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

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

OPPOSITION TO PETITIONS FOR RECONSIDERATION

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EXECUTIVE SUMMARY

Free Press submits this opposition to the petitions for reconsideration of the broadband privacy rules by NCTA – the Internet & Television Association,[1] the American Cable Association,[2] the United States Telecom Association,[3] and others (collectively, "Petitioners"). Petitioners simply do not and cannot meet the standards required for granting reconsideration of a final rule under 47 C.F.R. § 1.429. Therefore, these petitions to reconsider the rules in whole or in part all should be denied.

The Commission's *Privacy Order*[4] rests on the solid foundation laid by the 2015 Title II reclassification of broadband internet access service ("BIAS") providers as common carriers. In that 2015 order, the Commission gave ample notice that in addition to protecting customers from threats to the open internet such as throttling, blocking, and paid prioritization, it would soon consider rules effectuating Congress's mandate in Section 222 of the Communications Act to protect customer privacy.[5]

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[1] Petition for Reconsideration of NCTA – The Internet & Television Association, WC Docket No. 16-106 (filed Jan. 3, 2017) ("NCTA Petition").

[2] Petition of American Cable Association for Reconsideration, WC Docket No. 16-106 (filed Jan. 3, 2017) ("ACA Petition").

[3] Petition for Reconsideration by the United States Telecom Association, WC Docket No. 16-106 (filed Jan. 3, 2017) ("USTelecom Petition").

[4] *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Report and Order, 31 FCC Rcd 13911 (2016) ("*Privacy Order*").

[5] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 462 (2015); *id.* ¶ 463 ("We find that forbearance from the application of section 222 with respect to broadband Internet access service is not in the public interest under section 10(a)(3), and that section 222 remains necessary for the protection of consumers under section 10(a)(2). The Commission has long supported protecting the privacy of users of advanced services, and retaining this provision thus is consistent with the general policy approach.") (citations omitted).

By adopting the Privacy Order the Commission fulfilled that mandate, by providing guidance to broadband ISPs about their duties under Section 222. The Commission correctly concluded that because they are common carriers, Section 222 applies to broadband ISPs. It acted within its lawful authority to protect customer proprietary information under Section 222, and properly determined that the role of edge-providers in the online advertising market has no bearing on that authority. And last but not least, the Commission presented sufficient evidence that internet users' privacy rights and interests would be harmed but for the promulgation of these rules.

Petitioners raised objections to all of the legal and factual findings above, and to several others as well, during the proceeding that led to the adoption of the *Privacy Order*. The reconsideration petitions are little more than a cut-and-paste rehash of arguments made during that proceeding. Petitioners make no new arguments, present no new facts, demonstrate no change in the underlying law, and present no compelling public interest reason to reconsider the rules. By merely dusting off old arguments, the Petitioners betray their cynical motives for this play: political opportunism, seeking to take advantage of the fact that the Commission is under new management, with no regard for the actual privacy rights and interests of internet users and broadband customers.

I. THE PETITIONS PROVIDE NO BASIS FOR RECONSIDERATION

Free Press, other public interest commenters, and industry commenters alike have extensively addressed the issues cited by Petitioners in their filings. The Commission's final *Privacy Order* spends page after page addressing concerns repeated now by the Petitioners – including more than seventeen pages regarding the legality of the

application of Section 222 protections to broadband ISPs.[6] The order directly addressed and rejected NCTA's[7] and USTelecom's[8] arguments about the applicability of Section 222 to broadband ISPs.[9] As a result, Section 222's requirements for telecommunications carriers are plainly applicable to BIAS providers.

The *Privacy Order* also addresses Petitioners' concerns about regulation of websites and applications under a different framework, and specifically Petitioners' argument that information made available to other parties online deserves no protection from its use by broadband providers.[10] In response to these claims, the Commission rightly found that while edge providers have access to some of the same information as BIAS providers this is immaterial to the question of whether Congress directed the FCC to promulgate sector-specific telecommunications privacy rules.[11] Additional examples abound showing both the breadth and depth of the Commission's considered inquiry in this proceeding.

Even a cursory reading of the record in this proceeding and the final *Privacy Order* shows that none of the Petitioners' arguments raised again on reconsideration were left unexamined by the Commission. Petitioners merely disagree with the Commission's 2016 decision, and seek now to relitigate the order on the same rejected grounds. Wisely, the Commission's rules require denial of reconsideration petitions that "[f]ail to identify

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[6] *See Privacy Order* ¶¶ 332-370.

