

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

JULY 6, 2016

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

REPLY COMMENTS BY ROSLYN LAYTON¹

These comments follow my earlier submission² in this proceeding. The bottom line of my earlier comments was the FCC's proposed but nevertheless ill-informed rules will create barriers to competition in the highly concentrated online advertising industry. Moreover, the FCC while pretending to protect consumers' privacy, conducts its rulemaking as a means to pay tribute to its Democratic Party supporters, mainly Google. This activity constitutes a profound deceit upon unsuspecting consumers who will unwittingly believe that the FCC is regulating the privacy of the entire digital communications experience when it speciously focuses on one actor. Moreover the FCC snatched the jurisdiction of the Federal Trade Commission--which has ably and dutifully fulfilled its role to protect online privacy—and then grandstands on inventing a new “expert” regime overnight.

This reply comment supports a return to the system that worked well and provided a consumer-centric, harmonized approach to broadband consumer privacy under the Federal Trade Commission (FTC). Both the comments of FTC Commissioner Maureen K. Ohlhausen³ along with FTC staff⁴ clearly exemplify the FTC's detailed experience and expertise in the topics of consumer privacy and enforcement.. This comment also replies to remarks from the American Civil Liberties Union (ACLU), Public Knowledge (PK), the Open Technology Institute (OTI), and the Electronic Privacy Information Center (EPIC).

I share Commissioner Ohlhausen's concern that “the FCC's approach may not best serve consumers' interests.” Ideally, the issue of privacy should be handled by the FTC. The FTC is a long-established watchdog for American consumers. It has established norms which regulate all

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² <https://www.fcc.gov/ecfs/filing/60001975125>

³ “Comment of Commissioner Maureen K. Ohlhausen of the Federal Trade Commission” Before the Federal Communications Commission, WC Docket No. 16-106, May 27, 2016

<https://ecfsapi.fcc.gov/file/60002079250.pdf>

⁴ “Comment of the Staff of the Bureau of Consumer Protection of the Federal Trade Commission” Before the Federal Communications Commission, WC Docket No. 16-106, May 27, 2016

https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-federal-trade-commission-federal-communications-commission/160527fcccomment.pdf

digital players equally and appropriately with regard to privacy. When consumers expect a seamless digital experience, nothing less than the same regulatory standard across the ecosystem is acceptable. In addition the FTC has amply demonstrated that it can bring enforcement actions to protect users' online privacy. The FTC comments in this proceeding offer a roadmap which properly weighs responsibility and usability within the confines of the FCC approach. Simplification serves the consumer; creating duplicate regulatory regimes integrated digital services is impossible to support.

The superlative FTC approach, with its differential treatment dependent on the granular *type* of data and its *use* (rather than the FCC's arbitrary distinction that it's information in the possession of broadband providers) is a more comprehensive solution which can be applied from end to end. Such a construct of regulation and enforcement can encompass not only the networks, but also their various connected commercial actors. Consumers' privacy options and protections should not simply stop, nor morph, at ISPs' demarcation points. The FCC's forcing of varied privacy structures with no synchronicity upon consumers is a needlessly complex exercise.

Importantly the FTC approach takes the commercial perspective into account. The FCC's lack of nuance in the proposed consent mechanism would hamper ISPs' ability to compete with edge providers which dominate the online advertising industry. If such rules are enacted, they would impose substantial burden on broadband providers in their efforts to offer new, innovative broadband services and effectively deter the entry to the concentrated online advertising market. While the FCC may have reasons to restrict entry (to please its Democratic Party supporters), the FCC's duty is to maximize the value to consumers. Clearly consumers would be served by more competition and innovation, as Chairman Wheeler likes to declare. But that dynamic holds for ad serving just as it does for broadband. Competition and innovation come from more providers with different types of online services and different value propositions to consumers.

Currently global digital advertising revenues are projected to double by 2020 to \$285 billion,⁵ with Google taking a staggering one-third of the world's digital advertising revenue.⁶ Forcing broadband providers into a separate and convoluted privacy structure which does not appropriately take usability and customer experience into account effectively hinders their ability to compete in the advertising industry and denies consumer alternative options. The online advertising industry is highly concentrated with Google taking the largest share of market and revenue,⁷ and greatly needs additional entrants and diversification in business models.

