

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**REPLY TO OPPOSITIONS/COMMENTS TO PETITIONS FOR RECONSIDERATION
OF NCTA - THE INTERNET & TELEVISION ASSOCIATION**

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March 16, 2017

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NCTA - The Internet & Television Association (NCTA), pursuant to Section 1.429 of the Commission’s rules, respectfully submits this Reply to Oppositions/Comments to its Petition for Reconsideration (“NCTA Petition”) filed January 3, 2017 in the above-captioned proceeding.^{1/}

I. SUPPORTING COMMENTERS CONFIRM THAT RECONSIDERATION OF THE BROADBAND PRIVACY RULES WOULD BE BENEFICIAL FOR BOTH CONSUMERS AND THE DIGITAL ECONOMY

A diverse array of commenters strongly support reconsideration of the rules adopted in the *Order*, emphasizing two over-arching issues: the rules will harm consumers and adversely affect the digital economy.^{2/} As the Progressive Policy Institute notes, the record of this proceeding contains powerful survey evidence demonstrating that, by overwhelming margins, consumers want and expect a consistent set of privacy rules across the Internet, and that the substantial departures from the FTC framework effectuated by the rules adopted in the *Order* are “likely to confuse consumers and violate their expectations.”^{3/} Madery Bridge observes that, to the extent regulations are needed, “the correct regulatory approach is obvious, a consistent treatment with consistent rules of all those who compete in the Internet ecosystem with access to

^{1/} *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, 31 FCC Rcd 13911 (2016) (“*Order*”).

^{2/} *See, e.g.*, ITIF at 1 (FCC’s overly restrictive rules “come at a real cost to the economy and do not align with an average consumer’s best interest”).

^{3/} Progressive Policy Institute at 1.

data, much like what the FTC has accomplished.”^{4/} Other commenters agree that consumers “want and need a more consistent approach to privacy regulation” than the *Order* provides,^{5/} and that the variances between the FCC and the FTC’s treatment of broadband data “would create consumer confusion, increase costs, and hamper innovation and ISP choices for consumers.”^{6/}

By imposing highly prescriptive restrictions on ISPs, the Commission’s rules also will reduce opportunities for consumers to benefit from customized offerings and services while raising their costs.^{7/} ITIF expresses concern that the rules fail to adequately take account of the “significant upside” for consumers associated with beneficial uses of data by ISPs, including more relevant advertising, greater innovation, and lower costs.^{8/} Economists Thomas Lenard and Scott Wallsten note that “the creative use of information generates real benefits” that will be hampered by the rules’ failure to “tak[e] seriously the benefits that come from the use of data.”^{9/}

By limiting the ability of ISPs to provide data-driven services and capabilities to their customers, the rules not only will harm consumers, they also will inhibit the growth of the digital economy. Commenters emphasize the interdependencies of the Internet ecosystem and express concerns that the constraints imposed upon ISPs’ use of data will disrupt data flows that spur the

^{4/} Madery Bridge at 5.

^{5/} Consumer Policy Solutions at 1.

^{6/} Internet Commerce Coalition at 5. *See also* Freedom Works at 4; Tech Knowledge at 6 (“[P]rivacy protections must be harmonized across all internet companies.”).

^{7/} *See, e.g.*, ITIF at 4 (“Consumers generally benefit from the ability of BIAS providers to more effectively use data, both directly from enjoying more relevant, less intrusive advertising, and indirectly from having advertisers pay more of the network costs.”); IACLE at 5 (“[T]he Order will harm consumers who do not view privacy protections through the same, maximalist lens as the Commission. The net result of these rules is that . . . consumers will be presented with a narrower range of pricing and product options, meaning that fewer consumers . . . will be offered their preferred options. Consumer welfare will consequently decrease.”).

^{8/} ITIF at 4.

^{9/} Thomas Lenard and Scott Wallsten at 4; ITIF at 4 (“If consumers can opt out of practices they are not comfortable with, a choice architecture with defaults that encourage rather than restrain innovation would be a win-win. By not exploring the current and potential benefits of using data from BIAS providers, the Commission risks creating unintended consequences for consumers and the economy if these rules are not revisited.”).

digital economy and make it more difficult for the marketplace as a whole to respond to consumer preferences.^{10/} Data is a key driver of innovation and investment in broadband networks and services, and commenters agree that the rules adopted in the *Order* will stifle such activity without providing any meaningful improvement in consumer privacy.^{11/}

