

Testimony of
Ben Gilman for
The Maine State Chamber of Commerce
In opposition to
L.D. 964, An Act To Protect the Privacy of Online Customer Information
April 24, 2019

Senator Lawrence, Representative Berry, members of the Joint Standing Committee on Energy, Utilities and Technology, my name is Ben Gilman and I represent the Maine State Chamber of Commerce, a statewide business organization made up of both large and small businesses, here to provide you with our testimony in opposition to **L.D. 964, An Act To Protect the Privacy of Online Customer Information**.

The Maine State Chamber of Commerce supports policies and regulations that spur the investment in and build out of high-speed broadband networks for the benefit of Maine residents, businesses and visitors. The broadband ecosystem is a major contributor to Maine's economic growth and provides the State with tremendous benefits and opportunities. The Maine State Chamber of Commerce does not believe that Maine, as a single state, should take on the issue of data privacy, this is a national issue and should be dealt with at a national level. To have one set of internet regulations for businesses that operate in Maine and another for other states, is not a place we believe Maine should be. No state has passed legislation which regulates ISP data privacy practices. If there is a concern that federal regulators lack the will or legal authority to protect consumer interests and pursue bad actors I would encourage you to read FTC Chair Simons recent remarks on this issue, which I have attached.

The small business economy in Maine depends on internet access and related services. The legislature should be very careful to not pass laws which will have negative unintended consequences on economic activity which is desirable and should be encouraged. LD 946 is so broadly written and so ambiguous that it will have far reaching negative consequences which cannot be understood without careful study and thought.

For example: Virtually all ISPs offer e-mail and have an e-mail home page that customers go to, to check e-mail. Offering advertising on that web page is a common source of revenue for the ISP. These are very desirable advertising opportunities for small businesses like Real Estate brokers or a Bed and Breakfast. B&B's and brokers often buy advertising on these pages because they are geographically relevant. This will no longer be possible unless each time the customer, upon checking their e-mail gives their express affirmative consent. Essentially, the customer will have request to see

advertising. Understandably virtually no one will opt in to receiving advertising which effectively means that this type of advertising will cease resulting in harms to small businesses like realtors in Maine.

LD 946 singles out ISPs but allows other types of internet companies continued use of consumer information, this approach harms more than it helps. The Chamber is concerned that consumers will think they are protected when they aren't.

For example: Consider a simple search for diapers. A consumer goes on line to a search engine and types in cotton diapers. The ISP doesn't know that the consumer searched for cotton diapers because search engines are encrypted. But the search engine is aware of the search parameters. In this example using the most popular search engine the top ten websites offered by the search engine are all https sites which means they are encrypted. So the ISP doesn't know which site the consumer clicks on, although the search engine does. Once on the cotton diaper site the customer reads reviews, clicks on various options and makes a purchase. Again, the ISP has no visibility into the browsing of the consumer as it is all on an encrypted website. But the website knows and so do the data brokers and web optimization companies who operate in the back of the cotton diaper website. Large amounts of the consumers information is being collected and presumably used but none of it by the ISP and likely without the consumer's knowledge or understanding.

One of the reasons, no state has passed ISP only legislation because they have learned that seeking to regulate a minor actor who has increasingly less access to information is problematic without more information. Limiting one actor's access to information when other companies in the internet economy such as data brokers, edge providers, website operators, search engines and application operators have access to the same and more information is of limited value. Many states are wrestling with what, if anything to do about this and many of them are taking a step back to better understand what actual consumer protections are necessary. As an example, Vermont directed its AG to make a study of the issue and come back with recommendations and Rhode Island is engaged in a similar activity. The Chamber supports this approach and believes it is much more likely to result in positive outcomes for consumers.

Thank you for the opportunity to provide you with our testimony.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

**Prepared Remarks of Chairman Joseph J. Simons¹
Free State Foundation Speech at Eleventh Annual Telecom Policy Conference**

March 26, 2019

I am delighted to be here today. Thank you to the Free State Foundation for inviting me to speak at this Eleventh Annual Telecom Policy Conference. The subject matter of many of today's panels—internet policy, telecommunications policy, and privacy and data security—touches on some dynamic areas of our economy. I find the discussions that often take place at conferences like this valuable in asking hard questions, challenging our assumptions, and updating our thinking. Indeed, at the FTC, we also are thinking through some of the same questions in our *Hearings on Competition and Consumer Protection in the 21st Century*. Part of what we are doing is engaging in self-reflection to see how we can use our existing antitrust and consumer-protection enforcement tools most effectively to target harmful conduct in these rapidly changing areas.

Today, I am going to talk about how the FTC's two missions—competition and consumer protection—apply to the internet ecosystem. Recent, important developments make this topic particularly timely. First, in 2018, the FCC repealed the Open Internet Order and passed the Restoring Internet Freedom Order.² The 2018 Order repealed the Open Internet Order's classification of broadband internet service as a telecommunications service, which is

¹ These remarks reflect my own views. They do not necessarily reflect the views of the Commission or any other individual Commissioner.

