

August 15, 2018

The Honorable John Thune, Chairman
The Honorable Bill Nelson, Ranking Member
U.S. Senate Committee on Commerce, Science, & Transportation
512 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Thune and Ranking Member Nelson:

We write to you regarding the “Oversight of the Federal Communications Commission” hearing.¹ For more than twenty years, the Electronic Privacy Information Center (“EPIC”) has worked to ensure that the FCC protects the privacy of American consumers.² We are now concerned that the Commission has abdicated a central responsibility to the American public and urge the Committee to obtain the witnesses commitment to protecting consumers’ online privacy and data.

FCC’s Failure to Safeguard Online Privacy

In 2016, in the context of a public rulemaking, EPIC urged the FCC to adopt comprehensive privacy rules that would apply to both Internet Service Providers (“ISPs”) and so-called “edge” providers, such as Google and Facebook, that dominate much of the Internet economy.³ However, the FCC adopted a modest rule that only applied to ISPs and that rule was subsequently repealed by Congress, with the support of the current FCC Chairman Ajit Pai. Instead of moving forward to safeguard consumers, the FCC is moving backwards, leaving users of new communications services exposed to unprecedented levels of identity theft, financial fraud, and security breaches.⁴

It is clear that the FCC has the ability to enact Internet privacy rules. The FCC has the authority to regulate companies such as Facebook and Google through ancillary jurisdiction. The Communications Act provides the FCC with the authority to regulate privacy practices of other

¹ *Oversight of the Federal Communications Commission*, 115th Cong. (2018), S. Comm. on Commerce, Science, and Transportation, <https://www.commerce.senate.gov/public/index.cfm/2018/8/oversight-of-the-federal-communications-commission/> (August 16, 2018).

² See EPIC, *US West v. FCC – The Privacy of Telephone Records*, <https://epic.org/privacy/litigation/uswest/> (1997) (describing the efforts of EPIC and others to defend the FCC’s customer proprietary network information (“CPNI”) rules). See also EPIC *Amicus brief*, *NCTA v. FCC*, 555 F.3d 996 (D.C. Cir. 2009) (defending the FCC’s CPNI privacy rules).

³ EPIC Statement, *FCC Overreach: Examining the Proposed Privacy Rules*, hearing before the House Committee on Energy and Commerce, Subcommittee on Communications and Technology, Jun. 13, 2016.

⁴ Federal Trade Commission, *Consumer Sentinel Network Data Book*, Mar. 2017, https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2016/csn_cy-2016_data_book.pdf.

online service providers where regulations “encourage deployment of [broadband].”⁵ Social networking sites, search engines, e-mail services, and other online providers easily fall within the Commission’s general jurisdiction over “interstate and foreign communication by wire and radio.”⁶ Section 706 of the Telecommunications Act explicitly mandates the Commission to encourage deployment of advanced telecommunications capabilities, such as broadband Internet.⁷

Of additional concern is the Commission’s recent proposed rule entitled “Restoring Internet Freedom.” In that proposed rule, the Commission signaled that they do not intend to protect consumers privacy online and instead requested comment on having online privacy handled by the Federal Trade Commission.⁸ This is unacceptable. The FTC is an agency with no authority or ability to issue proactive privacy rules and has allowed failed to take adequate steps to protect online privacy in the past.

The FCC has a core responsibility to ensure that communications services offered in the United States are safe for consumers. In fact, the year that the FCC was established to regulate industries providing communications services in the United States – 1934 – was also the year that the Congress established comprehensive safeguards for communications privacy.⁹ It is simply not possible to regulate communications services without providing an assurance of privacy.

EPIC Petition to End Retention of Telephone Data

In 2015, EPIC and a coalition of consumer privacy organizations, technical experts, and legal scholars undertook a petition to the FCC to repeal the bulk collection and retention of telephone data of American consumers.¹⁰ EPIC’s petition urged the FCC to repeal an outdated rule that requires that telephone records be collected and saved for 18 months.¹¹ Law enforcement agencies have conceded that the need for the retention of such data on a mass scale is no longer necessary.¹² Further, the bulk collection of telephone records places consumer privacy at risk by revealing intimate details about their daily lives and subjecting consumers to an increased potential for identity theft.¹³ And the European Union has recently determined that the bulk retention of telephone records violates fundamental rights, raising the very real possibility that an inconsistent policy in the United States could lead to disruption in digital trade, similar to the recent “Safe Harbor” dispute.¹⁴

⁵ 47 U.S.C. §1302.

⁶ 47 U.S.C. §152(a).

⁷ 47 U.S.C. §1302; *see also Verizon v. FCC*, 740 F.3d 623, 639-41 (D.C. Cir. 2014).

⁸ “Restoring Internet Freedom,” 82 Fed. Reg. 25,568 (Jun. 2, 2017)

⁹ Section 605, Communications Act of 1934.

¹⁰ *EPIC Petition to Repeal 47 C.F.R. §42.6, Federal Communications Commission (“Retention of Telephone Toll Records”)*, Aug. 4, 2015, <https://epic.org/privacy/fcc-data-retention-petition.pdf>; *End the FCC Data Retention Mandate!*, EPIC, <https://epic.org/privacy/fcc-data-retention/#legal>.

¹¹ 47 C.F.R. §42.6.

¹² Dept. of Justice and Homeland Security, Comment Letter on Notice of Rulemaking In the Matter of Implementation of the Telecommunications Act of 1996, at 10 (Apr. 28, 2006), CC Docket No. 96-115.

¹³ *Petition to Repeal 47 C.F.R. §42.6*.

¹⁴ Court of Justice of the European Union, *The Court of Justice Declares the Data Retention Directive to be Invalid*, (Apr. 8, 2014) (“It entails a wide-ranging and particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, without that interference being limited to what is strictly necessary.”), http://curia.europa.eu/jcms/jcms/P_125951/.

The EPIC Petition seeks an end to this FCC regulation that places at risk the privacy of users of network services.

In May 2017, the FCC docketed EPIC's petition for public comment.¹⁵ Support for repeal of the data retention mandate is strong. Every comment submitted to the FCC expressed support for repealing this outdated and unnecessary mandate.¹⁶

Three years have now passed since EPIC and the coalition filed the Petition to repeal the outdated data retention mandate. Now is the time for the FCC to act. The mandate puts consumer privacy at risk while also placing an unnecessary regulatory burden on carriers.

Chairman Pai should be asked how soon the FCC will begin the rulemaking on the EPIC Petition to Repeal 47 C.F.R. 42.6 (Retention of Telephone Records).

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

/s/ Christine Bannan

Christine Bannan
EPIC Consumer Privacy Counsel

¹⁵ FCC, *Comment Sought on EPIC et al Petition For Rulemaking To Repeal 47 C.F.R. § 42.6 ("Retention of Telephone Records")*, Public Notice, Docket No. 17-130, (May 17, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0517/DA-17-472A1.pdf.

¹⁶ Docket 17-130, *Petition for Rulemaking to Repeal 47 C.F.R. 42.6 (Retention of Telephone Records)*, https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-130&sort=date_disseminated_DESC ("No matter how many procedures a company implements to protect its servers, the very existence of 18 months of detailed and personal call data renders a consumer's call information vulnerable to attack." Comments of Consumers Union, *In the Matter of EPIC Et. Al. Petition for Rulemaking to Repeal 47 C.F.R. 42.6 (Retention of Telephone Records)* at 4 (June 16, 2017).