Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Protecting the Privacy of Broadband and Other Telecommunications Services	)	WC Docket No. 16-106
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To: The Commission

PETITION FOR RECONSIDERATION

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The Association of National Advertisers ("ANA"), American Association of Advertising Agencies ("4As"), American Advertising Federation ("AAF"), Data & Marketing Association ("DMA"), Interactive Advertising Bureau ("IAB"), and Network Advertising Initiative ("NAI") (together "Trade Associations") by their attorneys and pursuant to Section 405 of the Communications Act of 1934, as amended (the "Act") (47 U.S.C. 405), and Section 1.429 of the Commission's Rules (47 C.F.R. 1.429), hereby respectfully request that the Federal Communications Commission ("FCC" or "Commission") reconsider its final Report and Order titled, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services* ("Order" or "Rule"), published in the Federal Register on December 2, 2016.[1]

SUMMARY

The Order was adopted following the issuance of a Notice of Proposed Rulemaking ("NPRM") on March 31, 2016. However, the Order is fundamentally flawed in several ways.

[1] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, WC Docket No. 16-106 (Nov. 2, 2016) (hereinafter *Order*); *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Final Rule, 81 FR 87274 (Dec. 2, 2016) (hereinafter "*Rule*").

First, the Order improperly relies principally on Section 222(a) of the Act, a general purpose statement that is properly read to be controlled by the more specific provisions that follow in the Section. The Commission acted in an arbitrary and capricious manner inconsistent with Congressional intent in relying on this statutory language to justify its application of regulations to BIAS providers. Second, less restrictive proposals that were consistent with the mandates of Section 222 were offered, but the Commission failed to address those proposals in the process of adopting the Order. Finally, the Commission did not provide proper time for interested parties to offer comments on a proposal materially different from the NPRM, and only issued a highly general and vague four-page Fact Sheet for parties to consider less than a month before the Order was adopted, which prevented interested parties from assessing adequately the potential effects of the proposal.

The Trade Associations respectfully request that the Commission reconsider its adoption of the Order.

I. STATEMENT OF INTEREST

47 C.F.R. 1.429(a) permits "any interested person" to petition for the reconsideration of a final action. The Rule constitutes a final action in an FCC rulemaking proceeding. The Trade Associations are interested parties because their membership includes BIAS providers that the Order directly impacts, and have been leaders in developing self-regulatory frameworks for online advertising that protect privacy while promoting economic growth. The Trade Associations also represent the vast majority of the online advertising ecosystem impacted by the

Order's data use and sharing restrictions. The Trade Associations were actively involved in this rulemaking proceeding through the joint filing of comments.[2]

II. RELEVANT FACTS

The Trade Associations are the leading trade associations for advertising and marketing industries, collectively representing more than 5,000 U.S. corporations across the full spectrum of businesses that participate in and shape today's media and advertising landscape. Our members engage in responsible data practices that both deliver to consumers the goods and services they desire and also fuel economic growth. This data-driven marketplace subsidizes the online ecosystem, content, and programming that consumers value, promotes innovation, and grows the economy.[3] A recent study noted that the Data-Driven Market Economy ("DDME") generates vital revenue and jobs for the U.S. economy, adding $202 billion in revenue to the U.S. economy and fueling more than 966,000 jobs in 2014.[4] Unfortunately, the Rule would seriously undermine many of these benefits.

The NPRM outlined the Commission's proposal to amend its rules implementing Section 222 to apply to BIAS providers. The NPRM included proposals for new definitions of the term "customer proprietary network information" ("CPNI"), and new opt-in and opt-out approval

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[2] *See e.g.*, Comments of Association of National Advertisers, American Association of Advertising Agencies, American Advertising Federation, Data & Marketing Association, Electronic Retailing Association, Electronic Transactions Association, Network Advertising Initiative, Interactive Advertising Bureau, and National Coalition on E-Commerce, WC Docket No. 16-106 (May 27, 2016) (hereinafter *May Comments*).

[3] A recent Zogby Analytics poll commissioned by the Digital Advertising Alliance ("DAA") shows that consumers assign a value of almost $1,200 a year to ad-supported online content. DAA, *Zogby Poll: Americans Say Free, Ad-Supported Online Services Worth $1,200/Year; 85% Prefer Ad-Supported Internet to Paid*, PR Newswire (May 11, 2016 8:30 AM), http://www.prnewswire.com/news-releases/zogby-poll--americans-say-free-ad-supported-online-services-worth-1200year-85-prefer-ad-supported-internet-to-paid-300266602.html.

