

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

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Protecting consumer privacy in the information age is of the utmost importance, however regulation should be competitively neutral. Until recently, all companies in the Internet ecosystem were subject to the Federal Trade Commission’s “robust privacy enforcement practice.”<sup>1</sup> As Commissioner Pai notes in his dissent, the FTC privacy framework was technology-neutral, reflecting the fact that

“ISPs are just one type of large platform provider,” and “operating systems and browsers may be in a position to track all, or virtually all, of a consumer’s online activity to create highly detailed profiles.”<sup>2</sup>

This Commission’s mistaken decision<sup>3</sup> to classify broadband Internet access services as “telecommunications” services subject to Title II regulation under the Communications Act of 1934 as amended has wrecked this privacy framework by foreclosing FTC jurisdiction over broadband service providers’ privacy practices while leaving it intact with respect to edge service providers. Different sets of rules for different firms can have anticompetitive

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<sup>1</sup> *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, *Notice of Proposed Rulemaking* (rel. Apr. 1, 2016) (*NPRM*), para. 132.

<sup>2</sup> *Id.*, 139

<sup>3</sup> *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Open Internet Order*).

consequences, as the Commission acknowledges in the NPRM (“We recognize that...this regulatory disparity could have competitive ripple effects.”).<sup>4</sup> Obviously, the goal should be to prevent regulations from hamstringing some market participants but not others, and the logical way to do that is by ensuring that broadband providers and edge providers are treated the same. But the Commission refuses to do that, arguing that “broadband networks are not, in fact, the same as edge providers in *all* relevant respects.” (emphasis added.)

The NPRM proposes but fails to justify a stricter privacy framework for broadband service providers than for edge service and over-the-top competitors—creating asymmetric regulation that could inhibit competition and jeopardize private investment in broadband networks.

### **BROADBAND AND EDGE PROVIDERS ARE SUFFICIENTLY SIMILAR**

A key issue in this proceeding is who can use customer information for diverse purposes such as targeted advertising. The NPRM would require broadband providers to obtain customer approval before they can use any customer information for any purpose besides providing broadband service or to market communications-related services. Edge and over-the-top providers would be subject to a separate set of FTC rules. As Commissioner O’Rielly notes in his dissent, under those rules,

the highest degree of protection, affirmative express consent (opt-in), is reserved for specific uses like making material retroactive changes to privacy representations or collecting sensitive information, such as information about children, financial and health information, Social Security numbers, and precise geolocation data.<sup>5</sup>

The NPRM argues that stricter rules are appropriate for broadband providers because they have direct access to potentially *all* customer information while edge providers “only have direct access to the information that customers choose to share with them by virtue of engaging

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<sup>4</sup> *Id.*, para. 132.

<sup>5</sup> *Id.*, 140.

their services.”<sup>6</sup> But according to Sandvine, most Internet traffic is encrypted to keep information hidden. The company estimates that 70 percent of global Internet traffic will be encrypted in 2016, with many networks exceeding 80 percent.<sup>7</sup> So in reality broadband service providers do not have access to potentially *all* customer information, and customers can choose not to share a substantial amount of information with broadband service providers. The fact that encryption only obscures the payload of customers’ communications packets but broadband service providers can still collect source, destination and traffic type information, as the NPRM points out in footnote 238, should not diminish the significance of customers’ growing use of encryption. The fact is that markets are rarely perfectly competitive. Both broadband and edge providers have access to subsets of customer information that is valuable albeit not complete or identical, and there is much information that in a perfect world both sides would like to have direct access that they do not.

The NPRM neither alleges that there is any harm to consumers from targeted advertising, nor that the existing FTC privacy framework is inadequate. It’s puzzling, therefore, why the NPRM attempts to justify stricter privacy regulation for broadband service providers based on the type of information they typically collect taking into account the growing use of encryption. The Commission has an obligation to set out why, from a consumer perspective, it’s a materially more significant privacy threat for broadband service providers to know “what websites a customer has visited,” at what hours of day, from what location using which type of device<sup>8</sup> than it is for a search engine to view search terms and click-throughs.

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<sup>6</sup> *Id.*, para. 132.

<sup>7</sup> Sandvine: 70% Of Global Internet Traffic Will Be Encrypted In 2016 (Feb. 11, 2016)

<https://www.sandvine.com/pr/2016/2/11/sandvine-70-of-global-internet-traffic-will-be-encrypted-in-2016.html>

<sup>8</sup> See NPRM, para. 4.

