

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

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

**REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION OF CTIA**

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CTIA hereby replies to the oppositions filed by several parties (the “Opposition”)<sup>1</sup> to CTIA’s Petition for Reconsideration (“CTIA Petition” or “Petition”)<sup>2</sup> of the *Report and Order*.<sup>3</sup>

**I. INTRODUCTION.**

CTIA’s Petition seeks reconsideration of the *Report and Order*, adopting new data privacy and security rules for broadband providers (the “Rules”), because the Commission made material errors and omissions and failed to consider arguments presented during the comment period. Specifically, the Commission (1) failed to consider – and in some instances, mischaracterized – certain facts and arguments in the record, and (2) cited authorities and evidence that did not support adoption of the Rules. Reconsideration is also warranted because the Commission introduced new concepts – such as characterizing web browsing and app usage history as “sensitive” information – for the first time in the *Report and Order*, without giving

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<sup>1</sup> See Opposition of Free Press to Petitions for Reconsideration, WC Docket No. 16-106 (filed Mar. 6, 2017) (“Free Press Opposition”); Opposition of Public Knowledge *et al.* to Petitions for Reconsideration, WC Docket No. 16-106 (filed Mar. 6, 2017) (“Public Knowledge Opposition”); Opposition of Consumers’ Union and Consumer Federation of America to Petitions for Reconsideration, WC Docket No. 16-106 (filed Mar. 6, 2017) (“Consumers’ Union Opposition”); Opposition of Public Interest Commenters, WC Docket No. 16-106 (filed Mar. 6, 2017); Opposition of New America’s Open Technology Institute, WC Docket 16-106 (filed Mar. 6, 2017) (“OTI Opposition”); and Opposition of the Center for Democracy and Technology to Petitions for Reconsideration, WC Docket No. 16-106 (filed Mar. 6, 2017) (“CDT Opposition”) (collectively, the “Opposition”).

<sup>2</sup> Petition for Reconsideration of CTIA, WC Docket No. 16-106 (filed on Jan. 3, 2017) (“CTIA Petition” or “Petition”).

<sup>3</sup> *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd 13911 (2016) (“*Report and Order*”).

stakeholders an opportunity to comment. The Opposition offered no reason to deny CTIA's Petition. Indeed, rather than challenging CTIA's arguments and evidence, the Opposition merely cited to the *Report and Order*, ignoring facts and offering the same misleading arguments that the Commission did.

Therefore, for the reasons stated in CTIA's Petition and in this reply, CTIA requests that the Commission reconsider its application of the Rules to broadband service and to information other than customer proprietary network information ("CPNI"), and vacate the Rules insofar as necessary on these grounds, or, if the Commission declines to vacate the Rules in their entirety, modify the Rules, consistent with CTIA's Petition and this reply.

## **II. RECONSIDERATION IS WARRANTED BECAUSE THE COMMISSION FAILED TO CONSIDER FACTS AND ARGUMENTS IN THE RECORD.**

As CTIA explained in its Petition, the Commission, in numerous instances, either failed even to consider relevant facts and arguments in the record, or relied on facts and legal authorities that clearly did not support the Rules, making the *Report and Order* unreasonable and ripe for reconsideration. But even if CTIA's Petition merely repeated prior arguments, which it does not, the Commission nonetheless has significant discretion to grant the Petition,<sup>4</sup> and as both CTIA's Petition and the Opposition show, there are ample grounds to do so.<sup>5</sup>

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<sup>4</sup> *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Order Granting Stay Petition in Part, FCC 17-19, WC Docket No. 16-106, at 5 (rel. Mar. 1, 2017) (stating that "contrary to the Opposition's assertion that the Commission's authority to grant petitions for reconsideration is limited to those which rely on facts or arguments which have not been previously presented to the Commission, the Commission's rules simply permit the dismissal or denial of a petition that relies" on such arguments and "do not *require* such a dismissal or denial") (emphasis in original).