II. PROCEDURAL OBJECTIONS RAISED BY RECONSIDERATION OPPONENTS OFFER NO BASIS FOR DISMISSING THE PETITIONS

Claims that the petitions for reconsideration should be denied because they rely upon arguments previously considered and rejected are without merit.^{12/} The Commission has made clear that reconsideration may be granted based upon “material errors or omissions” in the *Order* under review.^{13/} NCTA’s Petition, for example, highlighted several key determinations in the *Order* that are materially erroneous,^{14/} as well as material omissions.^{15/} Even if it were correct that every argument in all the petitions had been previously considered (which it is not), such a circumstance still would not mandate their denial, as the Commission itself has observed.^{16/}

III. THE OPPOSITIONS FAIL TO REFUTE THE MATERIAL ERRORS AND OMISSIONS UNDERLYING THE KEY POLICY FLAWS OF THE RULES

NCTA and other petitioners identified several key errors and omissions underlying the *Order*’s determination to subject ISPs to more stringent privacy rules than all other Internet

^{10/} Madery Bridge at 3; U.S. Chamber of Commerce at 6-7.

^{11/} ITIF at 4 (The changes made by the Commission’s rules remove “data from being put to beneficial uses without empowering consumers with any additional control. What changes is the ability of ISPs to responsibly experiment with new ways of supporting the expensive deployment and maintenance of broadband networks.”).

^{12/} Public Knowledge Opposition at 1-3; CDT Opposition at 5; Free Press Opposition at 4-6.

^{13/} See 47 C.F.R. 1.429(b)(3),(l)(1) *FM Table of Allotments, Enfield, NH; Hartford, VT; Keeseville, NY*, 29 FCC Rcd 14947, ¶ 5 (2014); *Procedures to Govern the Use of Satellite Earth Stations on Board Vessels in the 5925-6425 MHz/3700-4200 MHz Bands and 14.0-14.5 GHz/11.7-12.2 GHz Bands*, 24 FCC Rcd 10369, ¶ 56 (2009).

^{14/} NCTA Petition at 4-12, 13-18.

^{15/} *Id.* at 19-21.

^{16/} *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Order Granting Stay Petition in Part, FCC 17-19, ¶ 11 (Mar. 1, 2017); *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, 26 FCC Rcd 1594, ¶ 30 (2011).

entities. While the oppositions fail to refute these deficiencies, the supporting comments bolster the view that these errors and omissions warrant withdrawal of the rules.

First, the *Order's* conclusions that ISPs have unique visibility over broadband customer data relative to other Internet entities and wield a putative “gatekeeper” role are unsupported by the record.^{17/} Opponents recycle the *Order's* erroneous conclusion that ISPs have a “unique, sweeping . . . all-encompassing picture window” into consumer online behavior.^{18/} As network engineer Richard Bennet notes, this claim is “false” and predicated upon the “large error” that edge providers can only track a broadband user who is utilizing their website and services.^{19/} In fact, edge providers not only have the ability to track users across the Internet, but they also have greater visibility into encrypted traffic than ISPs.^{20/} Further, the *Order* relied upon outdated information to support its view that encryption is an inadequate check on ISP visibility, and “cherry-picked assertions” that contravene “the latest comprehensive analysis” showing that “ISPs’ access is more limited than that of many edge providers.”^{21/} The inaccuracy of the *Order's* findings regarding ISP visibility relative to edge providers erodes the primary foundation for the majority’s decision to treat ISPs differently from all other Internet entities.^{22/}

Notwithstanding assertions to the contrary,^{23/} the *Order's* determination that ISPs wield a “gatekeeper” role over broadband customers is likewise faulty. The *Order* disregarded the fact

^{17/} NCTA Petition at 13-16; US Telecom Petition at 9-11; Oracle Petition at 3-7. *See also* Thomas Lenard and Scott Wallsten at 6-8; Tech Knowledge at 4; ICLE at 4.

^{18/} Consumers Union Opposition at 2-3. *See* New America’s Open Technology Institute Opposition at 6-8.

^{19/} Richard Bennett, Attachment at 1. *See also* Tech Knowledge at 2 (“[T]he FCC’s findings are inaccurate regarding the percentage of websites to which Google has access.”).

^{20/} *See* Richard Bennett at 1-2 and Attachment; NCTA Petition at 14.

^{21/} ICLE at 2-3; Tech Knowledge at 3-4. *See also* Thomas Lenard and Scott Wallsten at 7-8.

^{22/} Richard Bennett at 1-2; Thomas Lenard and Scott Wallsten at 4 (“[T]he Order does not demonstrate that ISPs have access to more, and more sensitive, data than other companies such that they require specific rules.”).

