

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

**MOBILE FUTURE REPLY TO OPPOSITIONS TO PETITIONS FOR
RECONSIDERATION**

Mobile Future submits this reply to oppositions to petitions for reconsideration (“Petitions”)¹ of the Federal Communications Commission’s (“FCC” or “Commission”) *Broadband Privacy Order*.² Throughout this proceeding, two truths have remained constant: (1) stakeholders agree that protecting consumers’ privacy is of the utmost importance, and (2) deviating from the Federal Trade Commission’s (“FTC’s”) successful approach to privacy and data security by establishing different rules for Internet service providers (“ISPs”) is unjustified and will cause consumer harm and confusion. The Petitions make these unassailable facts clear, and nothing in any opposition successfully demonstrates otherwise. Accordingly, Mobile Future

¹ American Cable Association Petition for Reconsideration (“ACA Petition”); Association of National Advertisers *et al.* Petition for Reconsideration (“ANA Petition”); CTIA Petition for Reconsideration (“CTIA Petition”); Competitive Carriers Association Petition for Reconsideration (“CCA Petition”); Consumer Technology Association Petition for Reconsideration (“CTA Petition”); Petition of ITTA for Reconsideration (“ITTA Petition”); Level 3 Communications, LLC, Petition for Reconsideration (“Level 3 Petition”); NCTA Petition for Reconsideration (“NTCA Petition”); Oracle Corp. Petition for Reconsideration (“Oracle Petition”); United States Telecom Association Petition for Reconsideration (“USTelecom Petition”); Petition of the Wireless Internet Service Providers Association Petition for Reconsideration (“WISPA Petition”). The Petitions were filed in WC Docket No. 16-106 on Jan. 3, 2017, except for the Oracle Petition, which was filed on Dec. 21, 2016.

² *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd 13911 (2016) (“*Broadband Privacy Order*” or “*Order*”); *see also Petitions for Reconsideration of Action in Rulemaking Proceeding*, Public Notice, WC Docket No. 16-106, Rep. No. 3067 (rel. Jan. 17, 2017). Mobile Future strongly supports the stay the FCC issued on March 1. *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Order Granting Stay Petition in Part, WC Docket No. 16-106, FCC 17-19 (rel. Mar. 1, 2017).

respectfully urges the Commission to reconsider the *Broadband Privacy Order* to restore the country's previous "single and robust regulatory approach" to protecting online data.³

I. ISP-SPECIFIC PRIVACY RULES HARM CONSUMERS WITHOUT ANY CORRESPONDING BENEFIT TO CONSUMER PRIVACY

The Petitioners – a diverse array of stakeholders, including technology-oriented groups, fixed and wireless providers, organizations representing rural and small carriers, and online advertisers – demonstrated that the *Broadband Privacy Order*, while purporting to advance consumer privacy, actually harms those it seeks to protect. As Mobile Future previously explained, applying new and different rules to one subset of the complex Internet ecosystem, while other participants remain subject to the FTC's preexisting regime, will create consumer confusion and cause real consumer harm.⁴ Yet, despite the weight of the record counseling otherwise, the Commission adopted ISP-specific rules that depart from both consumer expectations and a consistent ecosystem-wide approach to online privacy.⁵

Most egregiously, the *Order* ignores decades of FTC precedent and adopts an overbroad definition of "sensitive" information, i.e., in the *Order*'s terms, "sensitive customer proprietary information" ("customer PI"), to include all web browsing history and app usage information. This sweeping categorization encompasses far more information than the FTC's established privacy framework, which identifies specific types of sensitive information, such as financial, health and children's information. The *Order* adopts this ISP-specific classification largely based on the theory that ISPs are differently situated than others within the Internet ecosystem –

³ *Broadband Privacy Order*, 31 FCC Rcd at 14119 (Dissenting Statement of Comm'r Ajit Pai).

⁴ Reply Comments of Mobile Future, WC Docket No. 16-106, at 3-5 (filed July 6, 2016) ("Mobile Future Reply Comments").