<sup>5</sup> In addition, as the Commission noted in its order granting a stay in this proceeding, a majority of the current Commission disagreed with, and dissented from, the *Report and Order* issued under the previous Commission. *Id.*

**A. The *Report and Order* Failed to Address Arguments that Section 222 Does Not Extend to Broadband Service or Information Other Than CPNI.**

As the Petition explained, the *Report and Order* failed to address well-established legal authority that precludes extending Section 222 to cover either broadband service or information other than CPNI. These authorities make clear that such a reading would render the rest of the statute incomprehensible, violating well-established principles of statutory construction. Like the Commission, the Opposition did not offer any substantive response to CTIA’s arguments. Instead, it merely cited to the *Report and Order* and asserted that Section 222(a) gives the Commission authority to regulate Internet service providers’ (“ISPs”) privacy practices.

For instance, New America’s Open Technology Institute (“OTI”) simply stated, without citing to any legal authorities whatsoever, that Section 222(c) cannot circumscribe Section 222(a), because reading Section 222(c) as a ceiling would make Section 222(a) superfluous.<sup>6</sup> OTI failed to address the cases that CTIA cited, all of which make such a reading impossible.<sup>7</sup> Public Knowledge essentially did the same, merely citing the *Report and Order* itself without offering any legal arguments to support its conclusions and without addressing any of CTIA’s arguments.<sup>8</sup> Similarly, Free Press asserted that the Commission “extensively” considered questions regarding legal authority, without citing to any legal analysis by the Commission.<sup>9</sup> And all Opposition parties ignored entirely Commissioner O’Rielly’s well-reasoned dissent which admonished the Commission for its failure to consider principles of statutory construction when analyzing Section 222.<sup>10</sup>

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<sup>6</sup> OTI Opposition at 2.

<sup>7</sup> See Comments of CTIA, WC Docket No. 16-106, at 19-20; 25-35 (filed May 26, 2016) (“CTIA Comments”).

<sup>8</sup> Public Knowledge Opposition at 10.

<sup>9</sup> Free Press Opposition at 6-7.

<sup>10</sup> See *Report and Order* at Commissioner O’Rielly dissent at 1-3 (“Commissioner O’Rielly Dissent”).

In addition, the Opposition, like the Commission, failed to address CTIA’s argument that because “proprietary information” and “personal information” are qualitatively distinct and because Section 222 applies only to the former, the Rules cannot extend to information other than CPNI. For example, the Center for Democracy and Technology (“CDT”) relied on the *TerraCom NAL* to argue that Section 222 covers “personal” as well as “proprietary” information.<sup>11</sup> As CTIA explained in its Petition, however, the *TerraCom NAL* cited to Communications Act provisions that concerned the protection of confidential *corporate information* (not *personal information*) that warrants protection because of its commercial value.<sup>12</sup> CDT did not even acknowledge, let alone attempt to refute, CTIA’s argument that these statutory provisions apply only to commercially valuable – not personal – information.<sup>13</sup> OTI did something similar. In arguing that Section 222 can be read to cover information other than CPNI, OTI cited to a case that defined information as “proprietary” under Section 222 because it held great *commercial value* to Verizon, and not because it was “personal” information.<sup>14</sup>

Thus the Opposition merely cited to the *Report and Order* and its arguments without addressing the facts and legal authorities that the Commission ignored, reinforcing CTIA’s argument that reconsideration of the *Report and Order* is warranted.

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<sup>11</sup> As CTIA noted in its Petition, notices of apparent liability (“NALs”) for forfeiture represent only “tentative conclusions” of the Commission. CTIA Petition at 4, n.17 (citing *CBS Corp. v. FCC*, 663 F.3d 122, 130 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012)). Therefore, NALs cannot be cited as precedent. Moreover, because NALs cannot be used “in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued,” except under circumstances that do not exist here, *a fortiori* NALs cannot be used to the prejudice of parties that were not even the subject of the NAL. See 47 U.S.C. § 504(c).

<sup>12</sup> CTIA Petition at 5, n.18.

<sup>13</sup> CDT Opposition at 6.

