ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

January 11, 2018

The Honorable Ben Heuso
Chair
State Capitol, Room 4035
Sacramento, CA 95814

The Honorable Mike Morrell
Vice-Chair
State Capitol, Room 4035
Sacramento, CA 95814

Re: Federal Communications Commission's December 14, 2017 decision to end oversight over Internet Service Provider industry and its impact on privacy and network neutrality

The Electronic Frontier Foundation (EFF) is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. With over 41,000 dues-paying members and well over 1 million followers on social networks, we focus on promoting policies that benefit both creators and users of technology. We provide the following analysis for the California legislature in its effort to respond to the series of decisions by the Federal Communications Commissions (FCC) to abandon its responsibility to protect user privacy and network neutrality.

GENERAL RECOMMENDATIONS

Given The FCC's Decision to Abdicate its Traditional Role in Protecting User Privacy and Network Neutrality, California Should Endeavor to Fill the Gap to the Extent Permitted by Law.

The FCC made it clear that it will no longer seek to protect net neutrality and user privacy. That unfortunate decision creates an opportunity for states to take on greater oversight role themselves. The FCC has reclassified broadband providers as subject to regulation under Title I of the Communications Act of 1934, rather than Title II. This matters because Title I carriers are subject to relatively few federal statutory obligations. Therefore, state laws regulating their conduct are less likely to come into conflict with federal law. In addition, Congress has never expressly preempted the states from regulating companies that communicate by wire or radio in their entirety. In fact, Congress explicitly empowered states to have power over the "charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier (emphasis added)."[1]

[1] 47 U.S.C. § 152(b).

As a result of the current legal landscape facing consumers, EFF recommends that the legislature take several steps.

First, it should expeditiously pass AB 375. Late in 2016, the FCC issued strong rules to requiring ISPs to secure the consent of their users before being allowed to monetize their personal data. In 2017, Congress repealed those rules via the Congressional Review Act.[2] In effect, the repeal eliminated the updated privacy rules for broadband providers and prohibited the FCC from reviving identical or "substantially similar" rules in the future. The Legislature should step in to protect the privacy of all Californians, and thereby set a standard for other states around the country. According to the Obama Administration's own FCC Chairman Tom Wheeler, AB 375, would do just that.[3]

The bill has been subject to and approved by the relevant Senate committees and awaits a vote in the California Senate. Moving AB 375 in 2018 will send a clear signal to Washington DC that while the federal system stands down in the face of intense lobbying by the country's largest ISPs such as Comcast, Verizon, and AT&T, the state of California will stand up for its residents' legal right to privacy.

Second, the legislature should pass a legally enforceable and narrowly targeted state based network neutrality law. To survive judicial scrutiny, any such law should focus on intrastate conduct. No state law will be able to replace in its entirety what was lost with the repeal of the Open Internet Order in December, due to the limitations created by the Interstate Commerce clause. The bill for consideration this week, SB 460 is noteworthy in its goals but may be legally unsustainable when facing an expected interstate commerce preemption challenge by major ISPs.

As of this time EFF strongly supports the narrowly targeted approach endorsed by Senator Weiner's bill SB 822 that seeks to tie open Internet obligations with access to taxpayer funding or infrastructure. We encourage Senator de Leon to carefully narrow his bill to survive judicial scrutiny.

State Based Network Neutrality Must be Intrastate Focused to Avoid Preemption

Opponents to new state-based neutrality rules are likely to argue that federal law preempts most state regulation. In fact, while broadband service on its own implicates strong interstate commerce interests, ISPs are not thereby immunized from state regulation. Federal preemption[4] doctrines embody a careful balance between the

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[2] Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 47 CFR 64, available at https://www.federalregister.gov/documents/2016/12/02/2016-28006/protecting-the-privacy-of-customers-of-broadband-and-other-telecommunications-services.

[3] *Letter from former Federal Communications Commission Chairman Tom Wheeler to Assembly Member Chau re: AB 375* (Sep. 13, 2017), available at https://eff.org/document/fcc-chairman-tom-wheeler-endorsement-ab-375.