The FCC appears to assume that information exchange is inherently harmful. If the FCC were truly were so concerned, it would ask the FTC to regulate the rest of the digital value chain the same way in which it proposes. The fact is exchanging information for discounted or free products and services is not a new practice. The ad-supported business model is not only beneficial, it is common in the Internet ecosystem and has underwritten its development in

⁵ Sara Guaglione "Digital Ads To Exceed \$285B By 2020, \$27B Lost With Ad Blockers" MediaPost, last accessed June 28, 2016 <http://www.mediapost.com/publications/article/279062/digital-ads-to-exceed-285b-by-2020-27m-lost-wit.html>

⁶"Google Ad Revenue Growth to Drop to Single Digits This Year" eMarketer, April 20, 2016, <http://www.emarketer.com/Article/Google-Ad-Revenue-Growth-Drop-Single-Digits-This-Year/1013853>

⁷"IAB internet advertising revenue report" PricewaterhouseCoopers, April 2016, <http://www.iab.com/wp-content/uploads/2016/04/IAB-Internet-Advertising-Revenue-Report-FY-2015.pdf>

significant ways. In 2014, the White House had acknowledged the importance of digital advertising for United States employment and the economy as a whole.⁸

Another party that abused itself of the notion that information exchange is harmful is the ACLU. It noted,⁹

One danger is that the carriers will require customers to sign away their privacy rights as a condition of service, or certain kinds of service. This should be prohibited as it would create a gaping loophole that would quickly be exploited. Another danger is that customers will be induced to give up privacy protections that under the law should be their right. That may initially take the form of seductive “special discounts” for those who agree to give up their privacy, but will quickly become equivalent to extra charges for those who wish to preserve that privacy, as the “special” and the “normal” become inverted. The result will be that the underprivileged (and disproportionately minority) population that lacks the discretionary income to devote to privacy will lose a right available for purchase by more affluent Americans. The FCC needs to include protections that prohibit carriers from forcing customers to pay extra for their privacy.

There is no doubt that the ACLU is a leading organization to protect Americans’ civil liberties. Its website enumerates the rights for which people are protected under law and for which it advocates including situations involving the police, prisons, immigration, airport security, religious practice, sexual orientation, searches and seizure, and so on.¹⁰ The rights of consumer choice, first enumerated by President John F. Kennedy, are also important, even though they may not be one of the ACLU’s priorities. The ACLU’s speculative comments demonstrate that online privacy is not its area of expertise. It may be that the ACLU is engaging in coalition logrolling with the net neutrality lobby.¹¹

The ACLU posits that consumers would sign away privacy rights by opting for different kinds of service, but, if that is the case (and if, as they imply, information exchange has no value), then the situation is no different from what consumers routinely do today when they use advertising-supported services on the Internet such as Google. Broadband providers are only asking to be treated the same as internet companies in this regard. This is not unreasonable. If the ACLU really cared, why are they not making the same demands of all digital service providers? The ACLU evidently has no concern that the underprivileged and disadvantaged users’ personal information is collected in exchange for use of Google’s applications.

The ACLU also makes a number of projections for which it has no evidence, for example that underprivileged and minority populations would be harmed from such programs. There is compelling evidence that the opposite would occur, that such populations would benefit because they could use their finite resources on other items. Indeed an advocacy group that works with

⁸ “BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES” Executive Office of the President, May 2014 https://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf

⁹ “COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION (“ACLU”)” Before the Federal Communications Commission, WC Docket No. 16-106, May 17, 2016 <https://ecfsapi.fcc.gov/file/60002089529.pdf>

¹⁰ “Know Your Rights,” *American Civil Liberties Union*, accessed July 6, 2016, <https://www.aclu.org/know-your-rights>.

¹¹ Gabe Rotterman, “Don’t Make the Internet Angry...,” *American Civil Liberties Union*, September 9, 2014, <https://www.aclu.org/blog/dont-make-internet-angry>.

such minority and disadvantaged communities wants lowered broadband bills in exchange for an alternative online advertising model.¹² Users in fact would not “pay extra” as the ACLU falsely claims; consumers would “pay less”. It is not for the ACLU to decide what consumers should value. The ACLU insists that the poor should value FCC enforced “privacy” more than money in their pocket—how elitist. Indeed many of the donors who support the ACLU would gladly take lower priced broadband if given the information exchange opportunity.

This exchange proposed by broadband providers—which the FCC wants to deter--has the real world value to reward users financially and lower their costs of broadband. Competition proponents would recognize the pro-consumer competitive effects of diversification in the concentrated online advertising industry.

