

May 14, 2019

The Honorable Michael F. Doyle, Chair  
The Honorable Robert Latta, Ranking Member  
U.S. House Committee on Energy and Commerce  
Subcommittee on Communications and Technology  
2125 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Doyle and Ranking Member Latta:

We write to you regarding the oversight hearing for the Federal Communications Commission<sup>1</sup> and the critical issue of consumer privacy protection. In EPIC's view, the FCC needs to do far more to protect consumers from "robocalls," location tracking, and the unnecessary collection of their call records.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.<sup>2</sup> For over twenty years, EPIC has worked to ensure that the FCC protects the privacy of American consumers.<sup>3</sup> We are now concerned that the Commission has abdicated one of its most important responsibilities to the American public. The FCC must do more to safeguard American consumers—from the daily deluge of robocalls, from the unnecessary and invasive requirement to maintain detailed call records, and from the rampant mishandling of sensitive cell phone location data.

### *The Commission Has Failed to Protect Consumers Against Robocalls*

Americans are suffering from an epidemic of robocalls. In 2018 alone, it is estimated that 47.8 billion robocalls were made in the United States, an increase of more than 50% over the prior

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<sup>1</sup> *Accountability and Oversight of the Federal Communications Commission*, 116<sup>th</sup> Cong. (2019), H. Comm. on Energy and Commerce, Subcomm. on Communications and Technology (May 15, 2019), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-accountability-and-oversight-of-the-federal-communications>.

<sup>2</sup> See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

<sup>3</sup> See EPIC, *CPNI (Customer Proprietary Network Information)*, <https://epic.org/privacy/cpni/#EPIC> (outlining the history of EPIC's advocacy for consumer privacy rules at the FCC, including two successful campaigns for pro-consumer rule changes); 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); Letter from EPIC to the U.S. House of Representatives Committee on Energy and Commerce on FCC Privacy Rules (June 13, 2016), <https://epic.org/privacy/consumer/EPIC-FCC-Privacy-Rules.pdf>.

year.<sup>4</sup> The Federal Communications Commission is charged with enforcing the Telephone Consumer Protection Act (“TCPA”), the law that Congress passed in 1991 to prevent precisely this problem.<sup>5</sup> The FCC knows of the scope of the problem.<sup>6</sup> But so far the Commission has been unable to stop or even reduce the flow of unwanted calls. And the Commission is simultaneously soliciting proposals from telemarketing industry groups to would weaken the TCPA rules that are supposed to protect consumers from nuisance calls.<sup>7</sup>

EPIC has repeatedly warned the Commission about the need to strengthen, not weaken, privacy protections in the TCPA rules. For example, in response to the FCC’s notice in May 2018, EPIC filed detailed comments explaining why the Commission should not modify the regulations to exempt millions of unwanted calls and leave consumers without legal rights.<sup>8</sup> The Commission has twice sought comment on the question of “what constitutes an ‘automatic telephone dialing system’” under the TCPA.<sup>9</sup> This definition is central to the entire structure of the law, and if the Commission improperly narrows the definition, many consumers will be left without legal protection from unwanted calls. The FCC’s willingness to eliminate consumer protections when we are experiencing an unprecedented increase in robocalls contradicts the agency’s mission and would further the TCPA’s deterrent effect.

***Chairman Pai and the Commissioners should be asked what he is doing to ensure that consumers are protected from unwanted calls and why he is considering proposals to weaken the robocall rules.***

*The Commission Is Proposing to Extend the Unnecessary and Invasive Data Retention Regulation*

The Commission has also failed to take simple steps to protect consumer data by withdrawing an outdated rule that requires all carriers to retain detailed data about customer calls.

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<sup>4</sup> *Nearly 48 Billion Robocalls Made in 2018, According to YouMail Robocall Index*, PR Newswire (Jan. 23, 2019), <https://www.prnewswire.com/news-releases/nearly-48-billion-robocalls-made-in-2018-according-to-youmail-robocall-index-300782638.html>.

<sup>5</sup> 47 U.S.C. § 227.

<sup>6</sup> Fed. Commc’ns Comm’n, *The FCC’s Push to Combat Robocalls & Spoofing* (2019), <https://www.fcc.gov/about-fcc/fcc-initiatives/fccs-push-combat-robocalls-spoofing>.

