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MAY 27 2016

WASHINGTON

Tribe: FCC Broadband Privacy Proposal Violates First Amendment

NCTA, others commission paper from constitutional scholar

5/27/2016 11:46:00 AM Eastern



By John Eggerton

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ISPs wired and wireless **have submitted a paper** to the FCC by constitutional scholar Laurence Tribe that says the commission's broadband privacy proposal threatens speech rights.

The National Cable & Telecommunications Association, CTIA and USTelecom commissioned the paper, which they submitted Friday, the deadline for initial comments in the proceeding.

"The FCC's proposed rules would violate the First Amendment," Tribe concluded. "At minimum, they raise a host of grave constitutional questions and should not be adopted."

The FCC is proposing to require ISPs to get affirmative (opt in) permission from subs to share information with third parties in most instances, a requirement not placed on edge providers like Google and Facebook for their own data collection and monetizing.

Tribe is a voice of experience on the CPNI (customer proprietary network information) issue, the groups point out, having successfully challenged the voice CPNI order in US West Communications, Inc. v. FCC.

He says the FCC proposal clearly triggers First Amendment scrutiny and clearly does not fare well in that examination.

"The proposal runs afoul of fundamental First Amendment limits on the FCC's authority to regulate customer information," he said.

Tribe says the proposal restricts "a great deal of speech" and draws "impermissible content-based distinctions" based on what marketers say.

In US West, he points out, the sharing of CPNI with affiliates for marketing purposes was considered speech and the FCC's opt in regime for voice CPNI "failed to satisfy intermediate First Amendment scrutiny."

He says the FCC's proposed new rules for broadband CPNI are, if anything, even more problematic. He says the rules fail First Amendment scrutiny for another reason: "It singles out broadband ISPs for extremely burdensome regulation while ignoring the fact that much of the same information is available to and routinely used by social media companies, web browsers,



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The FCC has signaled it will move to three,

search engines, data brokers and other digital platforms."

He says he is not saying that the Googles and Amazons of the world can or should be more regulated, even though they are the largest collectors and users of broadband data, but that the asymmetry, "shows that the FCC's proposed rules are not tailored to any important governmental interest," which any restriction on speech must be.

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