[4] The traditional questions that must be answered to test for preemption are as follows: 1) Did Congress express a clear intent? 2) Is there conflict between federal and state law where it would be impossible to comply with both? 3) Did Congress imply a barrier to state regulation? 4) Has Congress legislated so comprehensively that it occupied the field? 5) Does state law stand as an obstacle to the objectives of

responsibility of state governments to protect their citizens, and the responsibility of the federal government to ensure relatively uniform conditions for interstate commercial activity.

When it is possible to draw a clear division between intrastate and interstate activities, the Communications Act allows federal and state governments to regulate within their respective spheres. The Communications Act also explicitly allows states to regulate business practices of ISPs so long as the activity being regulated is intrastate. Moreover, incidental interstate activity does not remove a state's regulatory power. Indeed, as the Supreme Court noted in 1986,

"[T]he Act would seem to divide the world of domestic telephone service in two hemispheres – one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the states would retain exclusive jurisdiction – in practice, the realities of technology and economics belie such a clean parceling of responsibility."[5]

Congress struck a balance between state regulation of companies that provide communications by wire or wireless leaving intrastate regulation with some exceptions a state power while reserving interstate regulation to the FCC.[6] Today, we see many instances of this division of responsibilities such as universal service fund support[7], local rights of way regulation of network deployment[8], and privacy[9] for example.

BACKGROUND

The FCC's "Restoring Internet Freedom" Order Effectively Ended Federal Protections for Network Neutrality

On December 14, 2017, the FCC issued the Restoring Internet Freedom Order and thereby effectively withdrew from federal oversight over the ISP marketplace.[10], If that Order survives judicial scrutiny, ISPs will be largely left to police themselves in response to market demands – even though the majority of Americans have only one choice for

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Congress? In the near complete absence of applicable federal law for information services, a preemption analysis is restrained to determining if Congress implied preemption; *See also Louisiana Public Service Com'n v. F.C.C.,* 476 U.S. 355 (1986).

[5] *Louisiana Public Service Com,n v. F.C.C*., 465 U.S. 355 (1986).

[6] 47 U.S.C. § 152(b).

[7] California Public Utilities Commission (CPUC) provides an explicit subsidy to assist in the deployment of high-quality advanced communications services under the California Advanced Services Fund.

[8] 47 U.S.C. § 224(c) (federal law grants the states the ability to "reverse" preempt the FCC should they choose to directly regulate local infrastructure access. The CPUC was granted authority by the state legislature to manage local rights of way); *See* CALIFORNIA PUBLIC UTILITIES COMMISSION POLICY AND PLANNING DIVISION, A Brief Introduction to Utility Poles, available at http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Organization/Divisions/Policy_and_Planning/PPD_Work/PPDUtilityPole.pdf.

[9] *See* Minn. Stat. §§ 325M.01 to .09; *See also* Nevada Revised Stat. § 205.498

[10] Remarks of Chairman Ajit Pai on Restoring Internet Freedom, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1128/DOC-347980A1.pdf.

high-speed broadband and, therefore, can't exert much influence over their providers.[11] Indeed, the FCC's decision contradicts the Trump Administration's own Department of Justice findings regarding the power of ISPs to harm competition.[12]

Contrary to the FCC Chairman's claims, this repeal is not a return to any status quo. Prior to 2015 the FCC under both Republican and Democratic leadership attempted to oversee the practices of ISPs in maintaining a free and open Internet through different network neutrality regimes. However, after years of battling ISP lawsuits and losing under its Title I authority to regulate, most notably the Comcast decision[13] and the Verizon decision,[14] the FCC was forcefully driven to the conclusion in 2015 that its only legal power over the industry was its common carrier (known as Title II) authority.

Abandoning that authority under the Restoring Internet Freedom Order has effectively ended the nondiscrimination obligations of ISPs that served as the legal authority to require network neutrality.[15] Once the Restoring Internet Freedom Order takes effect in early 2018, the ISP industry will, for the first time in communications law history, be virtually free from federal consumer protection law.

The FCC's Deference to Antitrust Law as Substitute Authority is a Shell Game

The FCC regularly asserts that antitrust law can substitute for its authority, which would presumably be enforced by the Federal Trade Commission (FTC) and Department of Justice. Unfortunately our antitrust laws are inadequate to the task of protecting net neutrality.[16] For example, the FTC itself told Congress in 2010 that if the current status of antitrust law had been in place 40 years ago, the Department of Justice prosecution of AT&T's monopoly would have likely failed.[17] Moreover, to the extent that collusive conduct that would run afoul of antitrust laws takes place within the ISP market, the FCC's abandonment of its oversight role will serve as a potentially major obstacle given its primary role as regulator.

