THE ISP/ECTR WORKAROUND: THE NEW BROADBAND RULES MAY BE NOT SO MUCH WHAT THEY'LL SELL, BUT WHAT THEY GIVE AWAY

Senator Ed Markey and seven of his colleagues (Franken, Blumenthal, Warren, Sanders, Wyden, Leahy, and Van Hollen) just sent letters to major ISP providers (AT&T, Comcast, Charter, Verizon, Sprint, T-Mobile, and CenturyLink, the latter of which I find most interesting for the purposes of this post) regarding what practices they'll follow in the wake of Congressional Review Act overturning President Obama's broadband privacy rules.

The letters focus on a lot of consumer right issues — such as whether customers will learn of any changes in a provider's privacy policy, the ability to opt in or out, forced arbitration, data breach provisions, and de-identification. That's all great stuff and I look forward to the answers Markey gets; the information will be as useful as the information he has obtained from wireless providers about information they keep.

But towards the end, the letters include what I'll call "Wyden questions," not because I know they came from him, but because they address issues about which he has long been obsessed. There's one on location, reflecting a concern that providers might presume consent from customers, resulting in the sharing of their location data with third parties.

> Under Section 222 of the Communications Act, carriers may not disclose subscriber location information without the "express prior authorization of the

> customer". Over each of the last three years, how many times did your company disclose to third parties individually identifiable customer location data or other Customer Proprietary Network Information with a customer's express prior authorization? Does your company obtain the consent from the subscriber directly? If not, and the third party obtains the consent (or claims they do), do you request or retain a copy of documentation showing that the customer provided such consent?

More interesting still is the question asking whether providers would retain and provide — in response to a National Security Letter — "netflow" records.

> Many ISPs retain so called "netflow" records, related to their customers' internet usage. Do you retain netflow records for your customers' web browsing activity? If so, for how long do you retain them? Will you disclose netflow records pursuant to a National Security Letter, or only court orders?

Remember, on several occasions last year, Republicans tried to change the rules of National Security Letters so as to permit the FBI to demand providers to turn over "electronic communications transactional records" (ECTRs) with just a National Security Letter. The FBI always asks for ECTRs on NSLs, but a number of providers started refusing to turn them over in the wake of a 2008 OLC decision stating they weren't included under the law. And Republicans have been trying to force through language that would permit FBI to always obtain such things.

While the discussion about ECTRs started by focusing on email and then moved to URLs, the possibility that FBI had been and wanted to obtain netflow data had been made apparent by — among other things — Nick Merrill's efforts to

declassify the NSL he received in 2004. As he described in a 2015 declaration,

> Electronic communication service providers can also record internet "NetFlow" data. This data consists of a set of packets that travel between two points. Routers can be set to automatically record a list of all the NetFlows that they see, or all the NetFlows to or from a specific IP ,address. This NetFlow data can essentially provide a complete history of each electronic communications service used by a particular Internet user.

So in effect, this question (whether or not it comes from Wyden) would reflect a concern that that would become available if these providers were willing to respond to FBI's requests for ECTRs, and may remain widely available because of the change in the broadband rules. It also reminds me of Wyden's neverending quest to liberate an OLC memo John Yoo wrote as part of Stellar Wind, but which purportedly pertains to cybersecurity.

In wake of the broadband rule change, AT&T, Verizon, and Comcast (but not, for example, CenturyLink) have assured customers they won't change their practices and won't be selling individual customers' data.

But I'm not seeing any of the providers making assurances about what they'll be giving away to the government.