



**Comments of**

**TechFreedom<sup>1</sup>**

Berin Szóka, President  
Tom Struble, Policy Counsel  
Ashkhen Kazaryan, Legal Fellow  
Jonas Bensimon, Legal Intern

**In Reply to Oppositions in the Matter of**

*Protecting the Privacy of Customers of Broadband and Other Telecommunications Services;  
Joint Petition for Stay and Petitions for Reconsideration*

WC Docket No. 16-106

**March 16th, 2017**

\*\*\*\*\*

---

<sup>1</sup> Berin Szóka is the President of TechFreedom, a nonprofit, nonpartisan technology policy think tank. Tom Struble is Policy Counsel at TechFreedom. He can be reached at [tstruble@techfreedom.org](mailto:tstruble@techfreedom.org). Ashkhen Kazaryan is Legal Fellow at TechFreedom. She can be reached at [akazaryan@techfreedom.org](mailto:akazaryan@techfreedom.org). Jonas Bensimon is a Legal Intern at TechFreedom. He can be reached at [jbensimon@techfreedom.org](mailto:jbensimon@techfreedom.org).

## I. Introduction & Summary

TechFreedom, in comments filed jointly with the Competitive Enterprise Institute, objecting to the legal claims underlying the rules proposed by the Federal Communications Commission (“FCC” or “Commission”) but, assuming the FCC was determined to proceed anyway, urging agency to develop a privacy regime that essentially mirrored that of the Federal Trade Commission (“FTC”), which previously governed the entire Internet ecosystem.<sup>2</sup> Despite our objections, the FCC’s Broadband Privacy Order (“the Order”) went further, creating a competitive imbalance in the digital advertising markets.<sup>3</sup> This was a mistake. We implore the Commission to quickly right this wrong, stay enforcement of the rules, reconsider the Order, and restore a level playing field throughout the Internet ecosystem.

## II. The Commission Should Grant the Petitions for Stay

Nine broadband industry groups and trade associations jointly petitioned the Commission to stay enforcement of the Order,<sup>4</sup> pending resolution of the petitions to reconsider the Order.<sup>5</sup> Several advocacy groups jointly filed to oppose the stay petition,<sup>6</sup> but their arguments are unpersuasive. The Commission has already stayed part of the Order,<sup>7</sup> and should stay the remainder as well, while it resolves fundamental questions about the FCC’s legal authority under Title II, Section 706 and Section 222(a).

---

<sup>2</sup> Joint Comments of TechFreedom & Competitive Enter. Inst., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (July 6, 2016) [“TF/CEI Reply Comments”], available at <https://goo.gl/ZK9zc2>.

<sup>3</sup> See Report and Order, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Nov. 2, 2016) [“Order”], available at <https://goo.gl/iAwro0>.

<sup>4</sup> See Joint Petition for Stay, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Jan. 27, 2017) [“Joint Stay Petition”], available at <https://goo.gl/v3oN1E>.

<sup>5</sup> See *infra* Section III.

<sup>6</sup> See Joint Opposition to Petition for Stay, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Feb. 3, 2017) [“Stay Opposition”], available at <https://goo.gl/5dMsnb>.

<sup>7</sup> See Order Granting Stay Petition in Part, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Mar. 1, 2017) [“Partial Stay Order”], available at <https://goo.gl/AdGoZv>.

### **A. Staying the Order Would Not Harm Consumers, As the FCC Can Enforce Privacy Standards Case by Case Without Formal Rules**

Contrary to the Opposition arguments, a stay of the Order would not harm consumers.<sup>8</sup> Even with broadband reclassified under Title II, the FCC does not need formal rules to protect consumers; indeed, it did not have them for a year and a half post-reclassification, yet the privacy sky did not fall. During that time, the Commission policed broadband privacy by applying Title II — most notably Sections 201(b) and 222(a) — directly, as its right under the Supreme Court’s bedrock 1947 decision in *SEC v. Chenery*.<sup>9</sup> In general, administrative agencies with both rulemaking and adjudicatory powers have the discretion to regulate using either or both powers.<sup>10</sup> An agency’s “judgment that adjudication best serves this purpose is entitled to great weight.”<sup>11</sup>