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[11] Jon Brodkin, *US Broadband: Still no ISP choice for many, especially at higher speeds*, ARSTECHNICA (August 10, 2016), available at https://arstechnica.com/information-technology/2016/08/us-broadband-still-no-isp-choice-for-many-especially-at-higher-speeds; See also Jon Brodkin, *FCC's claim that one ISP counts as "competition" faces scrutiny in the courts*, ARSTECHNICA (October 10, 2017), available at https://arstechnica.com/tech-policy/2017/10/fccs-claim-that-one-isp-counts-as-competition-faces-scrutiny-in-court.

[12] DEPARTMENT OF JUSTICE, Antitrust complaint (filed November 20, 2017), available at https://assets.documentcloud.org/documents/4254900/ATT-Antitrust-Complaint.pdf.

[13] *Comcast Corp.* v. *FCC*, 600 F. 3d 642 (D.C. Cir. 2010) (hereinafter Comcast decision).

[14] *Verizon* v. *FCC*, 740 F. 3d 23 (D.C. Cir. 2014) (hereinafter Verizon decision).

[15] 47 U.S.C. § 201; 47 U.S.C. § 202.

[16] The seminal Supreme Court cases known as *Trinko* and *Credit Suisse* created a general legal framework where areas of law that have an expert agency with regulatory power over an industry are not benefited by the added layer of antitrust law. As a result, the FCC is expected to exert its oversight over the ISP industry in lieu of antitrust law. *See Verizon Communications, Inc*. v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); See also *Credit Suisse Securities* v. *Billing*, 551 U.S. 264 (2007).

[17] Prepared Statement of the Federal Trade Commission, Committee on Judiciary: *Is There Life After Trinko and Credit Suiise? The Role of Antitrust in Regulated Industries* (June 15, 2010), available at https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-courts-and-competition-policy-committee-judiciary-united/100615antitrusttestimony.pdf.

The ISP Industry Has a Persistent History of Violating Privacy

Nothing in recent history suggests that ISPs stand ready to respect user privacy where they are not legally required to do so. As far back as 2008, Charter tested the idea of recording everything their customers did online into profiles using Deep Packet Inspection technology. The company relented only after bipartisan condemnation from Congress.[18]

In 2011, ISPs engaged in "search hijacking" where your Internet search queries were monitored in order to be rerouted in coordination with a company called Paxfire.[19] Other invasive efforts include AT&T inserting ads into data traffic in wifi hotspots in airports.[20] Even small rural ISPs have engaged in ad injection to advertise on behalf of third parties.[21]

Carriers also manipulate the software in the smartphones they sell. For example, AT&T, Sprint, and T-Mobile preinstalled "Carrier IQ" on their phones, which gave them the capability to track everything users did with those phones, from the websites they visited to the applications they used.[22] The carriers abandoned the practice only after a class-action lawsuit.[23]

Perhaps the most egregiously, in 2014 Verizon tagged every one of its mobile customers' HTTP connections with a semi permanent super-cookie, and used those "super-cookies" to enable third parties such as advertisers to target individual customers.[24] Verizon's "super-cookie" allowed unaffiliated third parties to track an individual, no matter what steps you took to preserve your privacy. AT&T would have followed suit, but quickly retreated after Verizon faced an FCC enforcement action.[25]

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[18] Press Release, *Markey, Barton Raise Privacy Concerns About Charter Communications* (May 16, 2008), available at https://www.markey.senate.gov/news/press-releases/may-16-2008-markey-barton-raise-privacy-concerns-about-charter-comm.

[19] Peter Eckersley, *Widespread Hijacking of Search Traffic in the United States*, DEEPLINKS BLOG (August 4, 2011), available at https://www.eff.org/deeplinks/2011/07/widespread-search-hijacking-in-the-us.

[20] Jonathan Mayer, *AT&T Hotspots: Now with Advertising Injection*, WEB POLICY BLOG (August 25, 2015), available at http://webpolicy.org/2015/08/25/att-hotspots-now-with-advertising-injection.