[4] Deighton and Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the U.S. Economy* (2015) (hereinafter "*The Value of Data*").

requirements for certain data use and sharing activities for BIAS providers.[5] Specifically, the NPRM proposed to require BIAS providers to obtain opt-in approval from consumers in order to share customer information with any third party.[6] The Trade Associations filed comments, both collectively and individually, offering their view that the Commission's proposal was overly restrictive, and that it misinterpreted Section 222's purpose.[7]

On October 6, 2016, Chairman Wheeler issued a four-page Fact Sheet that outlined a new and substantially altered proposal for a consumer choice regime for BIAS providers' sharing and use of Customer Personal Information.[8] The Fact Sheet was devoid of many details, but it did state that the Commission would adopt a regime based on the sensitivity of the information in question, an approach that it described as being consistent with the Federal Trade Commission's ("FTC") long standing approach.[9] As part of this approach, the Fact Sheet stated that it would require opt-in customer approval for BIAS providers to share or use "sensitive information," which it defined to include geo-location, children's, health, and financial information, Social Security numbers, the content of communications, and, in contrast to the FTC's long standing approach, all web browsing and app usage history information.[10]

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[5] *NPRM*.

[6] *NPRM* at 9.

[7] *See May Comments*; Direct Marketing Association, *Comment*, WC Docket No. 16-106 (May 27, 2016); Interactive Advertising Bureau, *Comment*, WC Docket No. 16-106 (May 27, 2016); Association of National Advertisers, *Comment*, WC Docket No. 16-106 (May 27, 2016).

[8] *Fact Sheet: Chairman Wheeler's Proposal To Give Broadband Consumers Increased Choice Over Their Personal Information*, Wireline Competition (Oct. 6, 2016) (hereinafter *Fact Sheet*).

[9] *Fact Sheet* at 2.

[10] *Fact Sheet* at 2.

In response to the Fact Sheet, the Trade Associations were left to surmise about numerous details of the proposal, but the Trade Associations did file several *ex parte* presentations based on our assumptions, including a proposal for a less restrictive, yet effective and strong, opt-out based regime for the use and sharing of non-sensitive web viewing and app usage history information.[11] The Trade Associations' proposals distinguished between sensitive and non-sensitive web viewing and app usage history information. The latter (*non-sensitive web viewing and app usage)* helps support the digital advertising ecosystem. This ecosystem has functioned well for years under an enforceable self-regulatory framework developed by the Digital Advertising Alliance ("DAA"), which is broadly supported by industry and widely recognized as a highly credible and effective privacy self-regulatory program that offers consumers transparency about online data collection and a way to control the use of their online data by DAA members while allowing data-driven innovation to flourish.[12] The DAA has been widely successful, with hundreds of companies and thousands of brands participating in the program, over 75 million unique visitors to its digital properties, reaching 35 countries and

[11] *See* American Advertising Federation, American Association of Advertising Agencies, Association of National Advertisers, Direct Marketing Association, Interactive Advertising Bureau, Network Advertising Initiative, *Trade Association Letter to FCC*, WC Docket No. 16-106 (Oct. 11, 2016); *Proposal*; American Association of Advertising Agencies, American Advertising Federation, Association of National Advertisers, Direct Marketing Association, Interactive Advertising Bureau, Network Advertising Initiative, *October 24 Ex Pate Broadband Privacy NPRM* (Oct. 25, 2016).

[12] The DAA's successful approach drew praise at a February 2012 event at the White House where the then-Chairman of the FTC, the then-Secretary of Commerce, and White House officials publicly praised the DAA's cross-industry initiative. The White House recognized the DAA as "an example of the value of industry leadership as a critical part of privacy protection going forward." The DAA's ongoing work in expanding its principles has garnered additional praise, including from FTC Commissioner Ohlhausen, who has stated that the DAA "is one of the great success stories in the [privacy] space." Speech by Danny Weitzner, We Can't Wait: Obama Administration Calls for A Consumer Privacy Bill of Rights for the Digital Age (February 23, 2012); Katy Bachman, FTC's Ohlhausen Favors Privacy Self-Regulation, Adweek (June 3, 2013).

translated into 26 languages. These Trade Associations' proposals represented a less restrictive alternative to the Fact Sheet's proposal.

