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	)	

COMMENTS OF FREE PRESS

Gaurav Laroia, Policy Counsel
Matthew F. Wood, Policy Director
Free Press
1025 Connecticut Avenue, N.W.
Suite 1110
Washington, D.C. 20036
202-265-1490

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EXECUTIVE SUMMARY

The Commission's February 2015 decision to reclassify broadband internet access service ("BIAS") as a telecommunications service was a watershed moment in the history of modern telecommunications and a seminal moment in the brief history of the commercial internet. This Title II reclassification returned the FCC to the interpretation of the law that Congress intended. It then allowed the Commission to preserve the open internet, and the principles of nondiscrimination for the network, in the face of threats from blocking, throttling, paid prioritization, unlawful new access fees and tolls, and other such unreasonable broadband provider practices.

Having acted decisively to protect those essential common carriage principles, the Commission is now properly engaged in this rulemaking pursuant to Section 222's mandate that it also protect telecommunications service customers' privacy.[1] The principle underlying this bedrock and still vital communications law is simple: just as telecommunications carriers have no business unreasonably interfering with the transmission of network traffic, they similarly have no business taking advantage of their position as network operators to commercialize without consent their customers' private information shared over that network. Essentially, subject to well-established carve-outs for reasonable network management, what it's carrying for you is not your carrier's business. Just as it shouldn't charge more based on the content of the message or the identity of the sender, a telecommunications carrier shouldn't peek at the message's content and address to sell you unrelated products either.

[1] *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, 31 FCC Rcd 2500 (2016) ("*Notice*").

Of course, little in the statute or in the current *Notice* flatly prohibits how broadband providers may use their customers' information for marketing purposes, or regulates to whom they are permitted to sell it once they have a customer's affirmative consent to share it. By adding Section 222 to the law in the 1996 Telecommunications Act, Congress recognized that consumers ought to be empowered first and foremost with meaningful choice when it comes to whether and how their private information is used.

In the broadband telecommunications age, the need for that type of consent mechanism and additional privacy safeguards remains paramount. The Commission is well aware that consumers have too little choice when it comes to broadband providers. While customers may be able to choose search engines, e-mail providers, and social media services that reflect their privacy preferences, there is no effective competition among broadband ISPs nor much room for entry by new ISPs trying to reach privacy-conscious consumers. Given ISPs' bottleneck position as the operators of the access network, even the savviest consumers can lose all agency when trying to protect their privacy online. The Commission here rightly seeks to restore and preserve that agency for broadband users, against the carriers that provide them with their pathway to the entire internet and every other person on it.

As our lives have moved online, these ISPs have gained more access to our most sensitive personal information. Advanced technologies allow companies to track their customers invisibly, collecting and selling data on nearly every detail of who we talk to, what we do and say online and, with location tracking, where we do it.

As ISPs track their customers, these companies create comprehensive profiles containing sensitive information on each person's finances, health, age, race, religion,

ethnicity and a host of other factors.[2] By sole virtue of their provision of basic and fundamental internet access service, their reach is pervasive. This means information on visits to websites discussing mental health, a search on how to collect unemployment benefits, or a visit to a church or Planned Parenthood office could be swept up into their databases. With so much sensitive information at stake, the Commission must fulfill its statutory mandate and promulgate strong rules in this proceeding.

The question before the Commission is once again how to correctly interpret the Communications Act provisions that establish the agency's authority and bind its discretion. Section 222 makes those bounds quite clear. While a customer must share certain personal information with her broadband provider to gain access to the internet, that information cannot then be used without her consent for purposes other than providing the underlying broadband internet access service. This of course means that, without her consent, the ISP also cannot share such personal information with other entities.[3] Clear, bright-line rules implementing and building on this fundamental principle will protect consumers, businesses, and the integrity of the network itself.