PK’s comments come as no surprise. The organization has advocated the FCC takeover of privacy for some time. At a Senate hearing, PK President and CEO Gene Kimmelman said that privacy is a “social policy” that the FCC should regulate. However PK’s concern for consumers only goes so far; it is loath to ask the government to extend the same oversight to Google, the company from which it receives significant funding.

PK appears to have staked out a position advocating a full removal of the FTC from broadband privacy. Its comments¹³ reveal their embrace of a specific policy opinion, in which the only path to consumer privacy protection is hard rulemaking from the FCC. This is specious for two reasons. First, the leading empirical study of online privacy shows that hard rules do not bring greater privacy.¹⁴ Better privacy is ultimately assured through the innovation; technology which avoids the compromise of personal information from the start is always preferable. Secondly, regulation is far from perfect. Regulatory solutions always rest on the subjective and political judgement of regulators. But if a regulatory solution is to be employed for privacy, then the FTC, not the FCC, is by far the better equipped and experienced agency to provide it.

PK claims, preposterously, that the FTC will *never* be capable of introducing a rulemaking in the future. This simply reflects that PK is upset that the FTC does not agree that the broadband providers need to be singled out for regulation. Unlike the FCC, which PK has successfully captured, including its former co-founder Gigi Sohn, now the special counsel to the FCC Chairman, the FTC is not a sector specific agency, thus it is less susceptible to capture by special interests.¹⁵

Furthermore enshrining a single legal opinion, at a single point in time, as evidentiary to determining the entire regulatory future of broadband privacy would be a foolish endeavor. Such is especially true when such a policy opinion seeks to completely unseat a government agency (the FTC) from broadband consumer issues in which the agency has reached considerable experience and depth in expertise.

¹² “ACT NOW TO KEEP FREE DATA | Multicultural Media, Telecom and Internet Council,” accessed July 6, 2016, <http://mmtconline.org/action-center/>.

¹³ “Protecting Privacy, Promoting Competition: A Framework for Updating the Federal Communications Commission Privacy Rules for the Digital World” Public Knowledge (February 2016), filed as comment with the FCC for WC Docket No. 16-106 <https://ecfsapi.fcc.gov/file/60002080007.pdf>

¹⁴ Bamberger and Mulligan. *Privacy on the Ground: Driving Corporate Behavior in the United States and Europe*. MIT Press, 2015.

¹⁵ Adam Thierer, “Regulatory Capture: What the Experts Have Found,” *Technology Liberation Front*, December 20, 2010, <https://techliberation.com/2010/12/19/regulatory-capture-what-the-experts-have-found/>.

The NPRM Comments by the Open Technology Institute¹⁶ (OTI) and the Electronic Privacy Information Center¹⁷ (EPIC) both insist on strict opt-in regulation across the board. Particularly, they appear to go as far as opposing broadband providers' use of personally identifiable information to market broadband service enhancements to the customer.

The Open Technology Institute, another Google-funded organization, asserts,

Customers must be able to choose how BIAS providers use their data, and the default must be opt-in consent in most, if not all, circumstances...It is important the FCC allow customers to choose how BIAS providers use and disclose their data. Opt-in consent is the most important mechanism for ensuring customers give consent to a provider's data practices. It is the centerpiece of this proposal and the FCC should reject calls to change its opt-in regime to an opt-out regime. In addition, the FCC should strengthen some of the aspects of the rule that are less protective of customers' data.

Similarly EPIC asserts,

Internet-based services must obtain voluntary, specific, and informed opt-in consent from consumers for all collection, use, and disclosure of consumer data beyond what is necessary to accomplish the specific purpose for which that data was disclosed. As a result, companies must obtain opt-in consent to collect, use, and disclose consumer data for behavioral profiling and targeted advertising purposes.

Opt-in consent is not empirically the best way for consumers to give consent to providers. Opt-in regimes create the illusion of privacy protection.¹⁸ Fundamentally consumers should be able to choose from different forms of payment and information exchange, facilitated by the competition and innovation in the ad-serving platform business. Opt-in regimes add costs to business and consumers, and perversely, they increase ad serving technology. Because consumers may be out of the system but still get service, the data collection on the consumers who remain must increase. The opt-in provision's main goal is to give the the FCC a superficial artifact to regulate. This does not add value to consumers, the economy, or society, but rather imposes a perverse regulatory cost and further cements the FCC's control over the Internet.