^{23/} New America’s Open Technology Institute at 7; CDT at 12.

that more than 80 percent of Internet users report accessing the Internet via multiple networks, all while logged in to the same email account, using the same e-commerce sites, and exploring the world with the same search engine.”^{24/} Further, as ICLE points out, to the extent that competitive market share “is a touchstone for adequate privacy protection, the Commission has not actually evaluated the extent of competition in the relevant markets nor determined whether ISPs face more or less competition” than large edge providers.^{25/} In fact, evidence in the record ignored by the Commission showed that various edge market segments are no more – and in some instances are clearly less – competitive than the market for Internet access.^{26/}

Second, the *Order* repudiated key aspects of the FTC framework without demonstrating any concrete harms to consumers that justify those departures.^{27/} The *Order* treats all broadband customer Web browsing and app usage data as sensitive and subject to opt-in consent when accessed by ISPs, while subjecting most first-party marketing activities of ISPs to either opt-in or opt-out consent.^{28/} But neither the *Order* nor reconsideration opponents cite any evidence to support the view that ISPs were any less protective of broadband privacy than other online entities when the FTC framework was uniformly applied across the Internet. Nor do they explain why the FTC was wrong in 2012, after conducting an extensive analysis of all large platform providers, to apply the very same privacy framework to all ISPs and non-ISPs alike.^{29/}

^{24/} Thomas Lenard and Scott Wallsten at 3, 7-8.

^{25/} ICLE at 8.

^{26/} NCTA Petition at 15-16.

^{27/} Tech Knowledge at 8 (Supporters of asymmetric rules must show evidence demonstrating “that consumer privacy, consumer welfare, and the public interest will be served. The Order fails to do so.”); Madery Bridge at 4 (“[C]onsumers do not seem to think that ISPs are problematic and actually trust their ISPs typically more than they do other operators in the ecosystem.”); ICLE at 1 (“[T]he Order relies solely on hypothetical, potential harms.”).

^{28/} NCTA Petition at 17-18.

^{29/} *Protecting Consumer Privacy in an Era of Rapid Change*, FEDERAL TRADE COMMISSION, at 56 (2012); Maneesha Mithal, FTC, Remarks at The Big Picture: Comprehensive Online Data Collection FTC Workshop, Transcript, at 272-73 (Dec. 6, 2012).

While erroneously asserting that the *Order* properly classified Web browsing and app usage data as sensitive,^{30/} Public Knowledge never engages with the question of why the same set of customer information should be subject to two dramatically different privacy regimes as it transits the Internet, based solely upon the identity of the entity that comes into contact with it.^{31/} Nor can opponents justify depriving ISPs of the same leeway afforded non-ISPs to use broadband data to market other services they provide. Instead, they are reduced to arguing that it is “incorrect” to characterize the widely-praised FTC framework as “successful” and to denying the existence of any significant differences between the FCC’s rules and the FTC framework or the relevance of such differences.^{32/} The failure to show any market failure or substantial consumer harm arising from applying the FTC obligations to ISPs underscores the absence of any sound policy rationale for the radical departures from that framework adopted in the *Order*.

Third, opponents make no attempt to justify, or even grapple with, the absence of a cost-benefit analysis of the rules adopted in the *Order*.^{33/} CDT’s suggestions that only the “clear guidance” provided by the rules adopted in the *Order* can deliver the requisite level of “trust” for a healthy broadband market is belied by the fact that those rules have *never* been in effect during the entire span of the exponential growth of broadband services.^{34/} The disruption in data flows

^{30/} See zeotap at 8-9 (explaining why “browsing history and app usage information are qualitatively different from the other data elements the FCC has categorized as ‘sensitive’”).

^{31/} Cf. Public Knowledge at 4-7. *But see* Thomas Lenard and Scott Wallsten at 7.

^{32/} Public Interest Commenters Opposition at 5; CDT at 16 (“The Commission’s broadband privacy rules are already in harmony with the FTC’s privacy and data security guidance.”); Free Press at 9 (“Edge providers’ scope of access to their customer’s information is immaterial to the question of how the Commission should effectuate Section 222’s customer protection mandate.”). *But see* Madery Bridge at 2 (“The rules single out one part of a complicated and interdependent ecosystem, for intrusive discriminatory regulation.”).

^{33/} NCTA Petition at 19-21. *See also* Thomas Lenard and Scott Wallsten at 4 (“[T]he Order provides no evidence demonstrating that the new privacy rules would yield net—or, indeed, any—concrete benefits compared to the FTC’s rules. The Order does not acknowledge that the rules would have any costs and implies no tradeoff exists between access to information and privacy.”); ITIF at 2 (“[T]he Commission did not see to balance the protection of privacy interests with countervailing benefits of additional sharing and use.”).