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[2] *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 ("Today, ISPs can see a significant amount of their subscribers' Internet activity, and have the ability to infer substantial amounts of sensitive information from it…. [E]ven when Internet traffic is encrypted using HTTPS, ISPs generally retain visibility into their subscribers' DNS queries.").

[3] *See* 47 U.S.C. § 222(c)(1).

I. THE COMMUNICATIONS ACT REQUIRES THE FCC TO PROMULGATE STRONG BROADBAND PRIVACY PROTECTIONS.

A. Title II Reclassification Paved the Way for Properly Protecting Not Only the Integrity of Transmission, But of the Information Transmitted.

The FCC's reclassification of BIAS as a Title II service was a historic moment in the fight to preserve the open internet. Reclassification restored the law that Congress wrote for modern telecommunications networks by reacknowledging the differences between transmission and information. But the *Open Internet Order*[4] didn't just restore nondiscrimination principles for the network: it gave the FCC the mandate and authority to realize the goals of universal affordable access, competition, and consumer protection.

As the Commission found in that 2015 *Order*, protecting network users' privacy is both an independent statutory mandate as well as an element of promoting these other goals of the Communications Act. Reading the Act as a whole, the Commission reasoned that "ensuring the privacy of customer information both directly protects consumers from harm and eliminates consumer concerns about using the Internet that could deter broadband deployment."[5]

Yet whatever its salutary benefits both for implementing privacy policy and for achieving other statutory aims, the Commission was right to recognize and then take seriously on its own terms the Section 222 mandate. Consumers face real harms from the commercial surveillance carried out already by broadband ISPs – as well as the new forms of monitoring and commercialization of user data they are undoubtedly and openly

[4] *Protecting and Promoting the Open Internet,* GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*Open Internet Order*").
[5] *Id.* ¶ 53.

contemplating.[6] These harms include increased customer vulnerability to serious data breaches, as well as disparate treatment and discrimination in the marketing of products to people of color and other traditionally disadvantaged demographic groups. Answering the public policy questions about how to prevent such harms is of paramount importance, and no doubt will animate much of the debate in this proceeding.

But while there is room to discuss *how* the FCC might answer those questions, there can be no debate here about the FCC's congressional mandate to do so. Section 222 settles that issue when it comes to the customers of broadband providers, once again properly classified as telecommunications carriers, because these customers have a legal right to privacy under the Communications Act against ISPs' misuse of their personal information. Congress has spoken unambiguously on the topic and made this policy choice, despite the contentions of some ISPs and their advocates that the Commission is free to substitute the carriers' preferred policies for the ones enshrined in the law.

The principle that the purchaser of a common carriage communications pathway should be free to use the network without undue interference or surveillance of their network traffic by the carrier is a logical and longstanding policy that protects the integrity of the network. As Chairman Wheeler explained when the Commission adopted this *Notice,* privacy protection "makes just as much sense in the world of broadband as it has for the past 20 years in the world of telephone calls" and the FCC must continue its

[6] *See* Jeffrey Chester, Center for Digital Democracy, "Big Data is Watching: Growing Digital Data Surveillance of Consumers by ISPs and Other Leading Video Providers" (Mar. 2016), available at: https:// www.democraticmedia.org/sites/default /files/field/public-files/2016/ispbigdatamarch2016.pdf ("ISPs have made partnerships with powerful data brokers, giving them insights into our online and offline behaviors. They are incorporating state-of-the-art 'Big Data' practices – such as 'programmatic advertising' – that significantly threaten the privacy of subscribers and consumers.").

work protecting "consumers against misuse of their information by requiring that networks obtain their customers' approval before repurposing or reselling customer information."[7]

B. Section 222 of the Communications Act is an Unequivocal Statutory Mandate to Protect Broadband Customer's Privacy.

The language of Section 222 establishes the scope of the FCC's authority and its duty here. Despite recent and unsupported assertions to the contrary,[8] Congress already has spoken clearly. In order to protect telecommunications users' privacy it added Section 222 to the Communications Act in 1996, writing plainly that "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers."[9] The main but by no means sole direction from Congress for fulfilling that duty is that:

> Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service....[10]

The plain language of the statute contemplates the broad outline that Congress envisioned for telecommunications privacy protections. The law emphasizes the necessity

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[7] *Notice*, Statement of Chairman Tom Wheeler.
[8] *See* Doug Brake, Daniel Castro, & Alan McQuinn, Information Technology and Innovation Foundation, "Broadband Privacy: The Folly of Sector-Specific Regulation," (2016), http://www2.itif.org/2016-broadband-privacy-folly.pdf (falsely calling the FCC's Section 222 rulemaking "an opportunity to maneuver around Congress").
[9] 47 U.S.C. § 222(a).
[10] *Id.* § 222(c)(1).

for affirmative consent – in a paradigm that is consistent only with "opt-in" rather than "opt-out" approaches – and thus limits the use of a customer's information to what's necessary for providing the telecom service unless the customer agrees to other uses by the carrier and to further sharing of her information. The statute also emphasizes protection of customer proprietary network information ("CPNI"), but as indicated by the language in Section 222(a) (and as discussed in Part I.C immediately below) it does not confine carriers' duty to protecting solely this type of data.

The logic for applying Section 222 to broadband is inexorable. Once the FCC rightly reclassified broadband as a telecommunications service under Title II, these hallmark privacy provisions rightly became applicable to broadband ISPs. This proceeding is not a re-litigation of reclassification, nor is it an opportunity for the FCC to fashion a novel privacy regime – neither one that is more or less protective of broadband customers, nor one that is more or less expansive in terms of the entities to which it applies – outside the scope of Section 222's framework and its telecom carrier provisions.

Fortunately, the FCC has taken its congressional mandate seriously. In almost 150 pages it has asked more than 500 questions in order to properly adapt Section 222's rules to broadband internet access service. For internet users, knowing that their communications are secure and that network operators are not unduly surveilling them and selling their personal information without their permission is integral to protecting their communications rights, achieving universal internet access, and making the promise of the information revolution accessible to everyone.

C. The Statute Contemplates Protection of Customer Information Beyond CPNI.

The FCC is correct to take an expansive view in this *Notice* of the types of customer private information protected by the Communications Act. The Commission's reading of Section 222 both acknowledges the plain text of the statute and builds on the Commission's prior work in protecting customer information.[11] As a threshold matter, Section 222 begins with a general duty for telecommunications carriers to protect the "proprietary information" of customers. Subsections of 222 further elaborate on, but do not narrow the scope of that general duty to protect privacy. Additional support for the FCC's stance comes from the use of the term "proprietary" in the statute itself. Congress, by legislating that proprietary information be protected, contemplated a broad category of information to which the consumer herself has a right of ownership.[12] To that end, the FCC is right to rely on generally accepted federal privacy principles on protecting Personally Identifiable Information ("PII") to give substance to Section 222's general mandate.[13]

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[11] *See*, *e.g.,*TerraCom Notice of Apparent Liability, 29 FCC Rcd 13325, (2014).

[12] *See,* 19 CFR § 201.6 - *Confidential business information*. Proprietary information is a term of art which includes, "information of a commercial value" belonging to a person.

[13] *See* NIST, *Guide to Protecting the Confidentiality of Personally Identifiable Information* (PII), § 2.1 (2010), http://www.nist.gov/customcf/get_pdf.cfm?pub_id=904990 (NIST PII Guide); Federal Trade Commission, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers (2012), available at: https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

D. The Commission is Correct in its Approach to CPNI.

Adapting 222(h)(1)'s definition of CPNI to the broadband context is a relatedly straightforward exercise.[14] CPNI in the telephone context included the metadata required to bill for service, route calls, and provide emergency services. The *Notice* rightly proposes that broadband CPNI should include at least:

> (1) service plan information, including type of service (e.g., cable, fiber, or mobile), service tier (e.g., speed), pricing, and capacity (e.g., information pertaining to data caps); (2) geo-location; (3) media access control (MAC) addresses and other device identifiers; (4) source and destination Internet Protocol (IP) addresses and domain name information; and (5) traffic statistics.[15]

The IP network, like the telephone network, requires this kind of technical configuration, destination, and location information to operate and transmit messages over the network, to provide customers with broadband service (and then properly bill them for it). But that same information can be used to paint a startlingly clear picture of a person's life, habits, politics, personal choices, and health information, to name just a few private or sensitive categories of data. The Communications Act forbids carriers' disclosure or use of that information (other than "in its provision of [ ] the telecommunications service from which such information is derived") without affirmative customer consent to such other uses or disclosures.

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[14] Defined in § 222(h)(1) as "information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship"

[15] *Notice* ¶ 41.

E. The Commission is Right in the *Notice* to Propose Including Past as well as Present Customers.

Under the Commission's current rules implementing Section 222 a customer is defined as "a person or entity to which the telecommunications carrier is currently providing service."[16] This definition is insufficient to achieve the purposes of either Section 222 or the Communications Act at large. Limiting Section 222's privacy protections to current customers would have the perverse effect of stifling competition and broadband deployment by locking customers into their current provider lest they lose the law's protection for the data their current ISP gathered during their commercial relationship.

If a large institution were to change broadband providers, the loss of protection for its private information could affect hundreds, thousands or even millions of people who are in turn that institution's patrons or customers. In schools or libraries, even more so than in individual households, that could mean the loss of privacy for a significant number of children. The Commission's proposed definition of a customer as "1) a current or former, paying or non-paying subscriber to broadband Internet access service; and 2) an applicant for broadband Internet access service"[17] is a logical and sensible update to the Commission's regulations. Nothing in the text of Section 222 itself suggests that carriers' duty applies only to their *current* customers, and this updated definition thus respects both the purpose and the language of Section 222 and the rest of the Communications Act.

[16] 47 CFR § 64.2003(f).
[17] *Notice* ¶ 31.

F. Forms of Consumer Choice.

The Commission's proposed rules contemplate a 3-tiered customer choice model with: (1) Approval that is inherent in the creation of the customer-broadband provider relationship (or in other words, use of the information to provide the underlying telecom service); (2) Opt-Out approval for broadband providers or their affiliates that provide communications-related services "to use customer PI to market other communications-related services"; and (3) Opt-In approval for other uses of a customer's information including sharing it with other entities not encompassed by the Tier 2 Opt-Out exemption.[18]

The Commission's proposal is a vast improvement over the status quo, where customers are wholly without effective choice or sufficient remedies when it comes to broadband privacy. However, the FCC's proposed regime – and specifically that exemption in Tier 2 – runs afoul of the plain reading of Section 222. The Communications Act is explicit in its edict that the information a carrier receives "by virtue of its provision of a telecommunications service" should not be used for purposes other than the provision of the main telecom service (or subsidiary services) without the customer's "approval."[19] The statute therefore contemplates only two "tiers" of information use: uses necessary to provide the telecom service for which the customer signed up, and all other uses only when given the customer's approval. The Commission should modify its proposal accordingly and require opt-in approval for sharing or use outside the direct provision of broadband service – even within affiliated services.

[18] *Id.* ¶18.
[19] 47 U.S.C. § 222(c)(1).

II. THE ACT ALSO REQUIRES ALL TELECOMMUNICATIONS CARRIERS' PRACTICES TO BE REASONABLE WITH RESPECT TO PRIVACY.

The *Notice* offers possible alternatives to Section 222 under which to promulgate privacy rules – a constellation of authorities including Sections 201 and 202; Section 706; and Sections 303 and 316.[20] We agree with the Commission that it has ample authority to promulgate these rules under Section 222.[21] Other authorities postulated by the *Notice* are either complementary, superfluous, or even potentially unhelpful here, depending on the specific provisions in question.