[21] Phillip Dampier, *ISP Crams Its Own Ads All Over Your Capped Internet Connection; Banners Block Your View*, STOP THE CAP! (April 3, 2013), available at http://stopthecap.com/2013/04/03/isp-crams-its-own-ads-all-over-your-capped-internet-connection-banners-block-your-view.

[22] Marcia Hofmann, *Carrier IQ Tries to Censor Research With Baseless Legal Threat*, DEEPLINKS BLOG (November 21, 2011), available at https://www.eff.org/deeplinks/2011/11/carrieriq-censor-research-baseless-legal-threat.

[23] *In re Carrier IQ, Inc. Consumer Privacy Litigation*, Case No. 12-md-023330 - EMC, available at http://www.carrieriqsettlement.com (detailing the terms of the settlement).

[24] Jacob Hoffman-Andrews, *Verizon Injecting Perma-Cookies to Track Mobile Customers, Bypassing Privacy Controls*, DEEPLINKS BLOG (November 3, 2014), available at https://www.eff.org/deeplinks/2014/11/verizon-x-uidh.

[25] FEDERAL COMMUNICATIONS COMMISSION, FCC Settles Verizon "Supercookie" Probe, Requires Consumer Opt-in for Third Parties: Verizon Wireless to Obtain Affirmative Consent from Consumers Before Sending Unique Identifier Headers to Third Parties, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-338091A1.pdf.

Even in the face of the 2015 Title II Open Internet order that would clearly apply communications privacy law to the industry, they continued to push their conduct as close to the law as possible. In 2015 telecom carriers partnered with SAP's Consumer Insight 365[26] to "ingest" data from cellphones close to 300 times a day every day across 20 to 25 million mobile subscribers (we do not know which mobile telephone companies participate in this practice, as that information is kept a secret). That data is used to inform retailers about customer browsing info, geolocation, and demographic data—information that would be have been protected if Congress had not reversed the FCC privacy rules.

The ISP Industry Also Has a Persistent History of Violating Network Neutrality

ISPs have an equally sorry history of net neutrality violations. In 2005, the FCC found that Madison River, a BIAS provider based in North Carolina, had been blocking Voice over Internet Protocol (VoIP) ports, thereby preventing its customers from making use of third-party VoIP services. This example of consumer harm is particularly egregious, given that "For those customers who had disconnected their traditional phone lines and were relying solely on Vonage, the blocking meant they had no ability to make calls, even to emergency 911 services."[27] The FCC's enforcement action at this time was premise on its Title II authority over Madison River.

In 2007, Comcast was found to be interfering with legitimate traffic based solely on its type. The most widely discussed interference was with certain BitTorrent peer-to-peer (P2P) file-sharing communications, but other protocols were also affected.[28] This interference went far beyond network management, and affected its customers' ability to download public domain works, not to mention properly use non-P2P software like Lotus Notes.

In 2012, AT&T chose to block data sent to and from users of Apple's Facetime software.[29] In particular, AT&T announced in August of 2012 that only certain, more expensive data plans would be able to use Facetime, even acknowledging that "the company was using it as a lever to get users to switch over to the new plans which charge for data usage in tiers." In other words, customers were forced to pay more to AT&T to send or receive certain types of data, based on a business decision by AT&T.

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[26] Kate Kaye, *The $24 Billion Data Business That Telecos Don't Want to Talk About*, AD AGE (October 26, 2015), available at http://adage.com/article/datadriven-marketing/24-billion-data-business-telcos-discuss/301058/

[27] Jonathan Krim, *Phone Company Settles in Blocking of Internet Calls*, WASHINGTON POST (Mar. 4, 2005), available at http://www.washingtonpost.com/wp-dyn/content/article/2005/03/25/AR2005032501328.html.

[28] Peter Eckersley et al., *Packet Forgery By ISPs: A Report on the Comcast Affair,* ELECTRONIC FRONTIER FOUNDATION, Nov. 28, 2007, https://www.eff.org/wp/packet-forgery-isps-report-comcast-affair.

[29] David Kravets, *AT&T: Holding Facetime Hostage is No Net Neutrality Breach*, WIRED (Aug. 22, 2012), available at https://www.wired.com/2012/08/facetime-net-neutrality-flap.