There is little question that the FCC could continue to enforce Section 201(b) on a case-by-case basis, as the FTC does with Section 5, and address harmful broadband privacy practices in that manner. The FCC has long “found that unfair and deceptive practices by interstate common carriers constitute unjust and unreasonable practices under Section 201(b)...”<sup>12</sup> Furthermore, to the extent there are unreasonable and harmful practices that some Commissioners might view as outside the scope of Section 201(b), such as false marketing claims made by ISPs about their privacy and data security practices,<sup>13</sup> the transparency rule from the 2010 Open Internet Order, as expanded by the 2015 Open Internet Order, can still be used to punish such conduct so long as it remains on the books.

### **B. Fair Notice Limits on the FCC’s Ability to Impose Penalties Absent Rulemaking Do Not Justify Denial of the Stay**

The enforcement issues raised by this proceeding are difficult ones to resolve, but they are neither unique nor insurmountable. For example, the FTC cannot, by statute, impose civil penalties for first-time violations of Section 5 — only for violation of consent orders. But the FTC *has* confronted the more general problem of whether its case-by-case enforcement of Section 5 meets fair-notice requirements. In 2015, the Third Circuit rejected Wyndham’s

---

<sup>8</sup> See Stay Opposition, at 5–9.

<sup>9</sup> 332 U.S. 194, 202 (1947).

<sup>10</sup> See, e.g., Nat’l Labor Relations Bd. v. Bell Aerospace Co., 416 U.S. 267, 290–95 (1974).

<sup>11</sup> *Id.* at 294.

<sup>12</sup> *In re Advantage Telecommunications Corp., Notice of Apparent Liability for Forfeiture*, File No. EB-TCD-12-00004803, ¶ 10 and n.27 (May 9, 2013), available at <http://goo.gl/oCOELe> (summarizing such cases).

<sup>13</sup> See, e.g., Michael O’Rielly, FCC, *Remarks Before the Professional Association for Customer Engagement*, at 5 (Sept. 28, 2015), available at <https://goo.gl/fllszt>.

fair-notice arguments, explaining that the degree of fair notice required is inversely correlated with the deference given the agency by the courts:

1. **Skidmore**: “where an agency administers a statute without any special authority to create new rights or obligations ... the courts give respect to the agency’s view to the extent it is persuasive, but they retain the primary responsibility for construing the statute.”<sup>14</sup> Accordingly, “a party lacks fair notice when the relevant standard is ‘so vague as to be no rule or standard at all.’”<sup>15</sup>
2. **Chevron**: “where an agency exercises its authority to fill gaps in a statutory scheme. There the agency is primarily responsible for interpreting the statute because the courts must defer to any reasonable construction it adopts. Courts appear to apply a more stringent standard of notice to civil regulations than civil statutes: parties are entitled to have ‘ascertainable certainty’ of what conduct is legally required by the regulation.”<sup>16</sup>
3. **Auer**: “where an agency interprets the meaning of its own regulation ... courts typically must defer to the agency’s reasonable interpretation” so “private parties are entitled to know with ‘ascertainable certainty’ an agency’s interpretation of its regulation.”<sup>17</sup>

The Third Circuit rejected Wyndham’s invocation of the “ascertainable certainty” standard because it agreed with Wyndham’s other argument: the court should analyze the meaning of Section 5 for itself under *Skidmore*.<sup>18</sup>

At most, not having formal rules in place may limit the ability of the Commission to impose monetary penalties in some circumstances — depending on whether the Commission has otherwise provided sufficient “fair notice” of what these sections require for constitutional standards of due process. The Commission clearly believes it can impose such monetary penalties for data-security cases brought under Section 222(a) and for data-security and privacy cases brought under Section 201(b) — if not the first time it sanctions particular conduct,

---

<sup>14</sup> Fed. Trade Comm’n v. Wyndham Worldwide Corp., 799 F.3d 236, 250 (3rd Cir. 2015) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

<sup>15</sup> *Id.* (citing *CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 631–32 (3d Cir. 2013)).