² See Restoring Internet Freedom, 33 FCC Red 311 (2018).

considered subject to treatment as a “common carrier.” The FTC Act contains an exception for “common carriers subject to the Acts to regulate commerce.”³ By returning broadband service to its original classification as an information service, the Order returned antitrust and consumer protection jurisdiction to the FTC.

Second, in *FTC v. AT&T Mobility*, the Ninth Circuit recognized in an *en banc* decision that common carriers may be subject to FTC enforcement for non-common carrier activities.⁴ This decision, combined with the Restoring Internet Freedom Order, makes it clear that the FTC has authority to protect consumers when internet service providers (ISPs) engage in non-common carrier behavior, such as cable service or video services.

In light of these developments, there has been much discussion about the FTC’s role in overseeing ISP conduct. As part of these discussions, it is important to understand the different roles that the FTC and the FCC play in telecommunications markets. To be clear, the FTC and the FCC are very different in our mandates and our legal authority. The FTC is, principally, a law enforcement agency. It is not a sector regulator like the FCC.

As a law enforcement agency, Congress has charged the FTC with investigating and, when warranted, bringing cases for violations of the FTC Act, which covers both antitrust and consumer protection law. Specifically, we have authority under Section 5 of the FTC Act to sue ISPs, and others, for allegedly anticompetitive conduct or unfair or deceptive practices.

I intend to use our authority aggressively to address violations of the laws we enforce, but there are key differences between conduct prohibited by the FCC’s Open Internet Order, and conduct that the FTC can reach now with our antitrust and consumer protection jurisdiction.

³ 15 U.S.C. § 45(a)(2).

⁴ *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 863-864 (9th Cir. 2018).

First, consider ISP behavior that the FTC may address under the antitrust laws. Antitrust law is sufficiently flexible and dynamic to cover a wide range of activities. However, the laws are limited to prohibiting conduct that is anticompetitive, not simply perceived to be unfair or discriminatory.

In the Open Internet Order, the FCC prohibited certain ISP behavior, such as blocking, throttling, and paid prioritization on essentially a *per se* basis. Now, some conduct, such as horizontal agreements between ISPs to fix prices, allocate markets, or divide customers would be a *per se* antitrust violation. These types of agreements are so manifestly anticompetitive that antitrust law has determined that they are illegal without looking into their effect on prices, quality, or innovation.

But blocking, throttling, or paid prioritization would not be *per se* antitrust violations. Paid prioritization is a type of price discrimination, which is ubiquitous in the economy. For example, think about when you walk into grocery store. Some customers get lower prices because they cut out coupons. Others might get a seniors discount. Others might get 2% off with their credit card. Yet others get discounts because they have a loyalty card with that supermarket.

Those of us who go to the afternoon movie matinees will generally pay less, and those of us willing to show up at a restaurant before 6 pm might get the benefit of a lower priced menu. And of course, let's not forget Happy Hour discounts.

For those of you who live locally, think about the express toll lanes on interstates 95 and 66. Or think about Amtrak's Acela service to New York, which is faster and more expensive than the local trains. Clearly, our transportation authorities think that allowing people to pay more for faster service is at least sometimes beneficial.

Now, of course not all ISP conduct, including paid prioritization, is benign or pro-competitive—some may very well be anticompetitive. Where an ISP excludes certain content, applications, or services, we would engage in a fact-specific analysis to see whether that foreclosure harmed competition through raising rivals' costs or excluding competitors.

Likewise, our consumer protection mission also may bear on ISPs' data transmission activities. Under Section 5 of the FTC Act, we may prosecute unfair or deceptive acts or practices. With respect to deceptive practices, we are concerned about conduct that is likely to mislead reasonable consumers. Our deception authority also focuses on acts or practices that are material, meaning that they are likely to affect a consumer's purchase or use decisions. Simply stated, we have a strong interest in ensuring that companies stand by their promises to consumers.

This is how we have long applied our authority in a variety of areas, and we would review ISPs' activities in the same way. For example, we could take action against ISPs if they block applications without adequately disclosing those practices or mislead consumers about what applications they block or how.

Our consumer protection authority could also apply to throttling. To determine whether particular instances of throttling are deceptive, we would first evaluate what claims an ISP made to consumers about their services, and how those claims are supported. We would look closely at any relevant research and evaluate the study's design, scope, and results, and consider how a study relates to a particular claim.

To evaluate whether a practice was unfair, we would consider whether the alleged throttling had countervailing benefits, and whether there were reasonable steps consumers could

have taken to avoid it. We would also consider consumer injury, the number of consumers affected, and the need to prevent future misconduct.

We have challenged throttling practices before, prior to the FCC's 2015 Open Internet Order. We charged prepaid mobile service provider TracFone Wireless, Inc. with deceptive advertising for promising unlimited data to consumers but not disclosing that it slowed down their service – by between 60%-90% – after they exceeded certain data limits. The company agreed to pay \$40 million in consumer redress to settle those charges.⁵

We are still litigating charges that AT&T Mobility promised consumers unlimited data but then reduced speeds – in some instances by nearly 90% – against consumers who had purchased unlimited data plans.⁶ We believe this conduct was both deceptive and unfair and that it harmed consumers.