^{34/} *See* CDT at 12.

engendered by the Commission’s rules will impose significant costs – including upward pressure on broadband service rates, discouraging broadband investment and innovation, and thwarting competition in the online advertising market – that were never weighed by the Commission against the putative benefits of the rules.^{35/} That omission alone warrants reconsideration.

Fourth, as commenters have pointed out, the scope of information covered by the broadband privacy rules is far too broad, categorically capturing data that does not identify individuals and dramatically expanding the scope of sensitive information.^{36/} This overbreadth problem infects the scope and substance of the privacy, data security, and data breach notification rules, and therefore necessitates reconsideration.

IV. THE OPPOSITIONS FAIL TO SHOW THE COMMISSION POSSESSES THE LEGAL AUTHORITY TO ADOPT THE RULES SET FORTH IN THE *ORDER*

Opponents of reconsideration fail to refute the *Order’s* significant legal defects. First, echoing arguments from NCTA and others, commenters show that the language, history, and structure of Section 222 demonstrate that Congress did not intend for that provision to reach services other than voice telephony.^{37/} Opponents, however, decline to interpret the statute holistically and instead focus solely on the provision’s use of the term “telecommunications carrier.”^{38/} But when Congress enacted Section 222 as part of the Telecommunications Act of 1996, it clearly did not intend for that term to encompass Internet access service and deliberately

^{35/} Citizens Against Government Waste at 2 (Lack of a cost/benefit analysis “demonstrates a serious flaw in the regulatory process at the FCC, which must be addressed by the Commission. Without an economic analysis, it is difficult to weigh the true cost of regulation on providers of services and consumers.”); zeotap at 6 (“As Commissioner O’Rielly has recognized, a properly conducted cost-benefit analysis would have revealed that ‘consumer privacy has been adequately protected under the current FTC framework and that there has been no evidence of any privacy harms.’”); Freedom Works at 2 (“The FCC should conduct an analysis comparing how the FCC’s policies differ from the original privacy framework established by the FTC, along with an estimate of the differences in both cost and benefits from the new privacy rules.”); ITIF at 2; Tech Knowledge at 8-9.

^{36/} zeotap at 1, 4-5; Internet Commerce Coalition at 2-4; State Privacy and Security Coalition at 4. *See also* NCTA Petition at 9-11, 24-25.

^{37/} U.S. Chamber of Commerce at 3. *See also* NCTA Petition at 4-6; CTIA Petition at 2-3; ACA Petition at 4.

^{38/} Free Press at 7-8; Public Knowledge at 8.

employed different terminology to denote that service in Section 230 of the Act.^{39/} The post-hoc reclassification of Internet access service nearly 20 years after passage of the 1996 Act does not sanction extending the reach of Section 222 beyond the limits established by Congress.^{40/}

Second, commenters also agree that, even if Section 222 authorized the Commission to adopt some broadband privacy rules, Congress did not authorize regulation of information that does not fall within the definition of customer proprietary network information (CPNI), such as broadband customer personally identifiable information (PII).^{41/} Opponents of reconsideration fail to grapple with Congress' deliberate decision to refrain from using the term PII in Section 222, while employing it elsewhere in the Communications Act. Nor can they refute the arguments rooted in the structure of Section 222 demonstrating that subsection (a) cannot be read to grant the Commission standalone authority to restrict the use and sharing of PII.^{42/}

Third, as online advertiser zeotap demonstrates, the constraints on ISP use and sharing of IP addresses, MAC IDs, and other device identifiers established in the *Order* are likewise beyond the scope of the Commission's authority under Section 222.^{43/} The Commission cannot treat IP addresses and other device identifiers as either CPNI or PII (even assuming PII were covered by Section 222, which it is not) because, as the record demonstrates and as numerous courts have found, such identifiers cannot on their own identify an individual.^{44/}

^{39/} NCTA Petition at 6; ACA Petition at 5; WISPA Petition at 5-7. Contrary to Public Knowledge's erroneous claim, the question of how Section 230's references to Internet-based services should affect the construction of other provisions of the Act has in no way been "litigated and settled." See NCTA Petition at 6.

^{40/} Dissenting Statement of Commissioner Michael O'Rielly at n.11 (noting judicial precedent holding that an agency cannot use its definitional authority to expand its jurisdiction beyond what Congress intended).

^{41/} U.S. Chamber of Commerce at 4.

^{42/} NCTA Petition at 6-8.

^{43/} zeotap at 6.

