opt-in to ISPs using their information. More importantly, the ISPs confuse consumer choice, a staple of the free market, with financial harm.

Joint Petitioners’ claims of loss of goodwill are also speculative and highly exaggerated.<sup>36</sup> Joint Petitioners claim that obtaining consent for using customer information will prevent them

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<sup>31</sup> See *Amendment to Part 76 Rules* at at 10227 (denying to issue a stay to petitioners where “the Movants largely repeat[ed] claims about loss of viewers and advertising revenues that the Commission rejected in its *Fifth Report and Order* factual findings.”).

<sup>32</sup> *Joint Petition for Stay* at 25-26.

<sup>33</sup> *Joint Petition for Stay* at 25-26 (“To be in compliance by the rules’ effective date, ISPs will need to revise and send notices, and obtain opt-in for the use of app usage and Web browsing data, and offer either opt-in or opt-out consent for most first-party marketing activities they undertake today.”).

<sup>34</sup> See, e.g., ACA Petition for Reconsideration, WC Docket No. 16-106, at 16.

<sup>35</sup> *Joint Petition for Stay* at 26.

<sup>36</sup> *Joint Petition for Stay* at 7; See *Teva Pharm. USA, Inc. v. Food & Drug Admin.*, 404 F. Supp. 2d 243, 246 (D.D.C. 2005) (“[A]t this point, such possible harm is months away. Hence, under the present circumstances, no party is imminently faced with any irreparable harm—it is simply too early, and all harms are speculative.”).

from developing and recommending particular products and services, offering discounts and incentives, or creating targeted advertisements, thereby impairing customer goodwill.<sup>37</sup> Yet, using consumers' information for these purposes without notice and consent is much more likely to impair goodwill.

Similarly, complying with the data breach notice requirements will not harm ISPs' goodwill.<sup>38</sup> Rather, ISPs will lose goodwill if they are breached, choose not to notify customers, and then their customers are harmed. Moreover, most consumers appreciate receiving this information; without this knowledge they are less able to protect themselves, and market forces will not incentivize providers to compete in providing better security. It is paternalistic to assume that customers do not want to be notified when their data has been exposed. In any case, to the extent that the ISPs lose the public's goodwill, it is due to their inadequate data security measures, not the rules.

**D. Joint Petitioners are Not Likely to Succeed on the Merits in their Petitions for Reconsideration.**

1. Joint Petitioners rely on arguments which have previously been presented and considered by the Commission.

The Commission's power to grant petitions for reconsideration is limited to those which rely on facts or arguments which have not been previously presented to the Commission.<sup>39</sup> Yet, contrary to long standing Commission procedure, these Petitions for Reconsideration rely solely on arguments previously presented and considered by the Commission in the Order. For instance, For instance, CTIA argues in its Petition for Reconsideration: (1) that the Commission does not

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<sup>37</sup> *Joint Petition for Stay* at 26, 27.

<sup>38</sup> *Joint Petition for Stay* at 30, 31.

<sup>39</sup> 47 C.F.R. § 1.429.

have authority to reclassify broadband as a common carrier service, (2) Section 222 does not extend to broadband services, and (3) that Section 222(a) does not give the Commission authority to limit use of information other than CPNI under Section 222(c).<sup>40</sup> These are the exact same arguments CTIA presented to the Commission in their comments and reply comments.<sup>41</sup>

In fact, CTIA cites heavily to its own comments and reply comments in this proceeding throughout the CTIA Petition.<sup>42</sup> The Commission has previously rejected petitions for reconsideration where the petitioner “essentially repeats the same arguments it relied upon in the comments and reply comments it filed” and “fails to raise new arguments or facts that would warrant reconsideration of [the underlying] order.”<sup>43</sup> Further, the Commission explicitly considers and in many cases rejects CTIA’s arguments in the *Order*.<sup>44</sup>

CTIA’s Petition is not alone in its procedural deficiency. Each of the organizations that signed on to the Joint Petition for Stay commit the same fatal error in their Petitions for Reconsideration. For example, NCTA argues in their Petition for Reconsideration that the *Order* creates speaker-based distinctions subject to heightened scrutiny.<sup>45</sup> NCTA and others make the same argument in their comments and reply comments.<sup>46</sup> Here too, the Commission considers NCTA’s First Amendment argument and rejects the First Amendment arguments advanced by

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<sup>40</sup> See CTIA Petition for Reconsideration, WC Docket No. 16-106, at 2-6 (filed January 3, 2017) (“CTIA Petition”).

<sup>41</sup> See generally, Comments of CTIA, WC Docket No. 16-106 (filed May 26, 2016) (“CTIA Comments”).

<sup>42</sup> See e.g., CTIA Petition at 2 (As CTIA argued in its comments...); CTIA Petition at 3; CTIA Petition at 4.

<sup>43</sup> *In the Matter of AVR, L.P.*, CC Docket No. 98-92, Memorandum Opinion and Order, 16 FCC Rcd 1247, 1248-49 ¶¶ 3-4 (2001); see *GTE-Bell Atlantic*, CC Docket No. 98-184, Order on Reconsideration, 18 FCC Rcd. 24871, 24873 (stating that the Commission “will deny any petition that merely repeats arguments previously considered and rejected”).

<sup>44</sup> *Order* ¶¶ 334-36; 343-44 (affirming the Commission’s decision in the 2015 *Open Internet Order*, rejecting the view that Section 222 only applies to telephony, and finding that Section 222(a) provides authority for the rules as to Customer PI and imposes a duty on telecommunications carriers to protect the confidentiality of proprietary information.).

<sup>45</sup> See NCTA Petition for Reconsideration, WC Docket No. 16-106, at 21-23 (filed January 3, 2017) (“NCTA Petition”).