<sup>16</sup> *Id.* at 251 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

<sup>17</sup> *Id.* at 251 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

<sup>18</sup> *Id.* at 253–54.

then the second time it brings such an enforcement action (not necessarily against the same company).

For example, in *TerraCom* the FCC sought to impose \$10,000,000 in total fines for the companies' allegedly unreasonable data security and for failing to notify customers of data breaches: \$8,500,000 for violation of Section 222(a),<sup>19</sup> and an additional \$1,500,000 for violation of Section 201(b).<sup>20</sup> However, the Commission was careful to distinguish between what amounted to its deception claim (not novel, thus appropriately the basis for a penalty) and its unfairness claim (novel), and exercised its discretion to not assess a fine for the latter claim, but instead put parties on notice that such fines could be assessed going forward.<sup>21</sup>

Alternatively, as in *Verizon*, the FCC can assess fines pursuant to the Open Internet Order's transparency rule.<sup>22</sup> Furthermore, as in *Cox*, the Commission can simply apply its existing cable CPNI rules.<sup>23</sup> With all these tools at its disposal, none can reasonably claim that the FCC would be incapable of policing broadband privacy going forward.

### **III. The Commission Should Grant the Petitions for Reconsideration**

Ten companies and trade associations — including not only broadband providers, but also advertising and software companies — have petitioned the FCC to reconsider the Broadband Privacy Order it issued in this docket last October, just before the election.<sup>24</sup> Several advocacy groups filed comments opposing the petitions for reconsideration, but their arguments

---

<sup>19</sup> In re TerraCom, Inc., *Notice of Apparent Liability for Forfeiture*, 29 FCC Rcd. 13325, ¶ 52 (2014), available at <https://goo.gl/Ei9TKH>.

<sup>20</sup> *Id.* ¶ 53.

<sup>21</sup> *Id.* (“[I]n light of the fact that this is the first time we declare a carrier’s practices unjust and unreasonable under Section 201(b) for failures related to (i) data security and (ii) notice to consumers in connection with a security breach, combined with the fact that we are imposing \$10 million in penalties for the other violations at issue here, we exercise our discretion not to assess a forfeiture here for these apparent violations. *But carriers are now on notice that in the future we fully intend to assess forfeitures for such violations.*”) (emphasis added).

<sup>22</sup> In re Cellco Partnership, d/b/a Verizon Wireless, *Order*, EB-TCD-14-00017601, ¶¶ 2, 5 (Mar. 7, 2016) [“Verizon Order”], available at <https://goo.gl/Eb09oS>.

<sup>23</sup> In re Cox Communications, Inc., *Order*, EB-IHD-14-00017829, ¶ 3 (Nov. 5, 2015) [“Cox Order”], available at <https://goo.gl/m0W0FI>.

<sup>24</sup> See Petition for Reconsideration of the Wireless Internet Serv. Providers Assoc., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Jan. 3, 2017) [“WISPA Petition”], available at <https://goo.gl/WvT4iA>; Petition for Reconsideration of CTIA — The Wireless Assoc., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket

are unpersuasive.<sup>25</sup> The initial Order was deeply flawed, in both its legal and policy conclusions, so we urge the FCC to grant the petitions for reconsideration posthaste, and quickly restore a level playing field throughout the Internet ecosystem when it comes to privacy regulation.