⁵ Not only did the *Order* adopt unwise policy, unsupported by the record, but, as the Petitions demonstrate, also adopted rules that exceeded the FCC's authority, ran counter to congressional intent, and may even run afoul of the Constitution. *See, e.g.*, ACA Petition at 8-9; ANA Petition at 6-12; CCA Petition at 3-5; CTIA Petition at 2-6, 11-15, 22-25; ITTA Petition at 2-7; NCTA Petition at 4-12; WISPA Petition at 12-13.

an inaccurate notion thoroughly dismissed in the record.⁶ And contrary to claims otherwise,⁷ an overbroad and ISP-specific sensitivity classification does not serve consumers or their privacy interests. Instead, it will confuse and mislead consumers who do not view their privacy (or even the Internet itself) through such regulatory silos. Further, as CTA explained, the “overbroad classification of sensitive information upends the current opt-out model without considering the economic costs and benefits of different models to consumers.”⁸ Indeed, this risk comes without clear benefits, as the Commission in the *Order* “has not proved that its adopted policies will prevent harm to consumers.”⁹

The problems of the *Order*’s overbroad sensitivity classification are compounded by an overbroad breach notification requirement that fails to meet the balance achieved in other breach notification regimes.¹⁰ Put simply, should the FCC’s breach notification rules become effective, consumers may very well receive a deluge of notifications, making it significantly more difficult for individual consumers to understand when their information is actually at risk.¹¹ As CCA explained, “[w]ithout an intent element or other clear qualifiers, and without limiting the presumption that any sensitive customer PI triggers breach notices, the FCC will create an over-notification problem that will jeopardize consumer welfare and waste limited provider

⁶ See, e.g., ACA Petition at 14-15; CCA Petition at 9-10; USTelecom Petition at 12.

⁷ See, e.g., Center for Democracy and Technology Opposition at 10-13 (filed Mar. 6, 2017) (“CDT Opposition”); Free Press Opposition at 10-11 (filed Mar. 6, 2017) (“Free Press Opposition”); Public Knowledge *et al.* Opposition at 3-7 (filed Mar. 6, 2017) (“PK Opposition”).

⁸ CTA Petition at 13.

⁹ CCA Petition at 6, 8-9.

¹⁰ See, e.g., CTIA Petition at 20.

¹¹ See, e.g., NCTA Petition at 23-24; *cf.* CTIA Petition at 20.

resources.”¹² Indeed, the *Order*’s breach notification requirement may result in notifications of breaches in cases where no possibility of concrete harm even exists.¹³

The Petitions demonstrate many other flaws of the *Order* that will inhibit carriers from delivering value to their customers without actually increasing their customers’ privacy. For example, the *Order* is overly restrictive regarding ISPs’ use of their customers’ information for first-party purposes;¹⁴ defines information as personally identifiable information and/or customer proprietary network information that is neither proprietary nor sensitive;¹⁵ and imposes unnecessary requirements for innovative, pro-consumer service offerings.¹⁶ These issues were avoidable. Rather than pursue prescriptive and ISP-specific requirements, the FCC could have adhered more closely to the FTC’s privacy approach, which has fostered the American Internet success story. The FTC’s approach to consumer privacy remains the best path forward for the Commission to protect consumer privacy without inadvertently hamstringing ISPs’ ability to meet customers’ needs and deliver them value.¹⁷ It also would ensure a consistent, harmonized approach across the Internet ecosystem that better meets consumer expectations.

The Petitions make clear that the FCC should reconsider the *Order* and instead adopt an approach to privacy and data security that better aligns with the FTC’s approach for others within the Internet ecosystem. Nevertheless, to support the *Order*, opponents rehash arguments

¹² CCA Petition at 19; *see also, e.g.*, NCTA Petition at 24 (“The timeframe adopted in the rules likely will operate to defeat any benefit gained from the harm-based notification trigger, resulting in over-notification to Federal authorities and heightening the likelihood of over-notification to consumers about breaches that may not ultimately result in any harm.”).