[7] *See* NCTA Petition at 4-6.

[8] *See* USTelecom Petition at 3-4.

[9] *Privacy Order* ¶ 334; *see also id.* n. 968 (citing Free Press's assertion that the "[t]he logic for applying Section 222 to broadband is inexorable.").

[10] *See, e.g.*, NCTA Petition at 10.

[11] *Privacy Order* ¶ 86 (noting that people routinely share "proprietary information" with third parties but explaining that such sharing with authorized entities "does not mean the information is not 'proprietary'" for the individual sharing it).

any material error, omission, or reason warranting reconsideration" or "[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding."[12] The Commission must reject the petitions for reconsideration in this docket for these very same reasons.

II. PETITIONERS' ARGUMENTS FAIL ON THE MERITS

A. LEGAL AUTHORITY

i. Section 222 is Applicable to Broadband ISPs

Arguments made by the Petitioners regarding the Commission's legal authority to promulgate broadband privacy rules under Section 222 of the Communications Act fail on the merits. Questions regarding the Commission's authority in this proceeding have been extensively aired in the *NPRM*,[13] during House[14] and Senate[15] hearings, and in the

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[12] *See* 47 C.F.R. § 1.429(*l*)(1), (3). The Commission's rules permit the relevant bureau to deny reconsideration of even a Commission action when the petition is procedurally deficient in this manner. *See In the Matter of Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Order on Reconsideration, DA 17-5 (rel. Jan. 4, 2017). Nevertheless, there is no doubt that the Commission itself also may deny petitions that fail to identify any errors and merely repeat on previously rejected arguments. *See In the Matter of Ensuring Continuity of 911 Communications*, PS Docket No. 14-174, Order on Reconsideration, 31 FCC Rcd 10131, ¶ 5 (2016) ("It is by now well settled that the Commission will not consider a petition for reconsideration that merely repeats arguments that the Commission has previously rejected.").

[13] *See In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Notice of Proposed Rulemaking, 31 FCC Rcd 2500, ¶ 61 (2016) ("*NPRM*").

[14] Oversight of the Federal Communications Commission: Hearings Before the Subcommittee on Communications and Technology of the House Energy and Commerce Committee (114th Congress) (July 12, 2016), https://energycommerce.house.gov/hearings-and-votes/hearings/oversight-federal-communications-commission-3.

[15] Oversight of the Federal Communications Commission: Hearings Before the Commerce, Science, & Transportation Committee of the Senate (114th Congress) (Mar. 2, 2016), http://www.commerce.senate.gov/public/index.cfm/hearings?Id=F3D2645F-5D15-4AC5-8323-6B64A4D2578F&Statement_id=FC0D01CF-D6CA-4384-844D-048D8140C9B3.

Commission's final *Privacy Order* that decided the issue. Significantly, then-Commissioner Ajit Pai made no mention of the Commission's legal authority to act with regard to broadband privacy in his dissenting statement, despite his policy disagreements with the final order.[16]

The ACA's frustration from beating this dead horse is readily apparent in its reconsideration petition, in which it labels the *Privacy Order* "off the rails"[17] and "a train wreck."[18] Such name-calling does not change the sound underlying legal foundation of that order. ACA, NCTA, and USTelecom all maintain their opposition to Title II reclassification. That position is untenable at present in light of the D.C. Circuit's affirmation of the *Open Internet Order*'s reclassification decision.[19] Broadband ISPs are Title II telecommunications carriers, and as such they must respect the obligations of common carriers under the Communications Act, including those in Section 222. As the Commission correctly held in the *Privacy Order*:

> The 2015 Open Internet Order reclassified BIAS as a telecommunications service, making BIAS providers "telecommunications carriers" insofar as they are providing such service. Section 222(a) imparts a general duty on "[e]very telecommunications carrier," while other subsections specify the duties of "a telecommunications carrier" in particular situations. The term "telecommunications carrier" has long included providers of services distinct from telephony, including at the time of Section 222's enactment.[20]

ACA then, in trying to cabin Section 222 to telephony alone, leans awkwardly on the canons of statutory construction as other industry groups have done. It asks that the

[16] *See Privacy Order*, Dissenting Statement of Commissioner Ajit Pai.
[17] *See* ACA Petition at 2.
[18] *Id.* at 3.
[19] *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).
[20] *See Privacy Order* ¶ 334.

