Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting the Privacy of Customers of	)	WC Docket No. 16-106
Broadband and Other	)	
Telecommunications Services	)	
	)	

REPLY OF THE COMPETITIVE ENTERPRISE INSTITUTE TO OPPOSITION TO PETITIONS FOR RECONSIDERATION

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1. Introduction

On behalf of the Competitive Enterprise Institute (CEI), we respectfully submit this reply to the opposition the Commission has received in response to petitions urging the agency to reconsider its November 2016 Order regarding the privacy of customers of broadband and other telecommunications services.[1] CEI is a nonprofit public interest organization dedicated to the principles of limited constitutional government and free enterprise. Earlier in this proceeding, CEI submitted joint comments with TechFreedom[2] in which we discussed numerous legal deficiencies and flawed policy determinations in the Notice of Proposed Rulemaking released by the FCC in April 2016.[3] This filing does not address each of the many arguments we raised in our comments last July, but instead focuses on the Commission's failure to consider the statutory constraints on its authority to regulate the practices of broadband providers with respect to their interception and disclosure of the contents of electronic communications. The Commission's Order wrongly concludes that Sections 222 and 705 of the Communications Act authorize the agency to enact regulations on broadband providers that exceed the scope of the Wiretap Act's provisions regarding the interception of electronic communications. To remedy this defect, the FCC should grant the petitions for reconsideration and revise or withdraw the Order.

2. The Communications Act and the Wiretap Act must be construed consistently with respect to broadband providers' interception or use of the contents of subscribers' electronic communications

The Wiretap Act, also referred to as the Electronic Communications Privacy Act, permits a person "not acting under color of law to intercept a wire, oral, or electronic communication … where one of the parties to the communication has given *prior consent* to such interception."[4] The Act also states that "[a] person or entity providing electronic communication service to the public may divulge the *contents* of any such communication … with the lawful consent of the originator or any addressee or intended recipient of such communication."[5] A broadband provider is an "electronic

1. Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, *Report & Order*, 31 FCC Rcd 13911 (Nov. 2, 2016) ["Order"].
2. Reply Comments of TechFreedom and CEI (July 6, 2016), *available at* https://cei.org/sites/default/files/tf_cei_reply_comments_fcc_privacy_nprm_7.6.2016.pdf.
3. Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, *Notice of Proposed Rulemaking*, 31 FCC Rcd 2500 (2016).
4. 18 U.S.C. § 2511(2)(d) (emphasis added).
5. *Id.* § 2511(3)(b)(ii) (emphasis added).

communications service" provider within the meaning of the Wiretap Act.[6] Importantly, Congress codified the Wiretap Act in Title 18 of the United States Code, not in any statute that is administered by the FCC. The Wiretap Act's provisions are enforced by the courts.[7]

In the Order, the Commission relies, among other provisions, on Section 222 of the Communications Act to justify its rules, which restrict when a broadband provider may use the contents of their subscribers' communications.[8] The Order "reject[s] arguments that protecting BIAS content under Section 222 is unnecessary or unlawful because Section 705 of the Act and the Electronic Communications Privacy Act (ECPA)."[9] In a cursory analysis that spans just two paragraphs of the 400-paragraph Order, the FCC contends that "Section 222 [of the Communications Act] complements these other laws in establishing a framework for protecting the content carried by telecommunications carriers."[10]

But neither Section 222's general provision, which imposes on telecommunications carriers a duty to "protect the confidentiality of proprietary information of … customers,"[11] nor its specific provision regarding "customer propriety network information,"[12] authorizes the Commission to regulate how providers intercept or use the *contents* of their subscribers' electronic communications. In fact, Section 222(h) defines customer propriety network information as "information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service."[13] This definition is essentially the opposite of the Wiretap Act's definition of the "contents" of a communication, which "includes any information concerning the substance, purport, or meaning of that communication."[14] Thus, while Section 222 is silent on the scope of the Commission's authority to regulate the contents of subscribers' communications, the Wiretap Act squarely addresses the issue. The Wiretap Act reflects the judgment of Congress