OTI's position would have some credibility if it advocated the same standards for other providers of online advertising, including Google, but they don't. It is not surprising that OTI which counts Google and its Chairman Eric Schmidt as leading donors would make such a claim. The only reason that the FCC pursues opt-in is that it gives the seeming appearance of consumer choice while effectively deterring entry into the online advertising marketplace. It's no secret

¹⁶ "Comments of New America's Open Technology Institute" Before the Federal Communications Commission, WC Docket No. 16-106, May 27, 2016 <https://ecfsapi.fcc.gov/file/60002081381.pdf>

¹⁷ "Comments of the Electronic Privacy Information Center" Before the Federal Communications Commission, WC Docket No. 16-106, May 27, 2016 <https://ecfsapi.fcc.gov/file/60002079241.pdf>

¹⁸ Fred H. Cate and Michael E. Staten, "Protecting Privacy in the New Millennium: THE FALLACY OF "OPT-IN"" *Privacy Briefing Book 2001* (Advisory Committee to the Congressional Internet Congress), (2001) <http://www.netcaucus.org/books/privacy2001/pdf/cate.pdf>

that, pound per pound, opt-in regimes are significantly less effective than default regimes.¹⁹ The user bases are smaller and the points of data collection need to be greater to get a fulsome view of the user behavior. Herein lies Google's (and the groups it funds) strategy: it ensures that any competitor will never get equal footing to enter the market (it only gets a subset of users who opt-in), and even if it can enter the market, it ensures that one foot will be tied down with lead (meaning it can't offer service with the same flexibility as Google).

The FCC's policy is unscrupulous because broadband providers are being deterred from offering plans and options that can *benefit the customer materially*. This flies in the face of the FCC's response to complaints that the price of broadband is high; for here the industry is attempting to address the concern, and the FCC is blocking the solution. A strict regime of opt-in for everything simply does not serve the consumers' best interests. Furthermore, it is a radical departure from the FTC's approach based on the actual *sensitivity* of the data involved.

While the NPRM puts forth a proposal to allow aggregate information without hindrance, provided that such is anonymized, such solutions are not always ideal for the consumer. Advertisers in an all-opt-in broadband ecosystem may only be able to target broadband consumers based on what is represented in the anonymized aggregate data. Such advertising is thus reduced to targeting the statistical majorities of consumers (Again, broadband providers are denied the flexibility that Google enjoys, the fine-tuning of ad serving based on unique profile information.) This regulation effectively negates the very reason why personalization and certain kinds of ad-serving technologies are deployed.

Privacy regulation on millions of users attempting to optimize millions of digital encounters and transactions may be the quintessential example of Hayek's knowledge problem.²⁰ Hayek was correct in pointing out that such FCC central planners can't possibly get all the information they need to make sound regulatory decisions. They can't possibly know all the preferences, budget constraints, concerns, needs, wishes and so on. The FCC itself is poor user of digital technology and probably does not even subscribe to the analytic and software systems it would need to begin to understand the markets it regulates. As such, individuals are much better suited to make decisions concerning themselves, especially with the dozens of advanced privacy tools available today.²¹ Indeed adoption of the tools is driven not from some bogeyman of broadband providers making competitive offers but from real world experience and documented cases of government surveillance.²² It is not an overstatement to say that anyone concerned about government surveillance should not want the FCC any more involved in regulating the Internet.

¹⁹Andy Boxall, "Average App Push Notification Opt-in Rates Have Dropped by 3% since 2013 - App Industry Insights," *Business of Apps*, April 30, 2015, <http://www.businessofapps.com/average-app-push-notification-opt-in-rates-have-dropped-by-3-since-2013/>.

²⁰Friedrich Hayek, "Hayek, The Use of Knowledge in Society," *Library of Economics and Liberty*, September 1945, <http://www.econlib.org/library/Essays/hykKnw1.html>.

²¹"How Ghostery Can Help YOU," *GHOSTERY*, accessed July 6, 2016, <https://www.ghostery.com/why-ghostery/for-individuals/>.

²²Paul Bischoff, "75+ Free Tools to Protect Your Privacy Online," *Comparitech*, January 26, 2016, <https://www.comparitech.com/blog/vpn-privacy/75-free-tools-to-protect-your-privacy-online/>.

