

June 20, 2017

The Honorable Shelley Moore Capito, Chairman
The Honorable Christopher Coons, Ranking Member
U.S. Senate Committee on Appropriations
Subcommittee on Financial Services and General Government
Room S-128, The Capitol
Washington, DC 20510

RE: Hearing on “Review of the FY2018 Budget Request for the Federal Communications Commission”

Dear Chairman Capito and Ranking Member Coons:

We write to you regarding the hearing today on “Review of the FY2018 Budget Request for the Federal Communications Commission.”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.

FCC’s Failure to Safeguard Online Privacy

Last year, 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the Internet economy.³ However, the FCC adopted a modest rule that only applied to ISPs and that rule was subsequently repealed by Congress, with the support of the current Chair. 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

¹ *Review of the FY2018 Budget Request for the Federal Communications Commission*, 115th Cong. (2017), S. Comm. on Appropriations, <https://www.appropriations.senate.gov/hearings/review-of-the-fy2018-budget-request-for-the-federal-communications-commission> (June 20, 2017).

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.

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 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

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.⁸ It is simply not possible to regulate communications services without providing an assurance of privacy.

EPIC urges you to ask the FCC Chair to discuss the steps the Commission is taking to safeguard consumer 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.⁹ EPIC’s petition urged the FCC to repeal an outdated rule that requires that telephone records be collected and saved for 18 months.¹⁰ Law enforcement agencies have conceded that the need for the retention of such data on a mass scale is no longer necessary.¹¹ 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.¹² 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.¹³

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 Section 605, Communications Act of 1934.

⁹ *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>.

¹⁰ 47 C.F.R. §42.6.

¹¹ 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.

¹² *Petition to Repeal 47 C.F.R. §42.6*.

¹³ 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

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

The FCC recently docketed EPIC's petition for public comment. 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.¹⁴

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/Kim Miller
Kim Miller
EPIC Policy Fellow

/s/ Jim Graves
Jim Graves
EPIC Law & Technology Fellow

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/.

¹⁴ 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.

ATTACHMENT

FCC Public Notice

Comment Sought on Repeal on EPIC et al. Petition for Rulemaking to
Repeal 47 C.F.R. §42.6 (“Retention of Telephone Records”)



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

DA 17-472

Released: May 17, 2017

COMMENT SOUGHT ON EPIC ET AL. PETITION FOR RULEMAKING TO REPEAL 47 C.F.R. § 42.6 (“RETENTION OF TELEPHONE RECORDS”)

WC Docket No. 17-130

Comment Date: June 16, 2017

Reply Date: July 3, 2017

On August 4, 2015, EPIC et al. filed a petition for rulemaking asking the Commission to repeal Section 42.6 of the Commission’s rules, Retention of Telephone Records.¹ With this *Public Notice*, we seek comment on that petition.

Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries

¹ Petition to Repeal 47 CFR § 42.6 (“Retention of Telephone Toll Records”), WC Docket No. 17-130 (filed Aug. 4, 2015), <https://ecfsapi.fcc.gov/file/10516108046964/Ma5162.pdf>. On April 24, 2017, petitioners sent a letter to the Commission requesting that the Commission docket the petition and issue a Public Notice for comment. Letter from Access Now et al. to Chairman Ajit Pai, Commissioner Mignon Clyburn, and Commissioner Michael O’Rielly, FCC (filed Apr. 24, 2017), <https://epic.org/privacy/FCC-Data-Retention-Petition-Followup.pdf>.

must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

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- FCC -