<sup>46</sup> See e.g. NCTA Reply Comments at 11-13.

Laurence Tribe on behalf of NCTA, USTelecom, and CTIA (all of whom are signatories to the Joint Petition for Stay).<sup>47</sup> Given that Joint Petitioners simply recycle arguments presented in their comments and reply comments, their Petitions for Reconsideration are not likely to succeed on the merits, and they should be denied in accordance with 47 C.F.R. § 1.429(l)(3).<sup>48</sup>

2. The Commission has the legal authority to adopt rules under section 222.

Not only do the Petitions for Reconsideration fail on procedural grounds, they would fail on the merits as well. Joint Petitioners boldly claim that Section 222 does not authorize the Commission to regulate how ISPs share and use their customers' data.<sup>49</sup> In 1996, Congress enacted Section 222 of the Communications Act providing protections to the privacy of the data that *all* telecommunications carriers collect from their customers. Congress' intent to protect telecommunication customers' information through Section 222 could not be clearer. As the Commission noted in the *Order*, Congress gave customers the right to know what information is collected about them and how that information is being used.<sup>50</sup> Through the *Open Internet Order*, the Commission reclassified BIAS as a telecommunications service, thereby subjecting ISPs to Section 222, a decision upheld by the D.C. Circuit in *United States Telecom Ass'n v. FCC*.<sup>51</sup> Therefore, it is clear that the requirements imposed by Section 222 on telecommunications carriers now apply to ISPs.

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<sup>47</sup> *Order* ¶¶ 375-387 (finding that the rules do not violate the first amendment and concluding that heightened scrutiny under *Sorrell* was unwarranted.).

<sup>48</sup> The Commission may dismiss any petition that relies on arguments that have been fully considered and rejected by the Commission within the same proceeding. 47 C.F.R. § 1.429 (l)(3).

<sup>49</sup> *Joint Petition for Stay* at 11.

<sup>50</sup> *Order* ¶ 21 (citing Joint Explanatory Statement of the Committee of Conference, 104th Cong., 2d Sess. 204; see also H.R. Rep. No. 204, 104th Cong., 1st Sess. 91 (1995)).

<sup>51</sup> *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd at 5733, para. 306; see also *United States Telecom Ass'n v. F.C.C.*, 825 F.3d at 712.

3. Broadband privacy rules do not violate the first amendment.

The *Order* does not violate the First Amendment rights of ISPs for several reasons. Joint Petitioners incorrectly assert that speaker-based distinctions are subject to heightened scrutiny.<sup>52</sup> This is only a partial statement of the law, designed to suit Joint Petitioners' interest. Whether a speaker-based distinction is subject to heightened scrutiny is based not merely on whether a law or regulation singles out individuals, but whether the speech-burdening restrictions are justified without reference to the content of the regulated speech.<sup>53</sup> As is the case with all of the arguments presented, the Commission addresses why strict scrutiny under *Sorrell* is unwarranted in the *Order*.<sup>54</sup> Unlike the facts in *Sorrell*, the broadband privacy rules do not prohibit nor disfavor any particular type of activity.<sup>55</sup>

Further, Section 222, and the rules promulgated to implement it, are not content-based.<sup>56</sup> Taking Joint Petitioners' argument to its logical end, applying strict scrutiny to the broadband privacy rules would require the same for a wide array of other existing privacy regulations, which impose different restrictions and requirements on the use and disclosure of personal information.<sup>57</sup> It is clear that *Sorell* does not require that analysis of all sector-specific privacy regulations. In fact, *Sorrell* specifically cites HIPAA, which is similarly limited to covering

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<sup>52</sup> *Joint Petition for Stay* at 20.

<sup>53</sup> *Boos v. Barry*, 485 U.S. 312, 320 (1988) (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011).

<sup>54</sup> See *Order* ¶ 388.

<sup>55</sup> *Id.*

<sup>56</sup> *Order* ¶¶ 38-39.

<sup>57</sup> See PK Reply Comments, WC Docket No. 16-106, at 12; *Order* ¶ 389, n.1171 (“Indeed, if laws impacting expression were considered content-based for not being universal, nearly every privacy and intellectual property law would need to pass strict scrutiny.”).



certain specific entities and types of information, as an example of a privacy protection that does *not* violate the First Amendment.<sup>58</sup>

Joint Petitioners also misapply the well-established framework for evaluating governmental restrictions on commercial speech, from *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*.<sup>59</sup> Joint Petitioners argue that the rules are both under-inclusive and over-inclusive, but as the Commission explains in the *Order*, *Central Hudson* only requires that the rules be no more extensive than necessary to advance the government's substantial interest.<sup>60</sup> This does not require the Commission to craft the least restrictive rule conceivable, but rather only one that is reasonable and whose scope is in proportion to the interest served.<sup>61</sup> The Commission goes into extensive detail in the *Order*, explaining why the rules are reasonable and clearly satisfies the *Central Hudson* test.<sup>62</sup> Thus, the broadband privacy rules do not violate the First Amendment.

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<sup>58</sup> *Sorrell*, 564 U.S. at 573; ACLU Reply Comments, WC Docket No. 16-106, at 5; *Order* n.1172 (“use-based exceptions to Section 222 and our rules do not render the statute or rules content-based any more than purpose-based exceptions in HIPAA.”).

<sup>59</sup> 447 U.S.C. 557 (1980).

<sup>60</sup> *Central Hudson*, 447 U.S. at 569-70.

<sup>61</sup> *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999).

<sup>62</sup> *Order* ¶¶ 384-87.

### III. Conclusion

For the foregoing reasons, the Commission should deny the Joint Petition for Stay.

Respectfully submitted,

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