### **A. The FCC Should Not Be Regulating Broadband Privacy**

The FCC simply has no business regulating broadband privacy. It has neither the enforcement tools nor the expertise needed to properly regulate this area. The FTC has more enforcement tools available to it, and has a wealth of experience built up from regulating privacy and digital advertising for over two decades. However, the 2015 Open Internet Order

---

No. 16-106 (Jan. 3, 2017) [“CTIA Petition”], available at <https://goo.gl/WDR7WU>; Petition for Reconsideration of the Assoc. of Nat’l Adverts. et al., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Jan. 3, 2017) [“Advertisers Petition”], available at <https://goo.gl/VZ3Qyf>; Petition for Reconsideration of Am. Cable Assoc., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Jan. 3, 2017) [“ACA Petition”], available at <https://goo.gl/st6LFR>; Petition for Reconsideration of Competitive Carriers Assoc., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Jan. 3, 2017) [“CCA Petition”], available at <https://goo.gl/Y8oYsV>; Petition for Reconsideration of NCTA — The Internet & Television Assoc., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Jan. 3, 2017) [“NCTA Petition”], available at <https://goo.gl/DB76HZ>; Petition for Reconsideration of ITTA — The Voice of Mid-Size Commc’ns. Cos., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Jan. 3, 2017) [“ITTA Petition”], available at <https://goo.gl/GSwQ9P>; Petition for Reconsideration of the U.S. Telecomm. Assoc., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Jan. 3, 2017) [“USTA Petition”], available at <https://goo.gl/FEQstI>; Petition for Reconsideration of Level 3 Commc’ns, LLC, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Jan. 3, 2017) [“Level 3 Petition”], available at <https://goo.gl/8MfPid>; Petition for Reconsideration of Oracle Corp., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Dec. 21, 2016) [“Oracle Petition”], available at <https://goo.gl/ep620f>.

<sup>25</sup> See Opposition to Petitions for Reconsideration of Pub. Knowledge et al., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Mar. 6, 2017) [“PK Opposition”], available at <https://goo.gl/VAV6V0>; Opposition to Petitions for Reconsideration of Ctr. for Democracy & Tech., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Mar. 6, 2017) [“CDT Opposition”], available at <https://goo.gl/6PQN5a>; Opposition to Petitions for Reconsideration of New Am.’s Open Tech. Inst., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Mar. 6, 2017) [“OTI Opposition”], available at <https://goo.gl/jAiwIQ>; Opposition to Petitions for Reconsideration of Free Press, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Mar. 6, 2017) [“Free Press Opposition”], available at <https://goo.gl/ZxEMnL>; Opposition to Petitions for Reconsideration of the Ctr. for Digital Democracy et al., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Mar. 6, 2017) [“CDD Opposition”], available at <https://goo.gl/O444aV>; Opposition to Petitions for Reconsideration of Access Humboldt et al., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Mar. 6, 2017) [“Coalition Opposition”], available at <https://goo.gl/N8ZLQY>; Opposition to Petitions for Reconsideration of Consumers Union & Consumer Fed’n of Am., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Mar. 6, 2017) [“Consumer Groups Opposition”], available at <https://goo.gl/XEP-wAe>.

stripped the FTC of jurisdiction over the privacy practices of ISPs, leaving primarily the FCC (bringing privacy claims under the Communications Act) and secondarily state attorneys general (bringing state law privacy claims not inconsistent with the FCC's rules) and private plaintiffs (bringing common law tort claims) to police broadband privacy.

Foremost, we urge the FCC to undo its Title II reclassification, and restore the FTC's broadband privacy jurisdiction. That will take some time, of course, but it is the path the Commission must take if it is to be true to the Congressional intent embodied in the Communications Act.

### **1. Congress Did Not Intend Title II to Apply to Broadband**

The Commission impermissibly misread the Communications Act when, in the 2015 Open Internet Order, it reclassified broadband providers as common carrier providers of telecommunications services subject to Title II. The D.C. Circuit panel that upheld the FCC's order was simply erroneous — as the dissent forcefully explained. The majority simply did not address<sup>26</sup> our core argument<sup>27</sup> that the familiar two-step test of *Chevron* should not apply, because the court should have, at what has been called “step zero” of *Chevron*, declined to apply that test.<sup>28</sup> Even if reclassification does make it to “step two,” Judge Williams amply explained why the FCC's interpretation of the statute was the epitome of arbitrary and capricious reasoning.<sup>29</sup> Sooner or later, this grievous error will be rectified.

