December 4, 2017

Chairman Ajit Pai  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C.

Dear Chairman Pai:

On behalf of the City of New York, the undersigned consumer advocacy organizations, digital divide advocacy organizations, rural advocacy organizations, and local governments, Public Knowledge submits this letter strongly urging that you delay a vote on the draft “Restoring Internet Freedom” Order (Draft Order) until resolution of the pending en banc review in FTC v. AT&T Mobility.¹ Rushing to a vote before the Ninth Circuit resolves this decision cavalierly risks the purported safeguards that you and other supporters of the Draft Order have repeatedly declared will protect consumers from abusive or anti-competitive practices.

The Draft Order proposes downgrading broadband from a critical “telecommunications service” to a mere “information service.” Not only does the Draft Order use this downgrade as a justification for eliminating the net neutrality protections first adopted more than 10 years ago by the George W. Bush Administration under Republican Chairman Kevin Martin,² but the Draft Order proposes to eliminate FCC broadband consumer protection regulations that have been in place since Republican Chairman Michael Powell initially classified cable modem service as an “information service” in 2002.³ The Draft Order justifies this remarkable reversal of nearly 20 years of bipartisan consensus with the reassurance that the Federal Trade Commission (FTC) will assume this role.

Astoundingly, after committing the entire future of consumer protection from broadband access providers to the FTC, the draft Order cavalierly dismisses the ongoing litigation that deprived the FTC of any jurisdiction to carry out the job the Draft Order thrust upon it. To the contrary, the cavalier way in which the Draft

¹ FTC v. AT&T Mobility LLC, 835 F.3d 993 (9th Cir. 2016), reh’g en banc granted, No. 15-16585, 2017 WL 1856836 (9th Cir. May 9, 2017).
Order dismisses this concern\(^4\) raises the question as to whether the proposal takes even its own fig leaf of consumer protection seriously. The question is not, as the Draft Order seems to imagine, whether the panel decision remains in effect. The question that should concern the Commission is whether or not the en banc panel will likewise deprive the FTC of jurisdiction over broadband access providers despite being downgraded to an “information service.”

As Acting General Counsel Nick Degani made clear in an attempted filing with the Ninth Circuit following oral argument,\(^5\) should the Ninth Circuit find for AT&T Mobility, the FCC would have no authority to protect consumers following adoption of the Draft Order. A vote to approve the Draft Order, followed by a decision favorable to AT&T Mobility by the Ninth Circuit, would therefore create a “regulatory gap” that would leave consumers utterly unprotected.

This potential regulatory gap is further compounded by the Draft Order’s purported preemption of any state regulations the FCC deems “incompatible” with the newly announced “deregulatory” federal policy. Although the Draft Order is vague as to what, precisely, the FCC is preemting, it would appear from context that it includes state consumer protection laws. In short, the FCC has decided to put all remaining consumer protection eggs in one basket, but cannot be troubled to wait until the Ninth Circuit affirms that this approach is actually consistent with the FTC’s own jurisdictional statute.

Given the enormous danger to consumers of losing all protections should the Ninth Circuit decide to affirm the panel decision and side with AT&T Mobility, the FCC should delay a vote until the en banc panel of the Ninth Circuit issues its decision. This modest delay is certainly worthwhile to ensure that consumers will continue to enjoy at least some token protections if the Commission adopts the Draft Order. By contrast, even assuming for the sake of argument that net neutrality, privacy protection and other existing protections depress investment in the manner described by the Draft Order, no one has suggested that this problem has any particular urgency. To the contrary, even the most dire predictions relied upon by the Draft Order point to no immediate crisis that requires a vote as quickly as possible. We therefore strongly urge that you delay any vote downgrading broadband access to an information service, or otherwise altering existing net neutrality rules and other consumer protections, until the Ninth Circuit issues its opinion.

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\(^4\) See Draft Order at ¶180.
To conclude, you and supporters of your proposal insist that consumers will still remain adequately protected following adoption of your Draft Order because the FTC will have jurisdiction to address consumer concerns. If you are sincere in this commitment, than basic prudence requires you to wait until the Ninth Circuit issues its opinion. To do otherwise puts even the most basic consumer protections for broadband subscribers at risk.

Sincerely,

Harold Feld  
Senior Vice President  
Public Knowledge

Miguel Gamiño Jr.  
Chief Technology Officer  
City of New York

Corynne McSherry  
Legal Director  
Electronic Frontier Foundation

Jeffery Chester  
President  
Center for Digital Democracy

Christopher Mitchell  
Director, Community Broadband Networks  
Institute for Local Self-Reliance

Susan Grant  
Director of Consumer Protection And Privacy  
Consumer Federation of America

Beth Givens  
Executive Director  
Privacy Rights Clearinghouse

John Breyault  
Vice President, Public Policy, Telecommunications, and Fraud  
National Consumers League

Carmen Scurato  
Director, Policy & Legal Affairs  
National Hispanic Media Coalition

Ferras Vinh  
Policy Counsel  
Center for Democracy and Technology

Tracy Rosenberg  
Executive Director  
Media Alliance

Linda Sherry  
Director, National Priorities  
Consumer Action

John M. Simpson  
Privacy and Technology Project Director  
Consumer Watchdog

Vinhcent Le  
Telecommunications & Technology Legal Counsel  
The Greenlining Institute
Dee Davis
President
Center for Rural Strategies

Angela Siefer
Executive Director
National Digital Inclusion Alliance

Mimi Pickering
Appalshop, Inc.

Olivia Wein
The National Consumer Law Center on behalf of its low-income consumers

Anthony P. Falzarano
Mayor
Town of Putnam, CT

Matthew Rantanen
Director of Technology,
Southern California Tribal Chairmen’s Association

Daniel Noyes
Co-Executive Director
Tech Goes Home

Tom Cytron-Hysom,
Facilitator,
St. Paul Community Literacy Consortium

Adrianne B. Furniss
Executive Director
Benton Foundation

Beth O’Connor
Executive Director
Virginia Rural Health Association

Eze Redwood
President
Rise Fast

Connie Stewart
Executive Director
California Center For Rural Policy

Rita Hamilton
City Librarian
Phoenix Public Library

Sean McLaughlin
Executive Director
Access Humboldt

Tom Gerber
Director of Information Technology
Housing Authority of the County of San Joaquin

Trish Steel
Chair of the Executive Committee
Broadband Alliance of Mendocino County

Bill Rappel
Director of Strategic Partnerships
PowerMyLearning

Lazone Grays, Jr.
President/CEO
IBSA, Inc.

Susan Corbett
CEO
Axiom

Aaron Wilkins
CFO
Human-I-T
Sara Rasmussen  
Digital Inclusion Manager  
Free Geek

Jim Tobias  
President  
Inclutech

Alan Inouye  
Director of Public Policy  
American Library Association

Tom FitzGerald  
Director  
Kentucky Resources Council, Inc.

Kevin Zeese & Margaret Flowers  
Co-directors  
Popular Resistance

Jay April  
President and CEO  
Akaku Maui Community Media

Molly De Blanc  
Campaign Manager  
Free Software Foundation