<sup>14</sup> OTI Opposition at 4, n.22 (citing *Verizon California v. FCC*, 555 F.3d 270, 272-73 (D.C. Cir. 2009)).

**B. The *Report and Order* Did Not Consider Facts and Arguments that Support Aligning the FCC Rules with the Federal Trade Commission’s (“FTC’s”) Privacy Framework.**

Should the Commission decline to vacate the Rules in their entirety, CTIA urged the Commission at least to adopt then-Commissioner Pai’s suggestion to modify the Rules to align them with the FTC’s technology-neutral framework.<sup>15</sup> The *Report and Order* adopted some elements of the FTC’s framework, but it ignored others. For instance, the Commission introduced for the first time in the *Report and Order* – without giving stakeholders a proper opportunity to comment – the concept of defining web browsing and app usage history as “sensitive” information. As the record clearly shows, however, the FTC *Privacy Report* defined as “sensitive” just five discrete types of information (Social Security numbers and financial, health, children’s, and precise geolocation information),<sup>16</sup> and the FTC articulated specific privacy risks associated with the misuse of such data that warranted classifying them as “sensitive.”<sup>17</sup> It did not find – either in its *Privacy Report* or in its comments in this proceeding – that web browsing history as a category posed such risks. The Commission should exclude this information from its definition of “sensitive” information.<sup>18</sup> Moreover, as was discussed extensively in the comments in this proceeding, the FTC allows entities to infer consent to use customer information for first-party marketing.<sup>19</sup> The Rules should do the same.

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<sup>15</sup> CTIA Petition at 6.

<sup>16</sup> See FTC, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Business and Policymakers*, at 47 (Mar. 2012) (“*Privacy Report*”), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commissionreport-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

<sup>17</sup> *Id.* at 47-48.

<sup>18</sup> As CTIA recommended in its Petition, the data breach notification rules should apply only to “sensitive” information. CTIA Petition at 20. Overbroad classification of information as “sensitive” therefore would impact ISPs’ data security and breach notification obligations, requiring ISPs to notify customers of a breach even when there is no likelihood of harm.

<sup>19</sup> *Privacy Report* at 40-48.

## 1. Web browsing and app usage history are not “sensitive information.”

To justify diverging from the FTC’s framework and defining web browsing history as “sensitive,” the Commission and the Opposition both cherry-picked evidence in an attempt to show that ISPs have unique and comprehensive access to consumers’ online information. As the full record shows, however, this is simply not true.<sup>20</sup> Indeed, even a prominent privacy advocacy organization asserted that it is “obvious that the more substantial threats for consumers are not ISPs,” but rather other large edge providers.<sup>21</sup>

For instance, Free Press echoed the Commission’s assertion that ISPs can see virtually all Internet traffic, while edge providers see only a “slice” of consumers’ online traffic.<sup>22</sup> This is false.<sup>23</sup> Free Press erroneously relied on certain elements of Upturn’s comments to debunk the findings that Peter Swire made in his report,<sup>24</sup> which showed that ISPs have *at best* fractured and increasingly diminished visibility into users’ traffic.<sup>25</sup> In fact, the record clearly shows that Upturn expressly *confirmed* that the Swire Report was “technically accurate in most of its particulars.”<sup>26</sup>

Public Knowledge was even more misleading. It asserted that treating web browsing history as “sensitive” information was “consistent with the FTC’s framework.”<sup>27</sup> But again, the

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<sup>20</sup> CTIA Comments at 7-8; *see generally* Peter Swire et al., *Online Privacy and ISPs*, The Institute for Information Security & Privacy at Georgia Tech, Working Paper (Feb. 29, 2016) (“*Swire Report*”).

<sup>21</sup> Comments of the Electronic Privacy Information Center, WC Docket 16-106, at 15 (filed May 27, 2016).

<sup>22</sup> Free Press Opposition at 9-10.

<sup>23</sup> Or as then-Commissioner Pai responded in his dissent before citing evidence in the record to the contrary, “A ‘slice.’ Really?” *Report and Order* at Commissioner Pai dissent at 2. *See also* Commissioner O’Rielly Dissent at 3 (stating that the “ridiculous notion” that “broadband providers are ‘gatekeepers’” and are “able to see more information about their customers than edge providers” has been “thoroughly debunked in the record”).