### **2. Section 706 Is Not an Independent Grant of Regulatory Authority**

We also have long argued, both at the FCC<sup>30</sup> and in court,<sup>31</sup> that Section 706 cannot reasonably be interpreted to confer independent regulatory authority upon the FCC. While it may

---

<sup>26</sup> U.S. Telecom Ass'n v. FCC, No. 15-1063, slip op. at 55 (D.C. Cir. June 14, 2016), available at <https://goo.gl/Wt3T7q>.

<sup>27</sup> See Motion of TechFreedom, et al. for Leave to Intervene, U.S. Telecom Ass'n v. FCC, Case No. 15-1063 (D.C. Cir. June 8, 2015), available at <http://goo.gl/z5MyTf>.

<sup>28</sup> Brief for Intervenors for Petitioners TechFreedom, et al., U.S. Telecom Ass'n v. FCC, Case No. 15-1063 (D.C. Cir. Aug. 6, 2015), available at <http://goo.gl/2nBHDE>; Reply Brief for Intervenors for Petitioners TechFreedom, et al., U.S. Telecom Ass'n v. FCC, Case No. 15-1063 (D.C. Cir. Oct. 5, 2015), available at <https://goo.gl/80i8M1>.

<sup>29</sup> U.S. Telecom Ass'n v. FCC, No. 15-1063, slip op. (D.C. Cir. June 14, 2016) (Williams, J., dissenting).

<sup>30</sup> See, e.g., Legal Comments of TechFreedom & ICLE, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, at 62–91 (July 17, 2014), available at <http://goo.gl/ZgVn6n>; Reply Comments of TechFreedom & ICLE, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, at 15–21 (Apr. 6, 2015), available at <http://goo.gl/3uVhYQ>.

<sup>31</sup> Brief for Scholars of Law & Economics et al. as Amici Curiae Supporting Petitioners, Tennessee v. FCC, No. 15-3291, at 10–31 (6th Cir. Sept. 25, 2015), available at <http://goo.gl/v1WFLi>.

have played a key role in the Senate’s vision of “AN END TO REGULATION,”<sup>32</sup> and thus reasonably have been characterized as “a necessary fail-safe” in the Senate committee’s report,<sup>33</sup> such language was not included in the report of the conference committee that fused the House and Senate versions of the would-be Telecom Act.<sup>34</sup>

All the tools Congress included by specific mention in Section 706 — and all the measures the conference committee said were authorized under Section 706 — were already granted to the Commission elsewhere in the Communications Act.<sup>35</sup> “[P]rice cap regulation,”<sup>36</sup> “regulatory forbearance,”<sup>37</sup> and “other methods that remove barriers ... [to] infrastructure investment[,]” including preemption,<sup>38</sup> were tools specifically enumerated by Congress.

A reasonable reading of the statute and legislative history suggests that Congress intended Section 706 to be merely a policy statement (subsection (a)) and a bellwether (subsection (b)), which served two goals: (1) put a thumb on the scale, directing the FCC to do everything within its power to promote broadband deployment; and (2) regularly assess how broadband deployment is proceeding, in order to ascertain whether and when Congress should step in again to adopt broadband-specific legislation. As such, the FCC may point to Section 706 as support for using one of its other powers in such a way that promotes broadband competition and deployment, but it cannot do with Section 706 something it could not otherwise do with the Communications Act. Therefore, in the instant proceeding, the Commission may point to Section 706 for support in using one of its other authorities in such a way that promotes broadband, but it cannot ground privacy and data-security rules in Section 706 alone.