<sup>7</sup> Public Notice, Fed. Commc’ns Comm’n, *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, 33 FCC Rcd. 4864 (May 14, 2018), <https://www.fcc.gov/document/cgb-seeks-comment-tcpa-light-dc-circuit-decision-aca-intl>.

<sup>8</sup> Comments of EPIC to the Fed. Commc’ns Comm’n, *Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, DA-18-493, CG 02-278, CG 18-152 (June 13, 2018), <https://epic.org/apa/comments/EPIC-FCC-TCPA-June2018.pdf>; Reply Comments of EPIC to the Fed. Commc’ns Comm’n, *Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, DA-18-493, CG 02-278, CG 18-152 (June 28, 2018), <https://epic.org/apa/comments/EPIC-FCC-TCPA-ReplyComments-June2018.pdf>.

<sup>9</sup> Public Notice, 33 FCC Rcd. 4864, *supra*; Public Notice, Fed. Commc’ns Comm’n, *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit’s Marks v. Crunch San Diego, LLC Decision*, DA-18-493, CG 02-278, CG 18-152 (Oct. 3, 2018)

The retention of this personal data creates an ongoing risk to American consumers from criminal hackers and foreign adversaries.

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.<sup>10</sup> EPIC's petition urged the FCC to repeal an outdated rule that requires that telephone records be collected and saved for 18 months.<sup>11</sup> Law enforcement agencies have conceded that the need for the retention of such data on a mass scale is no longer necessary.<sup>12</sup> 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.<sup>13</sup> And the European Union has recently determined that the bulk retention of telephone records violates fundamental rights, raising the real possibility that an inconsistent policy in the United States could lead to disruption in digital trade, similar to the recent "Safe Harbor" dispute.<sup>14</sup>

The EPIC Petition seeks an end to this FCC regulation that places at risk the privacy of users of network services. The Commission docketed EPIC's petition for public comment in 2017. Support for repeal of the data retention regulation is strong. Every comment submitted to the FCC expressed support for repealing this outdated and unnecessary regulation.<sup>15</sup> Yet the Commission has taken no action on EPIC's petition over the last two years. Instead, the Commission recently issued a Notice that it plans to extend the regulation for another three years.<sup>16</sup> This week, EPIC sent comments to the FCC in response to the proposal to extend the rule, again urging the repeal of the data retention regulation.<sup>17</sup> EPIC explained that "the regulation is unduly burdensome, ineffectual, and threatens privacy and security."

***Chairman Pai and the Commissioners should be asked why the FCC is continuing to require telephone companies to store detailed records of all their customers' telephone calls and has also ignored a petition to end the regulation.***

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<sup>10</sup> 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>.

<sup>11</sup> 47 C.F.R. §42.6.

<sup>12</sup> U.S. Dep't of Justice & U.S. Dep't of Homeland Sec., 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.

<sup>13</sup> *Petition to Repeal 47 C.F.R. §42.6*.

<sup>14</sup> 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/](http://curia.europa.eu/jcms/jcms/P_125951/).

<sup>15</sup> 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](https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-130&sort=date_disseminated,DESC).

<sup>16</sup> Notice and Request for Comments, Fed. Commc'ns Comm'n, *Part 42, Sections 42.5, 42.6, 42.7, Preservation of Records of Communications Common Carriers*, 84 Fed. Reg. 9121, 9122 (Mar. 12, 2019).

<sup>17</sup> Comments of EPIC to the Fed. Commc'ns Comm'n, *Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority*, OMB 3060-0076, OMB 3060-0166 (May 13, 2019), <https://epic.org/privacy/FCC-Data-Retention-Comments-20190513.pdf>.

## *The Commission Has Not Protected Consumers' Location Data*

In 2018 the U.S. Supreme Court ruled that cell phone location data is protected under the Fourth Amendment and that the government cannot obtain that data from telephone companies without a warrant.<sup>18</sup> Meanwhile multiple reports over the last two years have revealed that telephone companies have made their customers' location data available to third parties in bulk and without oversight.<sup>19</sup> As Commissioner Geoffrey Starks recently explained, "Wireless companies sell your location data. Federal regulators should stop them."<sup>20</sup> The FCC is responsible for protecting the privacy of "customer proprietary network information,"<sup>21</sup> yet the Commission has done absolutely nothing to protect cell phone location data. This data falls within the scope of the FCC's privacy authority, and Congress should demand that the agency protect consumers.