Yale University legal scholars observed in “Reflections on Professional Responsibility in a Regulatory State” some 20 years ago, “An agency that has been rendered obsolete by exogenous changes in the form of technological development or new marketplace developments will find that it must provide favors to discrete constituencies in order to preserve some measure of support for its continued existence.”²³ The FCC in 2016 could not be better described. It is an agency so desperate for a new job that it stole jurisdiction from another regulatory agency, the FTC. If the FCC has any shred of humility remaining, it would be wise to take the counsel of FTC Commissioner Ohlhausen’s in her thorough comments,

When regulators regulate, they are making decisions for others by either prohibiting or requiring certain actions by market participants... regulators make decisions that affect future behavior, where the “particular circumstances of time and place” lie temporally beyond the regulator’s grasp. Regulation is necessarily based on information about the past and predictions about the future. Thus, the regulator’s knowledge problem is most acute when regulating in a fast-changing factual environment—when guesses about the future are more likely to be incorrect.

This problem is especially acute when regulating industries that are characterized by disruptive change, because it is even more difficult to predict future effects when industry structures and paradigms transform over time.

Statutory, procedural, and resource constraints make it impossible for the FCC to continually update the rules; thus, its rules are constantly falling out of sync with technological change—and, worse, forcing business and technological innovation to slow down to stay compliant.

Additionally, because the FCC’s ex ante regulations are an attempt at the almost impossible task of predicting the future, some harms will occur that the agency never anticipated.

However, beneficial developments in the wake of deregulation in several industries provide some evidence that prescriptive regulation stunted such developments.

For example, if an innovative (and therefore, by definition, likely unanticipated) new product or service does not easily fit within an existing statutory or regulatory classification or framework, the innovator may be uncertain about how to comply with the law. This additional regulatory risk can be a significant barrier to venture capital investment.

Because an enforcement action requires a complaint to move ahead, the FTC typically focuses on actual, or at least specifically alleged, harms, rather than trying to predict future harms more generally.

These structural differences make the FTC’s enforcement process less vulnerable to the systemic knowledge problems of the FCC’s prescriptive, ex ante rulemaking approach.²⁴

²³ Jonathan Macey & Jeffrey Miller. Reflections on Professional Responsibility in a Regulatory State. Yale Law School Legal Scholarship Repository, 1995.

http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2445&context=fss_papers

²⁴ “The FCC’s Knowledge Problem: How to Protect Consumers Online,” *FCC*, accessed July 6, 2016, https://www.ftc.gov/system/files/documents/public_statements/818521/1509fccohlhausen.pdf.

There is a right to privacy, but that does not imply the FCC can create the right regime. As Commissioner Ohlhausen brilliantly describes,²⁵ the FCC, like all regulatory agencies, is subject to the “knowledge problem”, especially when attempting to regulate industries under disruption,

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Additionally, because the FCC’s ex ante regulations are an attempt at the almost impossible task of predicting the future, some harms will occur that the agency never anticipated.

The FCC’s prescriptive approach insinuates that it is omniscient and able to predict the future of a greatly changing environment. At least the FTC has the prudence to focus on the harms that actually happen.

When the FCC reclassified Internet access under Title II and enacted its Open Internet order,²⁶ it effectively reduced the FTC’s ability to regulate broadband providers to null. By deeming broadband service providers as “common carriers”, the FTC is no longer permitted to regulate them.²⁷ In hindsight, it is clearly evident that Title II was just a means to an end to effect the FCC power-grab from an effective FTC. But to those who follow the FCC closely know that this move is just one part of a long-term plan to turn broadband providers into dumb pipes, the perfect combination of government control and corporate cronyism that serves the regulatory advocates of the Democratic Party and companies such as Google and Netflix, the leading companies which support net neutrality as a means to protect their market share.

FTC Commissioner Ohlhausen has the humility and honesty to admit that no regulatory solution is perfect, even for privacy. The potential for regulatory errors looms large in emerging areas such as online privacy. It is for that reason that keeping online privacy within FTC jurisdiction--where expertise is vastly stronger and where evidence of harm must be shown—is the only supportable solution.

²⁵ “The FCC’s Knowledge Problem: How to Protect Consumers Online” Hon. Maureen K. Ohlhausen, *Federal Communications Law Journal* (Volume 67, Issue 2) September 2015 http://www.fclj.org/wp-content/uploads/2015/09/67.2.2_Ohlhausen.pdf

²⁶ “Report and Order on Remand, Declaratory Ruling, and Order” Federal Communications Commission, GN Docket No. 14-28 https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf

²⁷ 15 U.S.C. § 45(a)(2) <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section45&num=0&edition=prelim>