While recent appellate court decisions offer some hope for the FCC in trying to use Section 706 as a standalone basis of authority,<sup>39</sup> we remain convinced that these decisions were in

---

<sup>32</sup> S. 652 ES, 104th Cong., 2 (June 15, 1995) (Engrossed in Senate), available at <https://goo.gl/XBgXUG>.

<sup>33</sup> See S. Rep. No. 104-23, at 51 (Mar. 30, 1995), available at <https://goo.gl/Clt6TS>; see also *Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014).

<sup>34</sup> Conf. Rep. No. 104-458, at 210 (Jan. 31, 1996), available at <https://goo.gl/V5B559>.

<sup>35</sup> *Id.*

<sup>36</sup> See 47 U.S.C. § 203; see also Policies U.S. Patent No. 8510186 B2 - creation, redemption, and accounting in a virtual currency system and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd. 6786 (rel. Oct. 4, 1990), available at <https://goo.gl/6p04Re> (extending price-cap regulations to ILECs).

<sup>37</sup> 47 U.S.C. § 160.

<sup>38</sup> 47 U.S.C. § 253.

<sup>39</sup> See *U.S. Telecom Ass’n v. FCC*, No. 15-1063, slip op. at 94–97 (D.C. Cir. June 14, 2016), available at <https://goo.gl/Wt3T7g>; *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).



error. For example, in *U.S. Telecom Ass'n v. FCC*, Judges Tatel and Srinivasan accepted the *Verizon* analysis of Section 706, rejecting arguments that it was dicta and refusing to reengage in the statutory analysis by saying the court was bound by the *Verizon* precedent.<sup>40</sup> However, that aspect of the opinion may be overturned by the D.C. Circuit *en banc*, or by the Supreme Court. We therefore encourage the Commission to avoid grounding any of its privacy or data-security rules on Section 706, lest the legal landscape change on this issue and cut the rules' authority out from under them.

Overall, even if the Supreme Court upheld the FCC's reading of Section 706 an independent source of regulatory authority, the same line of reasoning presented above<sup>41</sup> dictates that it could not be used as a basis on which to impose monetary penalties. The FCC's authority to impose monetary penalties comes from Section 503(b) of the Communications Act,<sup>42</sup> which specifically limits said authority to "Any person who is determined by the Commission ... to have — willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter[.]"<sup>43</sup> Since "this chapter" refers to the Communications Act, and since Section 706 was *not* inserted into the Communications Act, Section 503(b) cannot be used by the Commission to impose any monetary penalties pursuant to Section 706. Thus, at most, the Commission could use Section 706 only as the basis for injunctive relief, whether applied case by case or through a rule-making.

## **B. Privacy Regulation Should Be a Level Playing Field**

In the Order, the FCC found that ISPs' "unique position in the Internet ecosystem" justified privacy rules more stringent than those applicable to every other company operating in said ecosystem.<sup>44</sup> This finding was erroneous, and should be promptly reversed by the Commission because (1) ISPs do not have uniquely pervasive access to consumer data, and (2) even if ISPs do have such uniquely pervasive access, that does not justify uniquely stringent privacy regulation.

---

<sup>40</sup> *U.S. Telecom Ass'n v. FCC*, *supra* note 27, at 96–97.

<sup>41</sup> *See supra* 3–5.

<sup>42</sup> 47 U.S.C. § 503(b).

<sup>43</sup> *Id.* § 503(b)(1)(B).

<sup>44</sup> Order ¶¶ 36–37 ("As discussed above and throughout this Order, our sector-specific privacy rules are necessary to address the distinct characteristics of telecommunications services.").

## 1. ISPs Do Not Have Uniquely Pervasive Access to Consumer Data

ISPs are in the business of transmitting consumer data, so, of course, they have greater access to such data than many other players in the Internet ecosystem. However, the such access is not uniquely pervasive, for several reasons.