EPIC has long advocated for strong consumer protections under the Communications Act. After Congress modernized the law in 1996, EPIC successfully petitioned the FCC to adopt pro-consumer rules regarding the authorization for marking disclosures.<sup>22</sup> EPIC successfully petitioned the agency in 2005 to update its rules to protect access to customer information by "pretexters" and to improve carriers' data security practices.<sup>23</sup> In the 2016 CPNI Rulemaking, EPIC urged the Commission 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.<sup>24</sup> However, the FCC adopted a modest rule that only applied to ISPs.<sup>25</sup> The 2016 CPNI rules were subsequently repealed by Congress.<sup>26</sup>

The Commission has never conducted a rulemaking or otherwise established a comprehensive framework for protecting the privacy of customers' cell phone location data. The

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<sup>18</sup> *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

<sup>19</sup> Jennifer Valentino-DeVries, *Service Meant to Monitor Inmates' Calls Could Track You, Too*, N.Y. Times (May 10, 2018), <https://www.nytimes.com/2018/05/10/technology/cellphone-tracking-law-enforcement.html>; Joseph Cox, *Hacker Breaches Securus, the Company That Helps Cops Track Phones Across the US*, Motherboard (May 16, 2018), [https://motherboard.vice.com/en\\_us/article/gykgv9/securus-phone-tracking-company-hacked](https://motherboard.vice.com/en_us/article/gykgv9/securus-phone-tracking-company-hacked); Joseph Cox, *Verizon Says It Will Stop Selling US Phone Data That Ended Up in the Hands of Cops*, Motherboard (June 19, 2018), [https://motherboard.vice.com/en\\_us/article/nek87/verizon-stop-selling-phone-location-data-wyden-securus-locationsmart](https://motherboard.vice.com/en_us/article/nek87/verizon-stop-selling-phone-location-data-wyden-securus-locationsmart); Joseph Cox, *I Gave a Bounty Hunter \$300. Then He Located Our Phone*, Motherboard (Jan. 8, 2019), [https://motherboard.vice.com/en\\_us/article/nepxbz/i-gave-a-bounty-hunter-300-dollars-located-phone-microbilt-zumigo-tmobile](https://motherboard.vice.com/en_us/article/nepxbz/i-gave-a-bounty-hunter-300-dollars-located-phone-microbilt-zumigo-tmobile); Joseph Cox, *Hundreds of Bounty Hunters Had Access to AT&T, T-Mobile, and Sprint Customer Location Data for Years*, Motherboard (Feb. 6, 2019), [https://motherboard.vice.com/en\\_us/article/43z3dn/hundreds-bounty-hunters-att-tmobile-sprint-customer-location-data-years](https://motherboard.vice.com/en_us/article/43z3dn/hundreds-bounty-hunters-att-tmobile-sprint-customer-location-data-years).

<sup>20</sup> Geoffrey Starks, *Why It's So Easy for a Bounty Hunter to Find You*,

<sup>21</sup> 47 U.S.C. § 222.

<sup>22</sup> See EPIC, *CPNI (Customer Proprietary Network Information)* (2018).

<sup>23</sup> Petition of EPIC for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC 96-115 (Aug. 30, 2005), <https://epic.org/privacy/iei/cpnipet.html>; see also *Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 96 (D.C. Cir. 2009) (affirming the updated rules).

<sup>24</sup> 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.

<sup>25</sup> Fed. Comm'ns Comm'n, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, 81 Fed. Reg. 87274 (Dec. 2, 2016).

<sup>26</sup> Joint Resolution, Pub. L. 115-22, 131 Stat. 88 (2017).

FCC has never even addressed whether all types of cell phone location data are protected under the CPNI statute. Instead of moving forward to safeguard consumers, the FCC has been moving backwards, leaving users of new communications services exposed to unprecedented levels of identity theft, financial fraud, and security breaches.<sup>27</sup>

***Chairman Pai and the Commissioners should be asked what the FCC will do to ensure that consumers' location data is protected, including whether the Commission plans to issue updated rules under 47 U.S.C. § 222.***

We ask that this letter be submitted into the hearing record. EPIC looks forward to working with the Subcommittee on Communications and Technology on this issue.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg  
EPIC President

/s/ Alan Butler

Alan Butler  
EPIC Senior Counsel

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald  
EPIC Policy Director

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<sup>27</sup> Fed. Trade Comm'n, *Consumer Sentinel Network Data Book*, Feb. 2019, <https://www.ftc.gov/reports/consumer-sentinel-network-data-book-2018>.