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6. "Traffic on the Internet is electronic communication." Kirch v. Embarq Mgmt. Co., 702 F.3d 1245, 1246 (10th Cir. 2012) (applying 18 U.S.C. § 2511(1) to a broadband provider).
7. *See, e.g.*, *id.* §§ 2520–2521 (providing injunctive relief against illegal interception and authorizing civil actions to recover damages for unlawful interception).
8. Order, 31 FCC Rcd at 13980, para. 177.
9. *Id.* at 13951, para. 104 (footnotes omitted).
10. *Id.* at 13951–13952, paras. 104–105 (footnote omitted).
11. 47 U.S.C. § 222(a).
12. *Id.* § 222(c).
13. *Id.* § 222(h)(1).
14. 18 U.S.C. § 2510(8).

regarding the circumstances under which a provider may intercept or use the contents of electronic communications that are transmitted over its facilities.

The Order also purports to dictate the circumstances in which broadband providers may access and use the *contents* of their subscribers' communications, among other elements of these communications. Specifically, the Order requires providers to obtain "opt-in consent" before "using or sharing sensitive customer PI," which includes the contents of subscriber communications. [15] And the Order imposes numerous conditions on the form and nature of such "opt-in consent."[16]

Similarly, the Wiretap Act requires a subscriber to consent before a provider may intercept or use the contents of that subscriber's electronic communications—but courts have construed this consent requirement very differently than the FCC's formulation laid out in the Order. Under the Wiretap Act, a subscriber "consents" when she expressly or implicitly manifests her assent to such interception. This manifestation may occur in a variety of ways: "In the [the Wiretap Act] milieu as in other settings, consent inheres where a person's behavior manifests acquiescence or a comparable voluntary diminution of his or her otherwise protected rights."[17] In other words, the Wiretap Act allows a person to consent to the interception or use of the contents of his electronic communications in many different ways, rather than prescribing a rigid framework that all providers must follow to secure the requisite consent.

However, the Order conflicts with Congress's decision to authorize providers to intercept or use the contents of their subscribers' communications with the consent of the subscriber *as consent is defined by the Wiretap Act*. Especially in light of Congress's deliberate decision to place the Wiretap Act's core provisions outside of the Communications Act, the FCC simply does not have the authority to rewrite the Wiretap Act to suit its policy preferences.

Section 705 of the Communications Act further bolsters the case against the FCC concocting its own definition of "consent" with respect to broadband providers' use and interception of the contents of subscriber communications. Section 705 imposes various restrictions on the interception of communications in specific circumstances, but none of Section 705's restrictions apply to conduct that is "authorized by chapter

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15. Order, 31 FCC Rcd at 13978, para. 172.
16. *Id.* at 14002–14004, paras. 221–227.
17. Griggs-Ryan v. Smith, 904 F.2d 112, 116 (1st Cir. 1990).

119, title 18."[18] (Chapter 119 of Title 18 is comprised solely of the Wiretap Act's core provisions.)

Based on this language in Section 705, the U.S. Court of Appeals for the Fifth Circuit has held that "each of [Section 705's] prohibitions" are limited "to activities not authorized by the Wiretap Act."[19] "Since Congress added the introductory phrase to [Section 705] at the same time that it enacted the Wiretap Act," the Fifth Circuit wrote, "we believe Congress likely intended to make the statutes consistent."[20] Although this opinion focused on the interaction between Section 705 and the Wiretap Act, the FCC's Order offers no reason to believe that when Congress enacted Section 222 in 1996,[21] it sought to create a new inconsistency between the Communications Act and the Wiretap Act. Neither the legislative history nor the plain text of Section 222 indicate that Congress intended to authorize the FCC to decide for itself what sort of "consent" should be required for a provider to intercept or use the contents of its subscribers' communications.

"[A]n agency may not bootstrap itself into an area in which it has no jurisdiction."[22] The responsibility for enforcing the Wiretap Act rests with our adversarial legal system, supervised by Article III courts—not with the FCC. Therefore, the petitions for reconsideration should be granted, and the Commission should withdraw the Order.

Respectfully submitted,

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18. 47 U.S.C. § 605(a).
19. Edwards v. State Farm Ins. Co., 833 F.2d 535, 539 (5th Cir. 1987).
20. *Id.*
21. Pub. L. No. 104-104, § 702, 110 Stat. 148 (1996).
22. Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990) (citing Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1978)).