<sup>24</sup> Free Press Opposition at 10.

<sup>25</sup> *Swire Report* at 23-24.

<sup>26</sup> Upturn Comments, WC Docket No. 16-106, at 1-2 (filed May 27, 2016).

<sup>27</sup> Public Knowledge Opposition at 3. Like Public Knowledge, CDT tried to show FTC support for including web browsing history in the definition of “sensitive” information, even though, as the record makes clear, the FTC did



record shows otherwise. Indeed, neither the FTC *Privacy Report* nor the FTC’s comments characterizes web browsing or app usage history as “sensitive” information. Public Knowledge suggested that the *Privacy Report* failed to mention web browsing history because, Public Knowledge claimed, the *Privacy Report* pre-dated the “sophisticated” data mining practices in use today.<sup>28</sup> If this were true, the FTC could have notified the Commission, in its comments in this proceeding, that it now considers web browsing history to be sensitive information; but it did no such thing. In fact, web browsing history was, and had long been, widely used for online advertising in 2012, when the FTC issued the *Privacy Report*, and the use of such data for behavioral advertising was discussed in great detail at the three FTC Privacy Roundtables that led to the *Privacy Report*.<sup>29</sup>

Public Knowledge also stated that the FTC only even mentioned “ISPs” in the *Privacy Report* one time on one page to state that ISPs warranted “heightened” privacy protection.<sup>30</sup> But this too is demonstrably false: the FTC *Privacy Report* carefully considered the privacy practices of ISPs and other large platform providers, spending several paragraphs on their activities,

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not characterize it as such in the *Privacy Report* or elsewhere. CDT asserted that defining web browsing history as “sensitive” somehow was consistent with the FTC’s support for requiring opt-in consent for the use of the “contents of communications.” CDT Opposition at 20. As CTIA explained in its Petition, however, the FTC’s Comments *did not* list website URLs among the types of information that it considered to be the “contents of communications.” CTIA Petition at 17. Moreover, the statutes that the Commission cited to support its expansive definition of “contents” do not treat website URLs as “contents,” and courts have shied away from doing the same. *Id.* at 17, n.79; n.82.

<sup>28</sup> Public Knowledge Opposition at 5.

<sup>29</sup> See e.g., FTC, Transcript of First Privacy Roundtable, 160-215 (Dec. 7, 2009), [https://www.ftc.gov/sites/default/files/documents/public\\_events/exploring-privacy-roundtable-series/privacyroundtable\\_dec2009\\_transcript.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/exploring-privacy-roundtable-series/privacyroundtable_dec2009_transcript.pdf).

<sup>30</sup> Free Press Opposition at 6.

mentioning “ISPs” multiple times,<sup>31</sup> and concluding that “any privacy framework should be technology neutral.”<sup>32</sup>

In sum, neither the Commission nor the Opposition cited to one commenter who disputed that various edge providers have access to the same information as, if not more information than, ISPs. They could not, because it is undisputed that edge providers enjoy significant access to, and use of, consumers’ information. Indeed, as the FTC noted in its *Privacy Report*, “ISPs are just one type of large platform provider.”<sup>33</sup> Moreover, the Opposition did not and could not cite to any facts in the record that contradict the overwhelming evidence that the general trend is toward diminished ISP visibility into consumer activity online.<sup>34</sup> Reconsideration of the Commission’s unjustified asymmetric privacy framework is warranted on these grounds alone.<sup>35</sup>

**2. ISPs should be able to infer consent to use customer information for first-party marketing.**

The Opposition also failed to counter CTIA’s argument that the Commission incorrectly diverged from the FTC’s framework in another significant respect: unlike the FTC’s privacy framework, the Rules do not allow ISPs to infer consent to use customer information for first-party marketing, despite the lack of evidence of actual privacy harms associated with such use.<sup>36</sup>

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<sup>31</sup> See *Privacy Report* at 55-56.

