

July 6, 2016

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

Re: WC Docket No. 16-106

In the matter of protecting the privacy of customers of broadband and other telecommunications services

Dear Ms. Dortch:

Consumers Union, the policy and advocacy division of Consumer Reports,¹ respectfully submits these reply comments in support of the Commission's proposal to strengthen broadband privacy protections for consumers.

As fixed and mobile Internet access becomes essential to the lives of growing numbers of American consumers, with 74.4 percent of all households as of 2013 reporting Internet use, and 73.4 percent reporting a high-speed connection,² it is increasingly important that consumers be able to rely on privacy protections in their access to the Internet. The Commission should promptly exercise its authority to ensure that effective protections apply to broadband Internet access service (BIAS) providers.

Just as consumers have relied for many years on laws that protect the privacy and security of mail, and later of telegrams and telephone conversations, privacy law must keep current with the technological revolution in communications. The amount of personal information accessible by BIAS providers vastly exceeds, by orders of

¹ Consumers Union is the public policy and advocacy division of Consumer Reports, an expert, independent, nonprofit organization whose mission is to work for a safe, fair, and just marketplace for all consumers and to empower consumers to protect themselves. Consumers Union conducts its policy and advocacy work in the areas of telecommunications reform, health reform, food and product safety, financial reform, and other areas. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

² U.S. Census Bureau, <https://www.census.gov/history/pdf/2013computeruse.pdf>, p. 2.

magnitude, the exposure consumers have traditionally faced with those earlier means of communication. Moreover, as consumers' awareness of their exposure grows, strong privacy and security protections will become increasingly necessary in order for consumers to feel confident and safe using BIAS providers to access the Internet.

With the re-classification of broadband under Title II, alongside telephone service, and the resulting changes in the contours of the regulatory authorities of this Commission and the Federal Trade Commission (FTC), it is important that this Commission act promptly to ensure that it is exercising its authority effectively. The Commission has ample authority under section 222 and other parts of the Communications Act to ensure that broadband Internet access service providers are covered by effective privacy protections.

A BIAS provider has an intimate, all-encompassing picture window into its customers' behavior. In the course of handling packets of customer data, a BIAS provider can obtain extensive insight into its customers' lives, habits, interests, health issues, political views, finances, and much more – and can use the special access afforded to it as a provider of essential communications services to connect this information to a customer's name, address, and phone number, to amass a detailed and comprehensive picture that can be used to profile its customers in ways that are highly intrusive to customer privacy.

As data storage costs continue to shrink, there is less natural disincentive to stop BIAS providers from simply saving all data they transmit, amassing year upon year of wide-ranging intimate, personal, and sensitive information about millions and millions of captive broadband customers, and retaining it indefinitely. The magnitude of these vast data repositories accumulated by BIAS providers in their role as communications utilities is likely to only further mushroom with the onset of the Internet of Things.

In developing consumer privacy protections for broadband Internet access service, the Commission should certainly be informed by the protections previously developed by the FTC, as well as by the protections the Commission has already developed for cable service and wireline and mobile telephone service, as the proposed rule reflects. But the Commission should undertake its own fresh effort to develop robust, state-of-the-art protections for BIAS providers, commensurate with their vast reach, that meet with consumers' needs, expectations, and interests. The protections that apply to BIAS providers should reflect the comprehensive breadth and detail of the information BIAS providers have access to, as well as the lack of meaningful consumer choice in whether to have broadband Internet access and, often, lack of meaningful consumer choice in where to obtain it.³

³ According to a study by the Center for Public Integrity, “[M]ost Americans have a choice of only one or two telecommunications companies for fast service. About 55 percent of U.S. households have just one provider that offers service at 25 megabits per second.” *See* <https://www.publicintegrity.org/2015/04/01/16933/how-broadband-providers-seem-avoid-competition>.