A. Sections 201 and 202 Are Properly Read to Augment the Commission's Broadband Privacy Authority and Carriers' Duties.

Sections 201 and 202 are an integral part of the Communications Act and they give the FCC the authority "to ensure just, reasonable, and nondiscriminatory conduct by broadband providers and for the protection of consumers."[22] These reasonableness standards allow for a strong but flexible approach. Similar services may be held to the same standard, yet the reasonableness of a carrier's conduct may differ based on specific circumstances.[23] This is a powerful and still integral regulatory authority for protecting telecom users in a rapidly evolving marketplace.

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[20] *Notice* ¶ 294.
[21] *See id.* ¶ 296.
[22] *Open Internet Order* ¶ 446.
[23] *See* Comments of Free Press, GN Docket No. 14-28, at 134 (filed July 17, 2014) ("Free Press Open Internet Comments"), *available at* http://www.freepress.net/sites/default/files/resources/Free_Press_14-28_Comments_7-18-2014.pdf.

As the FCC has noted it does have similarities to the FTC's Section 5 authority protecting consumers from unfair and deceptive practices.[24] The agencies' statutes mirror each other to some degree, as illustrated by the guidance and implementing rules that the two agencies have developed jointly in decades-old collaboration that continues to this day. Thus, the FCC's principles for truth-in-billing provide meaningful guidance on how carriers should clearly inform their customers of how they plan to use their personal data once a consumer has consented to sharing it.[25] The FCC should promulgate strong rules requiring broadband ISPs to provide "clear and conspicuous" disclosure to consumers of how their privacy may be affected should they consent to information sharing. And the FCC/FTC factors for evaluating whether a disclosure is "clear and conspicuous" provide meaningful guidance for devising model broadband privacy disclosures. Any disclosure must be prominent, proximate to the representation it modifies (in this case, the ISP's terms of service), absent of distracting elements, and clear and understandable.[26]

Yet Sections 201 and 202's prescriptions are by congressional design both more expansive and less specific than the privacy rules mandated by Section 222. For instance,

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[24] FCC and FTC, *Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers*, 65 Fed. Reg. 44053, 44054 (Jul. 17, 2000) ("*Joint FCC/FTC Policy Statement*"); *see also Notice* ¶ 306 (noting that "[t]here is a distinct congruence between practices that are unfair or deceptive and many practices that are unjust, unreasonable, or unreasonably discriminatory" but that "the FTC lacks statutory authority to prevent common carriers from using such unfair or deceptive acts or practices").

[25] *Truth-In-Billing and Billing Format,* CC Docket No. 98-170, 14 FCC Rcd 7492 (1999). The order was promulgated partly on the FCC's 201(b) authority and recognized that the FCC has "complementary but distinct jurisdiction with the Federal Trade Commission (FTC) to ensure that consumers are treated fairly with regard to their telephone bills." *Id.* ¶ 27. The principles reflected a flexible approach which included: Clear organization and clear and conspicuous notification of any changes in service provider; Full and not misleading descriptions of charges; and Standardized labels for charges resulting from federal regulatory action.

[26] *Joint FCC/FTC Policy Statement* ¶ 22.

the FCC was right to note in the *Open Internet Order* that "practices that fail to protect the confidentiality of end users' proprietary information, will be unlawful if they unreasonably interfere with or disadvantage end user consumers' ability to select, access or use broadband services, applications, or content."[27] In an analogous situation, the FCC was right to adopt bright-line Net Neutrality rules grounded in these core provisions of Title II, yet also retain a "no-unreasonable interference/disadvantage" standard in the *Open Internet Order* to protect against any other carrier practices ultimately found to be unreasonable or unreasonably discriminatory.[28]

This reflects Congress's clear intent to ensure that *all* carrier practices are reasonable, including with respect to protecting users' privacy, and succinctly explains why the FCC has continually recognized that "sections 201 and 202 lie at the heart of consumer protection under the Act."[29] Sections 201 and 202 are core components of the Communications Act that the FCC has always maintained for telecom services, even in (relatively) competitive markets.[30] It is entirely conceivable than an ISP might mislead consumers, or engage in other practices implicating their privacy rights, yet do not expressly violate the restrictions in Section 222 on unpermitted use of customers' proprietary information and CPNI.