<sup>32</sup> *Id.* at 56.

<sup>33</sup> *Id.*

<sup>34</sup> Technology Policy Institute Comments on Petitions for Reconsideration, WC Docket No. 16-106, at 7 (dated Mar. 3, 2017) (noting that the *Report and Order* ignored “data showing a steady overall trend in encryption, not just in traffic,” by industry and by connections and websites, and citing to Google’s latest transparency report, which shows that the share of web pages loaded over encrypted connections has increased by 3 to 5 percentage points just since the *Report and Order* was released).

<sup>35</sup> Moreover, certain Opposition parties’ claims that it is too difficult to identify “sensitive” information within web browsing data are baseless. See Free Press Opposition at 19-20; CDT Opposition at 20. ISPs routinely made such distinctions for years under the FTC regime prior to Title II reclassification.

<sup>36</sup> CTIA Petition at 8-11. As Commissioner O’Rielly noted, this is a stark departure from FTC practice and would create significant hurdles to the use of customer information for the first-party marketing that customers have come to expect. Commissioner O’Rielly Dissent at 5.

What's more, the Opposition ignored entirely arguments made below regarding the deleterious effects of such use restrictions on competition,<sup>37</sup> the constitutional implications of such restraints on commercial speech,<sup>38</sup> and the harm to consumers, who would not easily receive information about new products and services of interest to them and would be confused by two disparate privacy regimes.<sup>39</sup> Instead, they cited to items in the record that offered no support for imposing greater restrictions on ISPs and ignored evidence to the contrary.<sup>40</sup>

### III. CONCLUSION.

The Opposition, like the Commission, ignored facts and arguments in the record that Section 222 cannot be extended to broadband service or information other than CPNI, and mischaracterized the nature of ISPs' role in the Internet ecosystem to justify diverging significantly from the FTC's framework.

For the reasons stated in CTIA's Petition and in this reply, the Commission should reconsider and vacate the Rules, or, if the Commission declines to vacate them in their entirety, modify the Rules as explained in the Petition by fully aligning them with the FTC's privacy

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<sup>37</sup> CTIA Petition at 11.

<sup>38</sup> *Id.* at 11-15.

<sup>39</sup> *Id.* at 11. As the Progressive Policy Institute noted in its comments, an overwhelming majority of consumers expect and want a uniform online privacy regime. See Comments of Progressive Policy Institute, WC Docket No. 16-106 (filed on May 26, 2016) (noting that a recent survey of Internet users conducted by Public Opinion Strategies and Peter D. Hart showed that “[b]y an overwhelming 94%-5% margin, internet users agree that ‘[a]ll companies collecting data online should follow the same consumer privacy rules so that consumers can be assured that their personal data is protected regardless of the company that collects or uses it,’ including 82% of Internet users who say they ‘strongly’ agree with that statement”) (emphasis added).

<sup>40</sup> *E.g.*, Consumers' Union Opposition at 4 (stating that “[c]onsumers have also altered their online activity based on fears that their data may be compromised”). Consumers' Union cited the same NTIA blog post that CTIA and other made clear during the proceeding shows just the opposite: the study actually showed that the “use of online activities, even ones involving sensitive information” increased on a year-to-year basis from 2011 to 2015. CTIA Comments at 68.

framework. CTIA applauds the recent joint statement by Chairman Pai and Acting FTC Chairman Ohlhausen stating that they have agreed to do just that.<sup>41</sup>

Respectfully submitted,

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<sup>41</sup> Joint Statement of Acting FTC Chairman Maureen Ohlhausen and FCC Chairman Ajit Pai on Protecting Americans' Online Privacy (Mar. 1, 2017), <https://www.ftc.gov/news-events/press-releases/2017/03/joint-statement-acting-ftc-chairman-maureen-k-ohlhausen-fcc>.

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I, Emma Prieskorn, do hereby certify that on this 16th day of March, 2017, I caused a copy of the foregoing Reply to Oppositions to be served via U.S. Mail on the following:

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