Notwithstanding considerable opposition to the FCC's proposal, and the fact that the Commission never released a revised NPRM, Further Notice of Proposed Rulemaking ("FNPRM"), or official comment period for a materially revised proposal, on October 27, 2016, the FCC adopted the Order subjecting BIAS providers to restrictive rules that unnecessarily upend existing frameworks without adequate consideration of counter-proposals.[13] The Commission did this in a manner that unreasonably exceeds its statutory mandate by restricting a substantial amount of protected free speech counter to the First Amendment, and using a process that did not allow adequate notice and comment from interested parties.

III. THE FCC SHOULD RECONSIDER THE ORDER BECAUSE IT UNLAWFULLY RELIED ON SECTION 222 TO PROMULGATE ITS RULES IN AN ARBITRARY AND CAPRICIOUS MANNER.

The FCC relied on Section 222 to promulgate the Order, and in doing so acted in an arbitrary and capricious manner. The Commission relied on Section 222(a) as its authority to regulate BIAS providers' use and sharing of customer proprietary information, which the FCC defined to mean CPNI, Personally Identifiable Information ("PII"), and content of communication.[14] However, as explained in more detail below, that statutory language is specifically labeled a "General Statement" and is clearly governed by the more detailed subsections that follow it. To interpret Section 222(a) to authorize sweeping new restrictions on BIAS providers is the very essence of arbitrary and capricious regulatory action.

[13] *See generally Order*.

[14] *Order* at 18.

Section 222(a) imposes a general obligation to protect "proprietary information," but the section must be read in conjunction with the more specific obligations spelled out throughout the rest of Section 222. The specific requirements in the succeeding subsections define some of the duties that Congress imposed: Section 222(b) regulates telecommunications carriers' use of "proprietary information from another carrier," while Section 222(c) governs the use of CPNI.[15] If, as the FCC now attempts to mandate, Section 222(a) were read to make all customer proprietary information confidential, the later and more specific statutory provisions clearly would be unnecessary. Courts have held that "it is a commonplace of statutory construction that the specific governs the general."[16] Under this canon, courts will not read a general provision to swallow, and render superfluous, more specific ones.[17]

Section 222(a)'s reference to "proprietary information" rather than CPNI evidently is a collective reference to the two types of proprietary information addressed later in the statute—other carriers' proprietary information (Section 222(b)) and CPNI (Section 222(c)). As Commissioner O'Rielly noted in his dissent to the Order, Section 222(a) explains *who* is covered by the substantive rules in other sections (all telecommunications carriers), while Sections 222(b) and (c) set out substantive rules with regard to other carriers' proprietary information and CPNI.[18] The Commission failed to address this point.

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[15] 47 U.S.C. § 222.

[16] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

[17] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *See RadLAX Gateway Hotel LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012).

[18] *See* Dissenting Stmt. of Comm'r Michael O'Rielly, at 1.

The FCC's attempt to impose restrictions on all types of information through a catch-all provision is contrary to Congress's clear intent. Had Congress intended proprietary information regarding customers to include PII, it would have used the term PII as it did in other statutes.[19] The term "proprietary information" was introduced into Section 222(a) in 1996. At that time, PII was a term of art used in the Act itself and in other earlier statutes.[20] Further, interpreting Section 222(a) as imposing a general confidentiality duty on information beyond CPNI would be inconsistent with the exceptions set out in Section 222(d). Those exceptions permit telecommunications carriers to use CPNI, among other things, to bill for telecommunications services; to protect the rights or property of the carrier or to protect users of those services and other carriers from fraud; and to provide inbound telemarketing, referral, or administrative services to the customer on calls that the customer initiates.[21] If Section 222(a) created a separate, affirmative obligation on the part of telecommunications carriers with regard to data beyond CPNI, then Congress would have made similar exemptions for PII or "proprietary information" more generally.