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[27] *Open Internet Order* ¶ 141.
[28] *Id.* ¶ 137.
[29] Free Press Open Internet Comments at 31 (quoting *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 15 (1998) ("*PCIA Forbearance Order*")).
[30] *Id.* at 30 (quoting *PCIA Forbearance Order* ¶ 15 ("Although these provisions were enacted in a context in which virtually all telecommunications services were provided by monopolists, they have remained in the law over two decades during which numerous common carriers have provided service on a competitive basis.")).

This is why Congress imbued the FCC with the regulatory power to protect consumers from unreasonable practices in general, yet also mandated that the agency protect consumer privacy via the more explicit directives in Section 222.[31] Those specific statutory provisions in Section 222 – and, importantly, the FCC's ability to implement them using its general rulemaking authority – are necessary to ensure that telecom customers have a choice about whether and how their private information is used and shared. Sections 201 and 202 are thus entirely relevant here, and useful for understanding the duties that carriers owe their customers, even though Section 222 remains a sufficient *and* necessary ground for effectuating the policies and the rules proposed in the *Notice*.

B. Resort to Section 706 Is Unnecessary To Protect Broadband Customers' Privacy.

On the other hand, reliance on Section 706 poses serious issues. As Free Press wrote in our comments in the *Open Internet* docket, Section 706 was inadequate authority in that proceeding to the extent that it would not permit the Commission to prevent *per se* unreasonable practices and harmful forms of discrimination unless and until ISPs were regulated once more as common carriers.[32] Returning broadband ISPs to the Title II regulatory framework was the appropriate legal interpretation and regulatory mechanism, in that rightfully understood broadband ISPs to be common carriers first and then crafted specific protections against such harmful practices.

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[31] *See* Appalshop *et al.*, Opposition to Petition for Partial Reconsideration, WC Docket Nos. 11-42, 10-90, and 09-197, at 13-15 (filed Oct. 9, 2015) ("The creation of particular statutory obligations, however, does not limit the Commission's authority to enforce other data security practices necessary to ensure that 'charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable' under Section 201(b).")

[32] *See generally* Reply Comments of Free Press, GN Docket No. 14-28 (filed September 15, 2014).

Regulating carriers' privacy practices under Section 706 is thus unnecessary, as Title II provides the FCC with ample authority to protect broadband telecom users' privacy. To the extent that parties filing in this docket may attempt to stretch Section 706 and call for FCC regulation of non-carriers, Free Press is not persuaded that this is a sound legal approach or policy prescription. So-called edge providers unquestionably can and do threaten the privacy of their users. But ISPs in self-serving fashion attempt to muddy the waters between connectivity and content and call for consistent regulation of the whole internet "ecosystem." They do so quite obviously to dissuade any FCC privacy rules and to encourage a race to the bottom at the FTC. Section 222 provides a clear Congressional mandate for the Commission's actions here, and does so without the need to awkwardly cast privacy protections and rights as a mere broadband deployment spur.

C. Sections 303 and 316 Are Not Necessary for These Rules Under the Current Framework.

The *Notice* also points to licensing authorities under the Communications Act as additional support for wireless broadband privacy rules. Section 303(b) directs the Commission to, "as public convenience, interest, or necessity requires…[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class."[33] In addition, Section 316 gives the Commission the ability to add new conditions onto existing licenses if doing so is in the public interest. The Commission notes that when "BIAS is provided by licensed entities providing mobile BIAS, these provisions would appear to support adoption of rules such as those we consider in this proceeding."