Commission give effect to "all words in the statute"[21] while ignoring 222's unqualified reference to "Every telecommunications carrier,"[22] including broadband ISPs. As both Free Press and the Commission have explained (and as these ISP trade associations purportedly believe too) – all of these words in the statute have meaning.[23] Title II reclassification properly restored broadband ISPs' classification as common carriers, correctly reading the law that governs the Commission while providing the necessary and sufficient legal underpinnings for both the *Open Internet* rules and the privacy rules challenged here.

ii. The Commission Rightly Interpreted Section 222(a) to cover Customer Proprietary Information

Despite ACA's insistence that "all words in the statute must be given effect," that association and other industry groups are adamant that the Commission should read Section 222(a)'s operative language out of existence. ACA asserts that despite the plain language in this subsection, it "cannot be squared with the clear and more specific provisions of sections 222(b) and 222(c)."[24] As scholars of the canons, ACA is aware that different terms in a statute mean different things, and that Congress does not litter statutes

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[21] *See* ACA Petition at 7.

[22] 47 U.S.C. § 222(a) (emphasis added).

[23] *See* Reply Comments of Free Press, WC Docket No. 16-106, at 8 (filed July 6, 2016) ("Free Press Reply Comments") ("The wireless lobby counsels the Commission against 'atomistic interpretation of Section 222(a)' and urges instead a 'holistic[ ]' approach to the statute. Now a careful, 'holistic[ ]' reader of CTIA's comments might wonder where the lobby's 'holistic[ ]' approach was less than ten pages prior, when it advised the Commission to ignore the entirety of the statue in favor of focusing on atomistic references to telephone and voice services.").

[24] ACA Petition at 9.

with “mere surplusage.”[25] To the extent ACA and others might even contend that certain categories of information protected by the *Privacy Order* fall outside the scope of “customer proprietary network information” as defined in Section 222(h)(1), the Commission was right in finding that Section 222(a) nonetheless imposes “a broad duty on carriers to protect customer PI that extends beyond the narrower scope of information specified in Section 222(c).”[26]

B. THE FCC’S *PRIVACY ORDER* IS SOUND POLICY

The *Privacy Order* is based on ample authority to promulgate the broadband privacy rules, and the order makes for sound policy too. The Petitioners’ insistence that the Commission must find unique harms caused by broadband providers’ access to private information, above and apart from those caused by edge providers data-gathering on their customers, is wholly wrongheaded. Edge providers’ scope of access to their customer’s information is immaterial to the question of how the Commission should effectuate Section 222’s customer protection mandate. There are real privacy risks that customers face from their BIAS providers, which do not depend in any way on how much or how little access to the same information other entities have in the so-called internet ecosystem, and broadband customers have made it clear that they expect their privacy to be protected online.

Broadband providers continue to hang their hat on Peter Swire’s misleading paper suggesting that they have less and less access to their customer’s information compared

[25] *See* Free Press Reply Comments at 7; *see also Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”).
[26] *See Privacy Order* ¶ 343.

to edge providers.[27] They then insist that broadband providers should be subject to the same "FTC style" regulation that edge providers are. Swire's claims about the increasing prevalence of encryption have been debunked by reports like Upturn's on what ISPs can see.[28] Ultimately, however, this is argument is little more than a non-sequitur. It once again ignores the FCC's mandate to protect broadband customers' privacy in favor of a fanciful approach that would only lower the bar – facilitating ISPs' commercialization of their customer's private information without their consent while offering no new protections from edge providers' practices.

i. ISPs Have a Duty to Protect their Customers' Privacy Whether or not Edge Providers also Have Access to their Customers' Personal Information

NCTA and others continue to cite the Swire report for the proposition that there is no potential harm to broadband customers here.[29] Yet, broadband ISPs see 100% of their customer's unencrypted internet traffic, and can glean important information about their users even when websites and users themselves employ encryption technology.[30] Mining of this information by ISPs can reveal sensitive information about a customer's politics, finances, religion, and sexuality.[31] Broadband providers' and Swire's "whataboutism" on the practices of edge providers obfuscates the fact that it is Congress, not the Commission, that mandated privacy protections for customers of telecommunications

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[27] *See* Peter Swire, "Online Privacy and ISPs: ISP Access to Consumer Data is Limited and Often Less than Access by Others," at 7 (Feb. 29, 2016).