In particular, the desire for BIAS providers to “branch out” and compete with other Internet-based companies in the profitable use and sale of consumer data should not be a reason for Commission forbearance regarding the consumer disclosures and protections they should be required to provide in their role in providing broadband Internet access service. To the extent that BIAS providers are seeking to compete with other companies in providing other services over the Internet, they are free to establish separate, independent affiliates that collect and use consumer information in the same manner as those other companies, subject to the same rules that already apply. But to the extent that BIAS companies might seek a *competitive advantage* over edge providers or other Internet-based companies by virtue of their comprehensive gateway access to personal consumer information, that is but another important reason why consumer privacy protection rules for BIAS providers need to be strong. Consumers may very well prefer not to give their BIAS provider an insider advantage over competing companies in marketing these other services. And consumers should be in control of deciding that.

For this reason, effective consumer privacy protection measures are equally important regardless of whether there is some affiliate relationship between the BIAS provider and the other entity with which it desires to share information.

Effective consumer privacy protection for users of broadband Internet access service means:

- Consumers should be able to get a clear understanding of the information that the BIAS provider will collect, the uses that the BIAS provider will make of it, and the entities that the BIAS provider will give access to it.
- Consumers must have an easy and effective means of deciding whether to consent to the BIAS provider making these collections and uses of their information.
- The provision of BIAS should not be conditioned on consent for any collection or use except as functionally necessary in order to provide broadband Internet access service, and even in those situations, the reason the collection and use is functionally necessary should be clearly explained.
- The BIAS provider should give prompt notice of any data breach, and explain the scope and potential consequences.
- The BIAS provider should be accountable to consumers for any breach.

We are confident that these protections can be secured for consumers without unduly impeding the provision of broadband Internet access service.

Clear Disclosures Are Key to Consumer Understanding, Choice, and Control

In order for consumers to have meaningful choice and control over how a BIAS provider collects and uses the vast amounts of their personal information it has access to,

the BIAS provider should clearly and specifically disclose to consumers – in plain English – what information is to be collected and the ways it will be used. Consumers should have the ability to make their own informed decision about whether to permit each such collection and use.

Particularly in light of the need for the process of obtaining broadband Internet access service to be efficient, the privacy disclosures need to be customer-friendly. Such BIAS disclosures need to be brief enough, and conspicuous enough, that consumers will read them, and need to be clear and specific, and in plain English, so that consumers will understand them. These disclosures should be made in advance of and at the point of sale of the applicable BIAS service, and in advance of any kind of new use of the information or new sharing of it with other entities. And they should be readily available thereafter for easy consumer access and reference.⁴

The plain English disclosures can be supplemented by a link to more detailed, technically accurate descriptions for those who want the more technical details, but the plain English version should be accurate and give consumers a reasonable understanding without needing to consult the technical version.

The fact that the BIAS provider believes a particular collection and use of information is likely to be of benefit to its customers is not reason to exclude that collection and use from the disclosure requirements. For example, the NPRM refers to the use and disclosure of customer phone numbers in order to filter or block unwanted robocalls and robotexts. This has been and continues to be a top advocacy priority of Consumers Union, and we fully support the Commission's efforts to encourage and require providers to enable it for consumers. We still believe BIAS providers should disclose this intended use, however.

Notice of any planned material changes to collection and use policies should be provided in advance of taking effect, to give consumers time to become familiar with the changes and make new informed decisions regarding consent.

Structuring Standardized Disclosures

To make it easier for consumers to read and understand BIAS provider privacy policies, we support the Commission's proposal for standardized disclosures, which all BIAS providers would be required to use, presented in a "consumer-facing privacy dashboard" that would consolidate all privacy-related disclosures, and allow customers to control all of their data decisions in one place.

⁴ In this regard, we agree with the Commission's proposal to require that the disclosures to a consumer should also be translated into another language, in similarly simple, clear, and concise terms, if any part of the information used in marketing broadband Internet access service to that consumer was in that other language. The Commission should clarify that this would be in addition to providing the disclosures in English.

For even greater clarity to consumers, we also recommend that these standardized disclosures be structured so that variations specific to a particular BIAS provider would be conspicuously noted in a separate part of the disclosures. This would enable consumers and consumer advocacy organizations to more effectively monitor and understand the policies in effect, including any differences among BIAS providers.

We recommend that these standardized disclosures be developed in a multi-stakeholder process, including input by consumer organizations as well as BIAS providers large and small, and other experts, and overseen by the Commission. We would welcome the opportunity to be included in that process.