[33] 47 U.S.C. § 303(b).

While the Commission is correct that licensed entities often provide broadband access, the more apt and sufficient authority in Section 222 encompasses this lesser one, as it requires privacy protection for all Title II services. This includes mobile broadband. The Commission need not at this time rely on Title III authority for its privacy rules.

III. THE COMMISSION SHOULD CAREFULLY CONSIDER THE DISCRIMINATORY IMPLICATIONS OF CARRIER PRACTICES SUCH AS FINANCIAL INDUCEMENTS BEFORE FINDING THEM REASONABLE.

Free Press is particularly concerned with the prospect that broadband ISPs may offer financial inducements or even free service to those customers willing to consent to use of their private information in exchange for discounted service.[34] While we are currently aware of only one broadband ISP offering such an inducement – AT&T on its Gigapower service – we believe it represents a clear sign that broadband ISPs are willing to experiment with these schemes. The potential harms and discriminatory impacts of these services are many. Financial inducement schemes could render privacy (a right guaranteed to customers by statute) a luxury for the rich. A use case where the poorest customers are induced to waive their privacy rights in exchange for free or low-cost access could then subject the most vulnerable consumers to predatory advertising and other nefarious uses of their personal information.

While some companies and economists may portray such pay-for-privacy schemes as valuable and as a fair market exchange, that assertion demands scrutiny and further proof before the Commission can accept it. Pay for privacy programs have at very

[34] *See* Sandra Fulton, Free Press, "Pay-For-Privacy Schemes Put the Most Vulnerable Consumers at Risk," May 2016, *available at* http://www.freepress.net /blog/2016/05/10/pay-privacy-schemes-put-most-vulnerable-americans-risk.

least the potential to disproportionally harm and abrogate the rights of millions of users who already struggle to get online, and who simply can't pay for the rights that richer customers might.

Ensuring that low-income families and members of other disadvantaged communities can meaningfully assert their right to privacy is an important civil rights issue. The FCC must take extreme care in analyzing and then regulating these practices to make sure that privacy will not solely be a luxury for the rich. We recommend that the Commission study pay-for-privacy offerings to determine whether the discount offered is a reasonable exchange and whether the terms and conditions of such offers offsets any unreasonably discriminatory impacts.[35]

IV. CONCLUSION

The American people's ability to exercise their free speech rights, organize, and meaningfully participate in economic life are all impacted by the policies put forward in this *Notice*. As the Commission finalizes its rules it should continue to look to the plain meaning and purpose of Section 222 and the Communications Act. Congress was clear that it wanted a strong, sector-specific consumer privacy regulator in the telecommunications sector. We applaud the Commission's focus on the network and the unchanging nature of users' rights even as the network technology changes. As they did in the *Open Internet Order*, the Commission's proposals here recognize the difference

[35] *See Generally Global Crossing Telecommunications, Inc v. Metrophones Telecommunications, Inc.*, 550 U.S. 45 (2007). The retention of Sections 201 and 202 in the 1996 Telecommunications Act gives the FCC the power to declare certain practices unreasonable and therefore unlawful.

between telecommunications infrastructure and the content that flows over it, along with carriers' position as the gatekeepers to (and potential monitors of) all that content.

Adoption of the proposals in this *Notice*, as modified slightly by the suggestions outlined in these comments, would reflect the importance of consumer choice in a functional market. It would help ensure that people in America enjoy unfettered and secure access to the internet. It would do so by maintaining and fulfilling crucial common carrier principles, which are still needed to protect telecom users from undue interference and privacy invasions by the carriers that provide them with pathways to the internet.

Respectfully submitted,

/s/

Gaurav Laroia, Policy Counsel
Matthew F. Wood, Policy Director
Free Press
1025 Connecticut Avenue, N.W.
Suite 1110
Washington, D.C. 20036
202-265-1490

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