



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

May 3, 2017

The Honorable Jennifer Williamson
Chair, House Committee on Rules
Oregon State Legislature
900 Court St. NE
Salem Oregon 97301

Re: Broadband Privacy

Dear Chair Williamson and Members of the Committee:

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 36,000 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 work to ensure that rights and freedoms are enhanced and protected as our use of technology grows.

Recently President Trump and Congressional Republicans enacted S.J. Res. 34, legislation that invoked the Congressional Review Act to repeal the Federal Communications Commission (FCC) broadband privacy rules.¹ In effect the repeal eliminated the updated privacy rules for broadband providers and placed a prohibition on the FCC from reviving identical or “substantially similar” rules in the future. These rules established clear guidelines for the cable and telephone industry to secure the consent of their users before being allowed to resell their personal data such as the websites they visit, the applications they use, and other details an individual reveals about themselves when using the Internet.

Due to the usage of the Congressional Review Act and its subsequent bar on agency activity, it has become an open question as to the extent the FCC is able to enforce an individual’s legal right to communications privacy under Section 222 of the Telecommunications Act of 1996. For example, it is unknown whether the FCC could invoke Section 222 if a telecommunications provider uses an individual’s online activities without their consent for any means effected under the CRA.

Compounding the federal gap in privacy protection is the Ninth Circuit Court of Appeals’ 2016 *Federal Trade Commission vs AT&T Mobility* decision² where the court found that the FTC is legally barred from exerting its authority over common

1 *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>.

2 *FTC v. AT&T Mobility*, 835 F.3d 993 (9th Cir. 2016)



carriers due to their exclusion in the FTC Act.³ This prohibition on FTC action will still apply to telephone companies even if the FCC eliminates additional consumer protections for broadband users by declaring broadband as an information service and not a common carrier service. In effect, the federal legal landscape for consumer privacy for the state of Oregon has substantively diminished at both the FTC and FCC and will continue to worsen as federal efforts continue. Therefore, absent a new federal law restoring the privacy rights of individuals when they go online, it is important that state legislatures explore their options if they are inclined to fill the void created by Congress.

We support efforts to utilize state power to close the potential gap created by Congress and the FCC through legislation and other means of state authority to protect individual consumer privacy. We believe that states are able to craft legislation that avoid federal preemption issues while providing the same level of protection afforded by the original FCC broadband privacy rules.

Americans from across the political spectrum agree that their personal data belongs to them and that it should be their choice in how it is utilized by the corporations and the government. It comes as no surprise that super majorities of Democratic, Republican, and independent voters believed President Trump should have vetoed the broadband privacy repeal.⁴ In the face of retreat by the federal system and the increasing demand by voters, states should proactively respond to the will of the public and restore what Congress took away.

Sincerely,

Electronic Frontier Foundation

³ 15 U.S.C. § 45(a)(2)

⁴ Karl Bode, *Trump Signs Hugely Unpopular Repeal of Broadband Privacy Rules*, DSLReports, Apr. 4, 2017, available at <http://www.dslreports.com/shownews/Trump-Signs-Hugely-Unpopular-Repeal-of-Broadband-Privacy-Rules-139286>.