^{44/} NCTA Petition at 9-11, nn.45, 48; US Telecom Petition at 20-21; Letter from Loretta Polk, NCTA, to Marlene H. Dortch, WC Docket No. 16-106, at 10-11, nn.34-37 (Oct. 20, 2016) (citing cases).

Fourth, the oppositions make little effort to substantively address the arguments in the petitions demonstrating the rules cannot pass muster under the First Amendment.^{45/} Free Press, the only opponent to even mention the issue, completely mischaracterizes petitioners’ position as seeking to vindicate a “First Amendment right of ISPs to surveil their customers without their consent”^{46/} – an argument not proffered by any ISP. Opponents neither acknowledge nor address the rules’ establishment of speaker-based distinctions among similarly-situated entities in the Internet ecosystem with respect to the use and disclosure of the same broadband customer data. Nor do they address the constitutionality of imposing more stringent constraints on ISP data practices given the demonstrated efficacy of the less restrictive FTC framework.

V. RECONSIDERATION OF THE RULES WILL NOT LEAVE BROADBAND CONSUMER PRIVACY UNPROTECTED

Contrary to suggestions by some opponents, broadband consumer privacy will continue to be protected if the petitions are granted. Withdrawal of the privacy rules adopted last October will maintain a status quo that has been in place for nearly two years since the FCC reclassified broadband as a Title II service. Following reclassification of broadband, the FCC issued enforcement guidance under Section 222 of the Communications Act to deter bad faith and unreasonable privacy practices. This guidance, which continues to apply, ensures that ISPs can be held accountable for bad faith or unreasonable practices until the effective date of finalized FCC privacy rules.^{47/} It can remain in effect pending either restoration of FTC jurisdiction over ISPs through invalidation of reclassification or adoption of broadband privacy rules by the FCC that truly parallel the long-standing and successful FTC approach. ISP privacy policies, which

^{45/} NCTA Petition at 21-23; CTIA Petition at 12-15.

^{46/} Free Press at 12.

^{47/} ITIF at 5 (“Since the effective date of the Open Internet Order in June 2015, we have been without specific privacy regulation for broadband providers, and yet the parade of privacy horrors advocates now describe has not come to pass. There has been no breakdown in broadband privacy.”); Tech Knowledge at 7.

are based upon Fair Information Practice Principles and the key elements of the FTC’s privacy framework – transparency, control, and security, will continue to remain in place^{48/} and ISPs will remain subject to a variety of other Federal and State privacy and data protection laws that safeguard consumer information.^{49/} Further, the voluntary privacy and data security commitments ISPs have pledged to follow provide consumers with additional safeguards.^{50/}

CONCLUSION

For the reasons set forth here and in NCTA’s Petition, the Commission should grant the petitions for reconsideration and withdraw the rules adopted in the *Order*.

Respectfully submitted,

/s/ Rick Chessen

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^{48/} ITIF at 2 (“[A]ll major broadband providers already allowed consumers to control how their information is used—a fact the FCC appears to have ignored.”).

^{49/} Contrary to claims by opponents, *see* CDT at 7-8, the broader question of whether the FTC has jurisdiction over the non-common carrier activities of common carriers being litigated in the Ninth Circuit has no bearing on the disposition of the petitions. Granting the petitions for reconsideration would not itself change the classification of ISPs. If the Commission determines that the rules should be withdrawn due to both policy and legal deficiencies, there are other mechanisms in place to ensure that ISPs remain accountable for protecting the privacy of their broadband customers pending further action, including resolution of any proceeding revisiting Title II classification, adoption of any new privacy rules, and/or - to the extent relevant in any part of the country - review of the Ninth Circuit panel decision. *See* ITIF at 6. Concerns that reconsideration could adversely affect children’s privacy protections, *see* Center for Digital Democracy Opposition at 1-8, are likewise off-base. The Children’s Online Privacy Protection Act continues to apply to ISPs irrespective of the outcome of this proceeding, and no ISP has challenged the determination – reached 5 years ago by the FTC – that children’s data be treated as sensitive.

^{50/} *See* Joint Petition for Stay, WC Docket No. 16-106, Appendix A (filed Jan. 27, 2017).

CERTIFICATE OF SERVICE

I, Ari Z. Moskowitz, hereby certify that on March 16, 2017 a true and correct copy of NCTA's attached Reply to Oppositions/Comments to Petitions for Reconsideration was served by U.S. mail, postage prepaid, upon:

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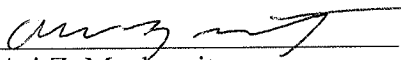
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