First, ISPs can only analyze and use consumer data that is unencrypted (a.k.a. “in the clear”). For advertising purposes, encrypted consumer data — such as traffic to/from a Website that utilizes HTTPS encryption, or traffic carried over a virtual private network (“VPN”) — are almost worthless to ISPs, and adoption of such encryption technologies continues to rise.<sup>45</sup> Of course, even if everything “past the slash” is obscure, an ISP could try selling data on consumers’ DNS queries (assuming the consumers don’t utilize DNS encryption, which is also now widely available)<sup>46</sup> to data brokers, who might piece together otherwise unintelligible data points into meaningful consumer profiles for use in advertising, but this practice is common throughout the Internet ecosystem, and is in no way unique to ISPs.

Second, putting aside increased adoption of encryption technologies (and the corollary diminution in consumer data available to ISPs), ISPs still have less pervasive access to consumer data than several other players in the Internet ecosystem, all of which are regulated under the FTC’s general privacy standards. Designers of operating systems (Windows, Android, etc.), web browsers (Chrome, Firefox, etc.), keyboard applications (Gboard, SwiftKey, etc.), and digital assistants (Alexa, Siri, etc.), to name a few, may all have more pervasive access to consumer data than ISPs, especially smaller and mid-size ISPs, which tend to have fewer subscribers and less money to invest to data analytics. There is simply no good reason to regulate the privacy activities of ISPs under a more stringent standard than what applies to the rest of the Internet ecosystem.

## 2. ISPs Do Not Merit Uniquely Stringent Privacy Regulation

Even if the FCC still believes that ISPs have uniquely pervasive access to consumer data, that is no reason to subject them to uniquely stringent privacy regulation. Essentially, those calling for uniquely stringent privacy regulation of ISPs are seeking to preserve the status quo in digital advertising — a market currently dominated by edge providers, particularly those specialized in social media, search, and shopping<sup>47</sup> — and to prevent ISPs from gaining a

---

<sup>45</sup> See, e.g., Peter Swire, Associate Director, *The Institute for Information Security & Privacy at Georgia Tech*, et al., Working Paper, Online Privacy and ISPs: ISP Access to Consumer Data is Limited and Often Less than Access by Others, at 28 (May 27, 2016), available at <https://goo.gl/cyEBCL>.

<sup>46</sup> *Id.* at 30–35.

<sup>47</sup> See, e.g., Oracle Petition.

competitive advantage. This stasis mentality is counter-productive, harmful to consumers, and beneficial only to a select few (namely, those who currently dominate the market for digital advertising and other services that might require greater consent under the FCC's rules).<sup>48</sup>

The FCC simply has no business picking winners and losers in the Internet ecosystem, which is precisely what its Order does by subjecting ISPs to uniquely stringent privacy regulation. None can reasonably say that additional competition from ISPs in digital advertising, for example, would harm consumers. If anything, the Order's sector-specific privacy rules are harming competition and consumers by warping the playing field and unfairly favoring some players over others. The Commission should recognize how harmful its initial Order would be, reconsider its uniquely stringent privacy regulations for ISPs, and restore a level playing field throughout the Internet ecosystem by harmonizing its approach with the FTC's, as TechFreedom — and many others — implored it to do the first time around.

#### **IV. Conclusion**

We implore the FCC to reverse the legal claims underlying the Broadband Privacy Order. Also, in the interim, the Commission should stay enforcement of the Order itself. Petitioners are likely to succeed in their efforts to have the Order reconsidered, and no harm would be done to consumers by staying the Order during the interim, but doing so would prevent significant harm from befalling the ISPs that would otherwise be bound by the Order.

In the end, whether under the regime of the FCC and/or FTC, privacy regulation should be consistent. A regulatory imbalance does real harm to competition and consumers. The FCC should move quickly to right this wrong and restore a level playing field throughout the Internet ecosystem.

---

<sup>48</sup> See, e.g., VIRGINIA POSTREL, *THE FUTURE AND ITS ENEMIES: THE GROWING CONFLICT OVER CREATIVITY, ENTERPRISE, AND PROGRESS* (Touchstone 1998).