[28] *See* Upturn, "What ISPs Can See: Clarifying the Technical Landscape of the Broadband Privacy Debate" (Mar. 2016), *available at* https://www.teamupturn.com/reports/2016/ what-isps-can-see.

[29] *Se* NCTA Petition at 13.

[30] *See Privacy Order* ¶¶ 20-37.

[31] *See* Free Press Reply Comments at 11.

carriers. As Free Press and others have noted, "the application of such privacy protections to common carriers and the communications network is not new. It is sound policy that reaches back to the founding of the Republic."[32]

The Commission was right to recognize that "BIAS providers are not, in fact, the same as edge providers in all relevant respects" and that most importantly "customers' relationships with their broadband provider [are] different from those with various edge providers, and their expectations concomitantly differ."[33] Yet, somehow, broadband providers remain fundamentally confused about the service they provide. USTelecom in its petition writes, "Consumer information is the fuel of the commercial Internet. Companies like Google, Facebook, and Twitter add incalculable value to the world economy by subsidizing affordable consumer services with the profits earned from productive uses of consumer information. ISPs are no different from any other Internet company in that regard."[34]

Describing Twitter's business model is in no way relevant to the service USTelecom's members provide their customers. The association offers an apocalyptic vision of the future in which adoption of the FCC's opt-in rule would "stop the modern digital economy in its tracks and transform many 'free' Internet services into smaller, subscription-based enterprises."[35] But "subscription-based" is merely a description of the

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[32] *See* Free Press Reply Comments at 3 (citing Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 Stan. L. Rev. 553, 568 (2007) (noting that the duties of communications carriers, including the duty to protect privacy, are deeply embedded in U.S. statutory law)). Section 222's edict that telecommunications providers protect their customers' privacy is a reflection of longstanding policy.

[33] *See Privacy Order* ¶ 35.

[34] *See* USTelecom Petition at 4.

[35] *Id.* at 7

very normal telecommunications carrier business model employed by USTelecom members – many of which are anything but small. Broadband customers pay, often handsomely each month, and have no expectation that advertising revenues will subsidize their internet access. Broadband ISPs are seeking to double-dip and not just make money from their customers' service subscriptions but to turn around and monetize the information they have been hired to carry for them as well – without getting their customer's affirmative permission. This fundamental difference underscores the entire proceeding, and provides more than enough policy basis for the Commission to fulfill its statutory mandate rather than abdicate it.

ii. Petitioners' Arguments Regarding the First Amendment and Pay for Privacy Schemes Were Likewise Rightly Rejected In This Proceeding

The Commission rightly drew on its authority in Section 222 (and in Sections 201 and 202 of the Communications Act as well) when formulating privacy rules to ensure that ISP practices are "just and reasonable."[36] Requiring opt-in consent from customers implicates no First Amendment right of ISPs to surveil their customers without their consent.[37] Extra scrutiny of financial inducements protects vulnerable communities from exploitation by ISPs and other advertisers while allowing BIAS providers to experiment with those offerings.[38]

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[36] *See Privacy Order* ¶¶ 368-370; *see also* Comments of Free Press, WC Docket No. 16-106, at 14 (filed May 27, 2016) ("Free Press Comments").

[37] *See Privacy Order* ¶¶ 375-392; *see also* Free Press Reply Comments at 12-28.

[38] *See Privacy Order* ¶¶ 298-303; *see also* Free Press Comments at 19.

III. CONCLUSION

The Petitioners' tiresome rehashing of previously vetted arguments in this proceeding is unavailing. Their refrain that they would like to see FTC-style, piecemeal enforcement actions on their privacy practices flies in the face of an explicit Congressional mandate. It also would rob these broadband providers of the regulatory certainty that explicit rules provide. With the Commission under new management, ISPs may think they see an opportunity to engage in a race to the bottom that leaves broadband customers without the privacy rights Congress granted and the protections these customers are lawfully owed.

The Commission examined both the factual and legal questions raised by Petitioners, and the order contains no deficiencies that would warrant reconsideration. The petitions for reconsideration in the above-captioned docket should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gaurav Laroia, hereby certify on this 6th day of March, 2017, a copy of the foregoing Opposition to Petitions for Reconsideration was served by first-class mail, postage prepaid, upon the following:

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