A further obstacle to the FCC's interpretation of Section 222(a) is the principle that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[22] The FCC bases the authority to create new categories of proprietary information and impose detailed

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[19] See *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (applying the canon that the court would not read the statute to implicitly intend a meaning when Congress had expressly legislated that meaning in other provisions or other statutes).

[20] *See, e.g.*, 47 U.S.C. § 551 (Communications Act); 18 U.S.C. § 2710(b) (Video Privacy Protection Act of 1988); 20 U.S.C. § 1232g (Family Educational Rights and Privacy Act of 1974).

[21] *See* 47 U.S.C. § 222(d).

[22] *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

regulations as to BIAS providers' use of customer PII and content of communications on a vague, general provision that would overwhelm the succeeding detailed provisions regulating the use of CPNI. Clearly, that cannot be an accurate interpretation of the meaning of these key provisions. Moreover, from 1996 (when these provisions were enacted) until 2014, the FCC had interpreted Section 222 to govern the use of only CPNI with regard to customer data, not proprietary information broadly.[23] The Supreme Court has said that, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism."[24]

IV. ON RECONSIDERATION THE FCC SHOULD CONSIDER LESS RESTRICTIVE PROPOSALS IN ORDER NOT TO VIOLATE THE FIRST AMENDMENT

The Order imposes restrictions on BIAS providers' ability to use customer information for the purposes of commercial speech, without a customer's opt-in to such use. As the Tenth Circuit held in *U.S. West*, effective speech has two components—the speaker and the audience; a restriction on either component is a restriction on free speech.[25] The creation, analysis, and transfer of consumer data for marketing purposes constitutes speech.[26] Non-misleading commercial speech regarding a lawful activity is protected under the First Amendment.[27]

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[23] *See Order* at ¶ 357 (acknowledging that the FCC had interpreted Section 222 to pertain to CPNI until its 2014 decision in *In re TerraCom, Inc.*, 29 FCC Rcd. 13325, when it said for the first time that Section 222(a) applied to more than CPNI).

[24] *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (internal quotation marks omitted).

[25] *See U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999).

[26] *Id.*

[27] *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980).

For the Commission to restrict the ability of BIAS providers to analyze and transfer consumer data for marketing purposes, it must show that the restrictions further a substantial state interest in regulating the speech and must show that the restriction does so in a direct and material manner, is narrowly tailored, and is no more restrictive of speech than is necessary.[28] General pronouncements about privacy are not good enough; the FCC has to articulate a specific harm that is being remedied.[29] The Order's justifications for its speech burdens fall far short of that test. For example, the prohibition against the use of an overly broad category of "sensitive" customer information, which would include all web viewing history and app usage information, without opt-in consent, unlawfully restrains and unreasonably burdens the ability of BIAS providers to engage in broad ranges of protected speech.

Opt-in consent has not been the historical standard for advertising and marketing uses of data. The Order, however, would require opt-in approval for the use of all web browsing and app usage history information for marketing purposes outside of very limited exceptions. The Order echoes the Commission's previous failed attempt to mandate an opt-in requirement for the use of data for marketing purposes, a regime that was rejected by the Tenth Circuit.[30] The Tenth Circuit stated that the government must specifically state the substantial privacy interest it is addressing, and demonstrate that it has balanced the benefits and harms its regulation imposes and that the regulation is narrowly tailored to address that specific harm.[31] The Order shares this same vulnerability, failing to specifically justify its restriction on constitutionally protected

[28] *Id*.

[29] *See U.S. West*, 182 F.3d at 1237 ("The government presents no evidence showing the harm to either privacy or competition is real. Instead, the government relies on speculation that harm to privacy and competition for new services will result if carriers use CPNI.").

[30] *U.S. West*, 182 F.3d at 1230.

[31] *U.S. West*, 182 F.3d at 1235; 1238.

speech, and there is no reason to believe that any attempt to require opt-in consent for marketing purposes would be upheld by any court upon review.