We can also challenge deceptive and unfair privacy and security practices by ISPs. For example, in one action against an ISP, the FTC alleged that the company caused substantial consumer injury when it distributed spam, child pornography, malware, and other harmful electronic content.⁷ We investigated whether Verizon Communications unreasonably failed to secure its routers and issued a closing letter in 2014.⁸ And we brought cases against two ISPs under the Fair Credit Reporting Act, alleging that they imposed less favorable terms on consumers who had negative information on their credit reports, without providing required

⁵ *FTC v. TracFone Wireless, Inc.*, No. 15-cv-392 EMC (N.D. Cal. Feb 20, 2015) (consent order), <https://www.ftc.gov/system/files/documents/cases/150223tracfoneorder.pdf>.

⁶ *FTC v. AT&T Mobility LLC*, No. 14-cv-4785-EMC (N.C. Cal. Oct. 28, 2014), <https://www.ftc.gov/system/files/documents/cases/141028attempt.pdf>.

⁷ See FTC Press Release, *FTC Shuts Down Notorious Rogue Internet Service Provider, 3FN Service Specializes in Hosting Spam-Spewing Botnets, Phishing Web sites, Child Pornography, and Other Illegal, Malicious Web Content* (Jun. 4, 2009), <https://www.ftc.gov/news-events/press-releases/2009/06/ftc-shuts-down-notorious-rogue-internet-service-provider-3fn>.

⁸ See Closing Letter to Dana Rosenfeld, Counsel for Verizon Communications, Inc. (Nov. 12, 2014), https://www.ftc.gov/system/files/documents/closing_letters/verizon-communications-inc./141112verizonclosingletter.pdf.

notices under the law. In these cases, we obtained a \$1.9 million fine against Time Warner Cable and a \$2.95 million fine against Sprint.⁹

Despite the fact that we are using all the tools Congress has given us, I note that we could use additional authority in the privacy and data security area. I have urged Congress to enact legislation that would give the FTC three tools: (1) the authority to seek civil penalties for initial privacy and data security violations, which would create an important deterrent effect; (2) targeted APA rulemaking authority that would allow the FTC to keep up with technological developments; and (3) jurisdiction over nonprofits and common carriers. The process of enacting federal privacy legislation will involve difficult policy tradeoffs that I believe are appropriately left to Congress. Regardless of what Congress chooses to enact, I commit to using our extensive expertise and experience to enforce any new legislation vigorously and enthusiastically.

In addition to our enforcement work, we engage in research and policymaking efforts to keep up with privacy developments affecting ISPs. We recently announced that we are using our authority under section 6(b) of the FTC Act to study the privacy practices of ISPs. We have issued orders to seven companies seeking information about their privacy policies, practices, and procedures. In particular, we ask questions about how the ISPs are collecting, using, combining, and disclosing the personal information that they collect about consumers from sources such as providers of fixed and mobile Internet, advertising platforms, and analytic services.

⁹ See FTC Press Release, *Time Warner Cable to Pay \$1.9 Million Penalty for Violating the Risk-Based Pricing Rule* (Dec. 19, 2013), <https://www.ftc.gov/news-events/press-releases/2013/12/time-warner-cable-pay-19-million-penalty-violating-risk-based>; FTC Press Release, *Sprint Will Pay \$2.95 Million Penalty to Settle FTC Charges It Violated Fair Credit Reporting Act* (Oct. 21, 2015), <https://www.ftc.gov/news-events/press-releases/2015/10/sprint-will-pay-295-million-penalty-settle-ftc-charges-it>.

The Commission is actively strengthening its existing expertise in broadband and tech markets, and we remain vigilant in reviewing conduct in this space. On February 26, we launched a Technology Task Force, a team of antitrust attorneys and a Technology Fellow charged with monitoring competition in U.S. technology markets, including the internet ecosystem.¹⁰ Just last week, we held a hearing on “Competition and Consumer Protection Issues in Broadband Markets.”¹¹ The hearing focused on three main topics: 1) what is the current state of broadband markets and technology?; 2) how can the FTC best identify market behavior that may violate the FTC Act?; and 3) once behavior is identified, how can we best use our enforcement authority?

I will end my formal remarks by emphasizing that the FTC will remain active in Internet commerce. Although our statutory framework differs from the 2015 Open Internet Order, we will be able to protect consumers from anticompetitive and unfair or deceptive conduct by ISPs and other firms in this fast-paced industry. I look forward to hearing any questions that you might have. Thank you.

¹⁰ See FTC Press Release, *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets*, (Feb. 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>.

¹¹ Fed. Trade Comm'n, *FTC Hearing #10: Competition and Consumer Protection Issues in U.S. Broadband Markets* (March 20, 2019), <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-10-competition-consumer-protection-21st-century>.