## THE ANTICOMPETITIVE PURPOSE OF SEC. 222

According to Peter W. Huber, Michael K. Kellogg and John Thorne, Sec. 222 was “an important bulwark of the interconnection rules,” designed to protect competing carriers from an “unscrupulous interconnector, also a competitor.”<sup>9</sup> The requirement that consumers consent to the use of customer proprietary network information was not for the protection of consumers, instead it was intended to prevent the Regional Bell Operating Companies from using billing data to “target the more lucrative long distance customers.” The RBOCs were in possession of the data because they had provided billing services for the long distance carriers. The information became competitively useful to the RBOCs when they were finally allowed to offer their own long distance services. Long distance carriers felt that was unfair. Real consumer-focused privacy rules arguably would have allowed the RBOCs to immediately contact all of the lucrative long distance customers and offer them a better deal.

Requiring broadband providers to receive “opt-in” approval before they can use customer information for diverse purposes such as targeted advertising, as the NPRM proposes, has only one purpose and that is to make it harder for broadband providers to offer targeted advertising in competition with edge providers who will not have to play by the same set of rules. Real consumer-focused privacy rules would not be aimed at protecting the competitors of the broadband service providers, but at ensuring that consumers can receive targeted ads from as many sources as possible. The Commission practices crony capitalism when it adopts rules that have the effect of picking winners and losers in the marketplace.

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<sup>9</sup> Huber, Peter W., *et al.* The Telecommunications Act of 1996: Special Report (Aspen Law & Business, 1996), 54-55.

## EFFECT ON INVESTMENT

The Commission argues in the NPRM that privacy regulation will *promote* broadband investment and deployment, because: a) the “largest investment ever in wireline networks came during those years in which DSL Internet access services were regulated under Title II,” and b) “protection of privacy encourages broadband usage that, in turn, encourages investment in broadband networks.”<sup>10</sup>

The second point is not a justification for new regulations. If privacy protection encourages broadband usage and therefore promotes broadband investment, then broadband providers already have a natural incentive to protect privacy and FCC regulations are unnecessary.

The assertion that the largest investment in wireline networks occurred when DSL was regulated under Title II is based on a flawed analysis by Free Press which looks at aggregate investment by incumbent and competitive local exchange carriers as well as wireless providers. Although all of these entities were covered under Title II, only the facilities of the incumbent local exchange carriers were subject to oppressive unbundling mandates that reduced incentives for investment in last-mile facilities. Jeffrey A. Eisenach has observed that much of the pre-2000 investment was for marketing and operations, and that the elimination of unbundling in 2003-05 preceded an investment spike in broadband facilities.

Since the FCC began exempting broadband infrastructures from unbundling requirements, overall investment in communications equipment in the U.S. has risen by more than 40 percent, as shown in Figure 2. And, unlike the prior investment bubble, much of which consisted of literally hundreds of billions “invested” by now bankrupt CLECs in advertising and overhead (Darby *et al* 2002), the bulk of the investment in the

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<sup>10</sup> NPRM, para. 11.

last five years has gone into network upgrades that have yielded a faster, more robust broadband infrastructure.<sup>11</sup>

The disastrous unbundling experiment that the Commission cites here—in which the Commission mandated artificially low prices for unbundled network elements that made it cheaper for new entrants to lease facilities from the incumbents rather than build their own, and which required the incumbents to share any profits from successful investments and eat the entire loss from unsuccessful investments—illustrates why, for example, in the *Open Internet Order*, the Commission conceded that regulation can harm investment, and that “...deregulation often promotes investment...”<sup>12</sup> Moody’s Investors Service has already warned that the privacy proposal will have a “negative impact” on both fixed and mobile broadband providers.<sup>13</sup>

“If approved, the ability to compete with digital advertisers such as Facebook [] and Google [] who are able to collect the same type of data from consumers who access their websites and those of others, will be severely handicapped in the future as the old guard ecosystem evolves to become more competitive,” Moody’s added.

## CONCLUSION

The only real as opposed to hypothetical problem that the NPRM would solve is the problem that the Commission unwisely created when it seized jurisdiction for broadband from the Federal Trade Commission. The NPRM fails to make a case—from a consumer’s perspective—for departing from the FTC’s balanced privacy framework, nor can it provide any credible assurance that asymmetric privacy regulation—one set of rules for broadband providers, another set of rules for edge and over-the-top providers—won’t inhibit competition and

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<sup>11</sup> Eisenach, Jeffrey A., *Broadband Policy: Does the U.S. Have it Right after All?* (September 9, 2008). Available at SSRN: <http://ssrn.com/abstract=1265579> or <http://dx.doi.org/10.2139/ssrn.1265579>

<sup>12</sup> *Open Internet Order*, 5693-94, para. 414.

<sup>13</sup> Moody’s: FCC’s privacy proposal would ‘handicap’ cable operators, by Daniel Frankel, *Fierce Cable* (Mar. 15, 2016).

discourage private investment in broadband. The Commission therefore ought to ensure that every provider in the Internet ecosystem is subject to identical privacy regulation.

Respectfully Submitted,

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