Also in 2012, Comcast announced that it would favor its own video-on-demand streaming services over third-party competitor services, by charging customers for the data they used to stream competitor services.[30] In this instance, customers were harmed by Comcast's decision to take advantage of its gatekeeper power to favor its traffic over its competitors, thereby clearly distorting the marketplace for video-on-demand services. These and many other examples[31] regularly demonstrate the gatekeeper incentive ISPs possess and willingness to act on that incentive.

Californians Cannot Rely on FTC Act Enforcement

The FCC and FTC recently released a Memorandum of Understanding setting out how the federal government intends to oversee the ISP marketplace.[32] The document details the extent the FCC will mandate disclosure by the ISPs of their intended conduct so that the FTC can use its legal power to penalize deceptive assertions. At the heart of the document is a basic premise: as long as the industry simply tells consumers what they intend to do, self-regulation will curtail the worst practices.

This premise cannot withstand scrutiny, for at least two reasons. First, a majority of the public has few if any choices for high-speed broadband, which means they cannot respond to unfair practices, however fully disclosed, by switching providers. Second, it allows ISPs to immunize from legal challenge all of the offending practices listed earlier in this letter so long as they are open about them.

Moreover, the FCC should not have acted in advance of a pending decision regarding FTC authority over telephone companies. Recently, the Ninth Circuit Court of Appeals' held that the FTC was legally barred from exerting its authority over telephone companies.[33] The Court is reviewing that decision en banc but, if it is affirmed, the ISPs will have successfully eviscerated even the most basic truth-in-advertising power remaining after the FCC's abdication. In other words, neither the FCC nor the FTC will have jurisdiction over telephone companies in many crucial respects.[34]

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[30] Kyle Orland, *Comcast: Xbox 360 On Demand Streams Won't Count Against Data Caps*, ARSTECHNICA (Mar. 26, 2012), available at https://arstechnica.com/gaming/2012/03/comcast-xbox-360-on-demand-streams-wont-count-against-data-caps.

[31] Tim Karr, *Network Neutrality Violations: A Brief History*, Free Press (Apr. 25, 2017), available at https://www.freepress.net/blog/2017/04/25/net-neutrality-violations-brief-history.

[32] FEDERAL COMMUNICATIONS COMMISSION AND FEDERAL TRADE COMMISSION CONSUMER PROTECTION MEMORANDUM OF UNDERSTANDING, available at https://www.ftc.gov/system/files/documents/cooperation_agreements/151116ftcfcc-mou.pdf.

[33] 15 U.S.C. § 45(a)(2)

[34] The reason why this decision only applies to telephone companies after broadband is officially declared that it is no longer a common carrier service under the Restoring Internet Freedom Order is because telephone service itself remains a common carrier service allowing companies like AT&T and Verizon to exempt themselves from federal enforcement but not Comcast, Charter, or other cable television companies.

States Can and Should Act in the Absence of ISP Privacy and Network Neutrality

EFF supports efforts to close the privacy and net neutrality gaps through state legislation and other means of state authority. Americans from across the political spectrum agree that their personal data belongs to them and that they should be able to choose whether and how corporations and the government use it. A staggering 83% of the public (85% of Republican voters, 82% of Democratic voters, and 78% of independent voters) support requiring ISPs to obtain their permission first before monetizing their personal data.[35] Similarly, an overwhelming majority of Americans, Republicans and Democrats alike, opposed the FCC's decision to repeal network neutrality.[36]

In the face of retreat by the federal system, all states, and particularly California, should take steps to protect their residents.

Sincerely,

Ernesto Falcon
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Electronic Frontier Foundation

[35] Freedman Consulting, LLC, *New Poll: Americans Overwhelmingly Support Existing Net Neutrality Rules, Affordable Access, and Competition Among ISPs*, available at http://tfreedmanconsulting.com.routing.wpmanagedhost.com/wp-content/uploads/2017/08/Tech-Policy-Poll-Summary-Final_20170710.pdf.

[36] Brian Fung, *This Poll Gave Americans a Detailed Case For and Against the FCC's Net Neutrality Plan. The Reaction Among Republicans Was Striking*, WASHINGTON POST (Dec. 12, 2017), available at https://www.washingtonpost.com/news/the-switch/wp/2017/12/12/this-poll-gave-americans-a-detailed-case-for-and-against-the-fccs-net-neutrality-plan-the-reaction-among-republicans-was-striking/?utm_term=.c5da0e52207b.