Ensuring Effective Consumer Choice

Consumers must have an easy and effective means of communicating their decision whether to consent to these collections and uses of their information by the BIAS provider who is providing their gateway to the Internet, and they must have a clear understanding of the consequences of their refusal to give consent – and specifically whether such refusal interferes with their ability to obtain high-quality broadband Internet access service. They should have this ability both at the time and point of sale of broadband Internet access service, or any other service or use the BIAS provider is offering or requesting, and they should be readily able to change their decision. The ways to accomplish this should be clear to consumers.

The provision of broadband Internet access service should never be conditioned on the consumer’s consent to any collection or use, except as functionally necessary in order to provide broadband Internet access service, and even in those situations the reason that the collection and use is functionally necessary should be clearly explained. Similarly, “two-tier pricing” – financial inducements to waive privacy rights in exchange for a reduced price for service – should also be prohibited. Low-income consumers are especially vulnerable: for them, sacrificing their privacy to get a discount is by no means a free choice. The Commission should pursue other ways to induce or require BIAS providers to offer service at more affordable rates to lower-income consumers – as it has done with Lifeline phone service.

Ensuring Effective Data Security

Strong security protections are crucial to protecting customer information from breaches. Given their special status in providing Internet access service to subscribers, BIAS providers must be required to follow strict rules to safeguard this information from security risks.

Important elements of an effective BIAS provider data security policy include carefully analyzing data security risks, implementing data security systems that respond to those risks, appropriately training all relevant personnel, regularly performing tests, designating responsible data security officers, having a breach response in place, and

notifying customers promptly if a breach occurs. Data security procedures should be continually improved and strengthened so that they remain state of the art.

Prompt Notification of Breach or Unauthorized Use

Timely data breach notices can help consumers mitigate harm from breach or unauthorized disclosure or use of their personal information. Prompt notice should be required, describing what information was disclosed, assessing the resulting risks, and explaining the remedial measures being taken. This should include a breach by another entity who received the personal information from the BIAS provider as a result of a sale of information or similar commercial transaction engaged in between the BIAS provider and the entity. We support having standardized data breach notification content requirements and standardized notification timetables for BIAS providers – which the FCC should ensure are realistic and practical, based on input from all stakeholders, including BIAS providers.

Legal Accountability for Data Security

To be effective, consumer privacy rights need to be enforceable.

As the entity with the direct relationship with its broadband Internet access service customer, the BIAS provider should be accountable under the law for harm resulting from a data breach, or unauthorized uses that conflict with the consumer's expressed preferences, with respect to personal consumer information it has collected through providing broadband Internet access service. This includes breaches with respect to such information by the BIAS provider's affiliates, contractors, joint venture partners, and other third parties with which it has engaged in a sale of the personal information or a similar commercial transaction. The BIAS provider may have its own legal recourse against the affiliate or contractor or partner or third party, which can also be made part of the contract under which the BIAS provider is sharing data.

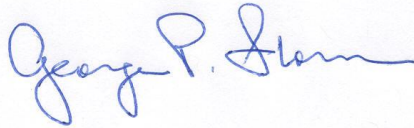
The BIAS provider should remain accountable under the law for any failure to take appropriate measures to ensure the security of customer information.

Consumers should have full recourse to the courts for pursuing these legal rights, in addition to the FCC's informal complaint mechanism. BIAS providers should not be permitted to require consumers to agree to submit claims to arbitration as a condition for receiving that service, or as a condition for any other inducement. Indeed, forcing consumers into arbitration as a condition for such essential service is inherently unfair and deprives them of fundamental legal rights. For consumers, arbitration agreements with BIAS providers to obtain such essential service can only be fair if the consumer freely chooses that route once the dispute has arisen, the stakes are clear, and the consumer has been able to seek legal counsel.

Conclusion

We appreciate the effort the Commission has undertaken in this NPRM. We urge the Commission to move forward as expeditiously as possible, and we stand ready to assist in developing effective privacy protections that will give consumers confidence that they can access essential broadband service for the benefits it provides – to them, and to commerce and the economy – without risking their private lives becoming an open book.

Respectfully,

A handwritten signature in blue ink that reads "George P. Slover". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

George P. Slover
Senior Policy Counsel