¹³ *See, e.g.*, WISPA Petition at 19-20 (also noting that the Commission’s definition of “harm” deviates from that of the U.S. Department of Homeland Security’s).

¹⁴ *See, e.g.*, ACA Petition at 16-17; CCA Petition at 12 n. 39; CTIA Petition at 8-11; USTelecom Petition at 13-15.

¹⁵ *See, e.g.*, CCA Petition at 13-14; CTIA Petition at 15-18; NCTA Petition at 9-11.

¹⁶ *See, e.g.*, ACA Petition at 3, 14; CCA Petition at 12; CTA Petition at 2-14; CTIA Petition at 18-19.

¹⁷ *See, e.g.*, Mobile Future Reply Comments at 1-2 (“the FTC has taken the right approach for the Internet ecosystem – it has allowed for the development of innovative products and services for consumers while ensuring their privacy can be protected”).

that never resolve the fundamental flaws of the *Order* – its failure to demonstrate that ISP-specific rules are warranted and that the rules adopted actually will serve consumer privacy. Indeed, they offer their conflicting accounts of whether or not the FCC’s rules are even harmonized with the FTC’s approach, revealing how far the *Broadband Privacy Order* has departed from the previous norm of the American Internet.

Specifically, multiple opponents claim – and have previously claimed in the record – that the FCC’s approach to consumer privacy is in fact consistent and harmonized with that of the FTC.¹⁸ This mistaken assertion is not only refuted by the Petitions that urge the FCC to revise its rules to be more consistent with the FTC, but also by opponents that support the FCC’s adoption of an FCC- and ISP-specific privacy approach.¹⁹ These parties argue that consumers and their privacy are best served by such an approach, even if means a fragmented regulatory framework. But as the Petitions demonstrate, the exact opposite is true; the more the *Order*’s framework differs substantially from the time-tested FTC approach – an approach based on the FTC’s expert opinion of how best to protect consumers – the more harm consumers are likely to experience.²⁰ While the Commission moved much closer to the FTC’s approach in the *Broadband Privacy Order* from its initial proposal, it did not move far enough. Ultimately, the

¹⁸ See, e.g., CDT Opposition at 16-19 (The rules “are already in harmony” with the FTC’s guidance.); PK Opposition at 3-6 (the *Order*’s approach to data sensitivity “is consistent with the FTC[’]s framework”); New America’s Open Technology Institute Opposition at 14 (filed Mar. 6, 2017) (“OTI Opposition”) (“The FCC’s Treatment of IP Addresses is Consistent with FTC Practices.”).

¹⁹ Free Press Opposition at 13 (questioning an “FTC-style” approach); OTI Opposition at 11-12 (“the FCC was not obligated to adopt the FTC scheme,” calling the “FTC’s Section 5 privacy regime” the “baseline approach” but arguing telecommunications carriers should be “subject to more stringent oversight”); Center for Digital Democracy *et al.* Opposition at 4 (filed Mar. 6, 2017) (“the FCC is not obligated to, nor should it, enact the exact same privacy regime as the FTC”).

²⁰ See, e.g., CTA Petition; NCTA Petition at 16-19.

approach it adopted in the *Order* “still differs substantially from the time-tested FTC framework” and thus “fails to ensure a coherent and consistent approach to consumer privacy.”²¹

II. CONCLUSION

For the foregoing reasons, the Commission should grant the pending Petitions to ensure a uniform online privacy regime that is consistent with consumer expectations.

Respectfully submitted,

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²¹ CCA Petition at 2.

CERTIFICATE OF SERVICE

I, Ayanna Lewis, hereby certify that on this 16th day of March, 2017, a copy of the foregoing Reply to Oppositions to Petitions for Reconsideration was served by first-class mail, postage prepaid, upon the following:

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