

April 25, 2017

The Honorable John Thune
Chairman
Senate Commerce Committee
Dirksen Senate Office Building 512
Washington, D.C. 20510

The Honorable Bill Nelson
Ranking Member
Senate Commerce Committee
Hart Senate Office Building 425
Washington, D.C. 20510

The Honorable Greg Walden
Chairman
Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Frank Pallone
Ranking Member
Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Thune, Chairman Walden, Ranking Member Nelson, and Ranking Member Pallone:

We write expressing grave concerns regarding a reported but undisclosed plan by the Federal Communications Commission (FCC). Based on media reports of the FCC Chairman's off-the-record meeting with broadband industry representatives, it is our understanding that the FCC intends to surrender the agency's legal authority over cable and telephone companies in exchange for unenforceable commitments.¹ Such an approach is not only unworkable as a practical and legal matter, but would also be devastating for Internet freedom, economic opportunity, and innovation.

The undisclosed FCC plan appears to rely on the Federal Trade Commission (FTC) to substitute as the consumer protection agency to enforce network neutrality after the FCC reclassifies Internet Service Providers (ISPs) as "information services" under the Communications Act.

This plan has several drawbacks and pitfalls.

First, the FTC lacks the ability to create rules that address the highly technical and quickly evolving practices of the industry.

Second, thanks to a recent appellate court decision the FTC does currently not have any jurisdiction over telephone companies such as AT&T and Verizon in the states of Oregon, Arizona, Alaska, Hawaii, California, Idaho, Montana, Nevada, and Washington.² This will still be the case whether or not their broadband service is considered a "telecommunications service" under Title II of the Communications Act.³ Telecommunication companies will no

¹ Rich McCormick, *FCC Head Ajit Pai Reportedly Outlines Plans to Roll Back Net Neutrality Rules*, Apr. 7, 2017, THE VERGE, available at <http://www.theverge.com/2017/4/7/15215316/fcc-ajit-pai-net-neutrality-title-ii-plans-roll-back>.

² *FTC v. AT&T Mobility*, 835 F.3d 993 (9th Cir. 2016)

³ *Id.* (the court held that "because we conclude that the common carrier exemption is a *status-based* exemption that excludes AT&T from section 5's coverage, we do not need to address AT&T's remaining arguments

doubt seek to extend this legal interpretation to other parts of the country.⁴ Thus, the result of reversing the classification would be that neither agency would have the power to adopt and enforce effective Net Neutrality rules preserving access to the Open Internet. It would also create illogical discrepancies in the legal regime governing Internet access based on geography and whether the provider also operates a common carrier service such as telephone service, such that they could take advantage of the loophole created by the 2016 court decision.

Third, there is an obvious flaw with basing network neutrality protection on the FTC's ability to enforce written pledges by cable and telephone industry. Nothing prevents cable and telephone companies from altering their pledges over time to try to reshape the Internet, charge higher prices, or invade the privacy of their customers⁵ in order to effectively avoid triggering FTC enforcement. In short, Americans are being asked to substitute clear rules for promises that do not have to be kept and would provide a false sense of protection as a practical matter.

Rather than rely on empty promises, the law today requires Internet Service Providers (ISPs) to operate their networks in an open and neutral manner in keeping with FCC policies that both Republican- and Democratic-led Commissions have supported. Such an approach has ensured that businesses, regardless of size, can compete on a level playing field and that any American can effectively start a home business with only ingenuity and a broadband connection.

The law further grants any online business that must interconnect the right to formally complain to the FCC should the cable or telephone company engage in price gouging or other economically harmful activity, ensuring that high speed broadband providers cannot exert monopoly power in markets where they are the sole access point for consumers and businesses.⁶ These and other legal protections for online commercial activity are at risk should the FCC's plan move forward.

regarding overlapping regulation and the effect of the FCC's Reclassification Order. The common carrier exemption in section 5 of the FTC Act carves out a group of entities based on their status as common carriers. Those entities are not covered by section 5 even as to non-common carrier activities. Because AT&T was a common carrier, it cannot be liable for violations alleged by the FTC (emphasis added)."

⁴ The *AT&T Mobility* decision already has potential national implications. Any national company with a common carrier status seeking to defeat FTC enforcement will attempt to have their case heard in the 9th Circuit to shield their activities from FTC oversight.

⁵ Several Members of Congress recently issued a letter to the FCC urging the agency to hold broadband companies to their privacy commitments under its remaining Title II authority after Congress repealed the FCC broadband privacy rules. Should the FCC proceed in relinquishing its legal authority over broadband companies while the status based prohibition that applies to telephone companies remain in place for states bound by the *AT&T Mobility* circuit court decision, there will be no federal enforcer for broadband privacy for the states they represent. See *House GOP Urges FCC to Fulfill Data Privacy Promises to Consumers*, Apr. 7, 2017, available at <https://energycommerce.house.gov/news-center/press-releases/house-gop-urges-fcc-fulfill-data-privacy-promises-consumers>.

⁶ *Protecting and Promoting the Open Internet*, 47 CFR 8, available at <https://www.federalregister.gov/documents/2015/04/13/2015-07841/protecting-and-promoting-the-open-internet>; See also 47 U.S.C. § 251 (the FCC currently has authority to address disputes between ISPs and any online entity that must connect with their network in order to gain access to users).

Therefore, we strongly urge your Committees to hold oversight hearings before any plan of this nature is implemented to fully vet and understand the ramifications of what is being proposed. Lastly, if the goal of the FCC is to effectively hand over the future of the Internet to the cable and telephone industry and abandon its duty to protect the public interest, we ask that you oppose such a plan.

Sincerely,

Electronic Frontier Foundation
Color of Change
Public Knowledge
Center for Media Justice
Writers Guild of America, West
Writers Guild of America, East
Free Press Action Fund
New America's Open Technology Institute
Fight for the Future
Demand Progress
18MillionRising.org
Common Cause
OpenMedia
Open MIC
United Church of Christ, OC Inc.
Faithful Internet
Media Mobilizing Project
Daily Kos
Free Software Foundation
Association of College & Research Libraries
American Library Association