Further, the FCC has made no attempt to demonstrate that the Order is narrowly tailored to serve the privacy interests that it asserts. Here, a regime where customers are allowed to opt out of data use would certainly be less restrictive of speech than prohibiting speech unless customers expressly opt in to permit it. The FCC has not shown that providing the opportunity for customers to opt-out of BIAS providers' use of customer proprietary information for certain purposes, a standard broadly adopted and recognized by the FTC as an effective and appropriate way to address privacy concerns, would be insufficient to protect privacy. Indeed, the Trade Associations provided the Commission with a proposal for such a regime, based on long-standing, effective industry practice and self-regulatory efforts.[32]

Specifically, the Trade Associations' proposal defined web browsing and application use history separate and apart from sensitive information, and provided for an opt-out mechanism to allow consumer choice for the use and sharing of that non-sensitive information.[33] This definitional distinction respects the reality that not all web browsing and application use information is sensitive, and that only when such information contains sensitive information (such as a Social Security number) should heightened approval requirements apply. This structure is common in the online ecosystem, and has supported the dynamic Internet economy consumers enjoy today. BIAS providers, and the broader Internet economy as a whole, have worked within this opt-out regime for the better part of a decade, and the Commission has failed

[32] American Association of Advertising Agencies, American Advertising Federation, Association of National Advertisers, Direct Marketing Association, Interactive Advertising Bureau, Network Advertising Initiative, *Trade Association Proposal Regarding Sensitive Information and Consent Standard*, WC Docket No. 16-106 (Oct. 19, 2016) (hereinafter *Proposal*).

[33] *Proposal* at 2.

to identify any consumer harm to justify the Order's upending of that regime. The Order fails to appropriately address the Trade Associations' proposal, nor does it justify the burdensome restrictions on speech for a different, compelling purpose.

V. THE TIMING OF THE ORDER WAS INSUFFICIENT TO ALLOW PROPER NOTICE AND COMMENT ON A PROPOSAL MATERIALLY DIFFERENT FROM THE NPRM

The Order was adopted less than a month after the Commission issued the four-page Fact Sheet outlining a drastic change in its approach to BIAS providers' use and sharing of customer information. The Fact Sheet did not afford a reasonable time, or provide appropriate or sufficient details to allow interested parties, to assess the new proposal and provide comments on it. Commission Rules at Section 1.415 require the Commission to "afford interested persons an opportunity to participate in the rulemaking proceeding through submission of written data, views, or arguments," and to provide a "reasonable time" for those comments to be provided.[34]

While the Commission provided a 30-day comment period for the NPRM, it substantially changed its proposal prior to adoption of the Order. For example, the Chairman's scant Fact Sheet provided a high-level overview of a wholly new regime regarding the use of "sensitive data," an approach in opposition to the framework laid out in the NPRM.[35] While the Fact Sheet claimed to be consistent with the FTC's approach to online privacy, as Commissioner Pai noted in his dissent, there are "vast differences between the Order's approach and the FTC's regime."[36]

[34] 47 C.F.R. § 1.415 (a) & (b).

[35] *Compare NPRM* to *Fact Sheet*.

[36] Dissenting Stmt. of Comm'r Ajit Pai, at 1.

Such a substantial change warranted the issuance of a FNPRM, pursuant to Commission rule 1.421,[37] a proposal suggested by the Trade Associations in an *ex parte* meeting on October 17, 2016.[38]

It is well established that agencies must provide the opportunity for the public to comment on, "[matters] of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures."[39] Whether there has been a full and fair opportunity for public review depends on whether, "given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticism" of a proposed rule.[40] In this case, the substantially different proposal contained in the Order was not afforded the appropriate and required opportunity for comment. The Order did not address the Trade Associations' proposal for an additional comment period, nor did it appropriately explain the Commission's choice to not allow reasonable time for comment on the Commission's substantially revised proposal, and the Commission ignored the proposal advanced by the Trade Associations.

[37] 47 C.F.R. § 1.421.

[38] American Association of Advertising Agencies, Association of National Advertisers, Direct Marketing Association, Interactive Advertising Bureau, *October 17 Trade Association Ex Parte* (Oct. 18, 2016).

[39] 5 U.S.C. §553.

[40] *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979); *See also Fertilizer Inst. V. EPA*, 935 F.2d 1303, 1311 (1991).

CONCLUSION

Accordingly, the Trade Associations respectfully request that the FCC reconsider its decision to adopt the Order regarding the use and disclosure of data by broadband providers due to the inadequate procedures taken to adopt the Order, and the other infirmities in the Order that are discussed in this petition.

Respectfully submitted,

Association of National Advertisers
American Association of Advertising Agencies
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