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Federal Communications Commission  
Office of the Secretary

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SUBJECT:	WC Docket 16-106	DATE:	Friday, May 27, 2016

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Federal Communications Commission  
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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

PROTECTING THE PRIVACY OF  
CUSTOMERS OF BROADBAND AND  
OTHER TELECOMMUNICATIONS SERVICES

WC DOCKET 16-106  
FCC 16-39

COMMENTS OF WILLIAM J. KIRSCH

In the Open Internet proceeding the FCC stated that sunshine is the best policy. The NPRM falls far short of that approach in protecting the privacy of customers of broadband and other telecommunications service, but threatens 1st, 4th, 5th, 10th and 14th Amendment rights.

As Rogier Cremers, Professor at Leiden University, has stated, the internet is as much a tool for control, surveillance and commercial considerations as it is for empowerment. See Simon Denyer, China's scary lesson to the world: Censoring the Internet works, Washington Post, May 23, 2016. The proposal to treat both source and destination internet protocol addresses as customer proprietary network information violates the equal protection rights of customers subscribing to disfavored providers. The NPRM affords wealthy customers of "edge providers" privacy benefits under Section 222 and the "edge providers" liability protection under Section 230, without imposing the same "burdens" including a tax-like imposition of subsidies that include subsidy payments that exceed biblical tithing of ten percent. This political favoritism redistributes wealth from the middle class to a Silicon Valley elite. Five U.S. companies, for example, Amazon, Apple, Facebook, Google and Microsoft, have a market capitalization of some \$2 trillion dollars and no Title II responsibilities. Even worse it means that small "edge providers" will likely be unable to compete with the Robber Baron giants and must rely on the hope that there is no new dot.com bubble.

The FCC denied an AT&T purchase of T-Mobile, but permitted a \$130 billion Verizon buyout of Vodafone. Both were in violation of Section 310. The latter exceeded half the total U.S. investment in broadband over the last decade. The FCC also permitted the acquisition by SoftBank of Sprint despite the close association with the PRC's trade protected e-commerce giant Alibaba and the warehousing of up to one-sixth of available U.S. spectrum.

In Prometheus v. FCC, 15-3863, May 25, 2016, the Third

Circuit noted that although "the courts owe deference to agencies, we also recognize that, [a]t some point we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough." See also, Public Citizen Health Research Group v. FCC, 314 F. 3d 143, 158 (3d Cir. 2002). The Court continued that "equally troubling is that nearly a decade has passed since the Commission last completed a review of its broadcast ownership rules," required by Section 202 (h) of the Telecommunications Act of 1996, Pub. L. No 104-104, 110 Stat. 56 (1996).

Enough is enough. Enough of the FCC's unilateral trade concessions and promotion of most favored nation free riding by U.S. trading partners. Well over two decades have passed since the FCC departed from President Wilson's "same footing as regards privileges" standard incorporated by Congress into 47 U.S.C. 34-39 and 47 U.S.C. 310 and used successfully through the Second World War and the Cold War. The FCC's failure to apply the same footing standard even after the explicit adoption of a reciprocity provision by Congress signed by the President in the Trade Act of 2015 represents a grave threat to the privacy of all Americans. We now know that the World Trade Organization (WTO) Agreement on Basic Telecommunications and related agreements were a failure. U.S. common carriers do not have the same footing in any, much less all, of the major U.S. trading partners, including the Japan, the European Union (EU), Canada or any of the BRICs.

The \$8 trillion internet economy is increasingly at risk as a result of the increasingly obvious failure of telecommunications provisions of the WTO General Agreement on Trade in Services (GATS). One in four of the world's online population is now behind the PRC's Great Firewall or what the PRC calls its Golden Shield. The FCC fails to provide any evidence in its NPRM of any PRC-related privacy protection for source or destination IP addresses. While PRC mercantilist approach in the WTO resulted in the observation by the Director of the National Security Agency that PRC cybertheft has resulted in the greatest transfer of wealth in history the FCC NPRM does not address the possibility that predatory PRC protectionism now may result in the purchase (rather than theft) of strategic internet assets in the United States or abroad using some or all of the \$3.5 trillion in PRC foreign currency reserves.

The FCC NPRM also fails to address the new privacy threat to all Americans from the transfer of control of the North American Numbering Plan administration to a Swedish company and the

transfer of control of the IANA administration to a Swedish President. In addition, the FCC fails to address the possible threat to the \$5 trillion in transatlantic investment identified by the United States Trade Representative in the 2016 National Trade Estimate and 1377 Telecom Trade Report from the *Schrems* decision of the European Court of Justice, C-362-14, Oct. 6, 2015. Neither the Department of Commerce Privacy Shield nor the USTR proposed Transatlantic Trade and Investment Partnership (TTIP) texts have been published in the Federal Register as required by the Trade Act of 1974, see USTR FR Notice, April 1, 2013, or Section 553 of the APA, see *D.C.P.S.C. v. FCC*, 906 F. 2d 718 (1990). Nor has NTIA published its proposed approval of the ICANN IANA transition in the Federal Register. FCC approval of its proposed privacy rules in the absence of such public notice would not only be premature, but unlawful. Indeed, FCC approval of its privacy proposal in the absence of the completion and publication of the proposed NTIA ICANN IANA transition and the USTR TTIP and TiSA texts (and the Transpacific Partnership (TPP) text) in the Federal Register would be unlawful and inconsistent with Executive Order 13, 526 Section 1.7(a)(1) that provides that in no case shall information be classified, or fail to be declassified, in order to conceal a violation of law, inefficiency or administrative error. Should the FCC adopt its proposed rules, the TTIP and TiSA texts must be declassified. See, e.g. Interagency Security Classification Appeals Panel request 2016-136 and USTR 16021746.

The FCC failure to modernize its rules to apply modern, streamlined, technology neutral, agency neutral, regulation to new and legacy facilities-based and resale providers of telephone and data communications services under Titles I, II and III of the Communications Act and the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. 1001-1010, even after the Paris and Brussels attacks, is at the heart of the problem. See, e.g. FCC FOIA 2016-514. APA 706(1) and mandamus appear to be the only available options under *Oil, Chemical and Atomic Workers Union v. Occupational Safety and Health Administration*, 145 F. 3d 120, 123 (3d Cir. 1998) citing *Telecommunications Research and Action Ctr.*, 750 F. 2d 70, 75 (D.C. Cir. 1984). In light of the Prometheus Court's clear concern that allows a Circuit Court to "compel agency action unlawfully withheld or unreasonably delayed" I request that the FCC issue a Further Notice of Proposed Rulemaking after the declassification of the TTIP and TiSA texts, the publication in the Federal Register of the TPP, TTIP, TiSA and Privacy Shield texts and the NTIA IANA proposal, and the re-establishment of the "same footing" standard.