ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

March 7, 2017

Senator John Thune
Chairman, U.S. Senate Committee on
Commerce, Science, & Transportation
512 Dirksen Senate Office Building
Washington, DC 20510

Senator Bill Nelson
Ranking Member, U.S. Senate Committee
on Commerce, Science, & Transportation
428 Hart Senate Office Building
Washington, DC 20510

Re: March 8, 2017 Oversight of the Federal Communications Commission Hearing

Dear Chairman Thune and Ranking Member Nelson:

Consumers Union, the policy and mobilization arm of Consumer Reports,[1] encourages you to consider the following topics for discussion in advance of the Federal Communications Commission (FCC) oversight hearing scheduled for March 8, 2017. This hearing provides a unique opportunity to learn what newly-appointed Chairman Ajit Pai's agenda is for the Commission, and whether his views on policy matters are aligned with the best interests of consumers.

Perhaps no other sector of the economy has been more dramatically transformed in the past twenty-five years than telecommunications. Just a few decades ago, telecom to the average consumer meant nothing more than picking up the phone and calling someone, or maybe using a fax machine in the office. Only a select few of us were dabbling with the internet or sending emails.

Telecommunications in the early 21st century is all about connecting to the world around us—with friends, strangers, movements, information, art, ideas, and more. We can stream video via YouTube or Netflix, buy just about anything from Amazon or eBay, book an apartment overseas via Airbnb, post updates and organize rallies on Facebook, share photos on Instagram, hail a ride from a stranger via Uber or Lyft, or have a face-to-face chat with a friend on our smartphones. When we encounter something we don't know, we "Google it" or "look it up on Wikipedia" and seconds later, we have our answer. Telecom today means we truly have the world at our fingertips.

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[1] Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of telecommunications, health care, food and product safety, energy, and financial services, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumers Reports has over eight million subscribers to its magazine, website, and other publications.

These advancements did not magically happen sometime since the mid-1990s. Though both politicians and activists demanded an internet "free" from regulation, the fact is that government carefully tended the rise of a diverse internet full of choices—good choices—for consumers. By favoring competition over consolidation and common sense rules of the road instead of unbridled commercialization, policymakers fostered a rich and robust telecommunications industry and a vibrant, open internet that is changing our lives for the better every day.

Such smart decisions by government played a role and must continue to do so to protect consumers in the new world of dizzying telecom inventions, and to guarantee a fair marketplace where the next great idea can flourish. Increased consolidation and industry calls for unwarranted deregulation pose challenges to the level playing field that benefits consumers. We at Consumers Union recognize the crucial role the FCC plays in the telecommunications sector, and we urge you to ensure the hearing is an opportunity to raise the critical consumer issues we describe in detail below.

The Clear Need to Protect the FCC's Broadband Privacy Rules

The FCC made history last October when it adopted consumer-friendly privacy rules that give consumers more control over how their information is collected by internet service providers (ISPs). Said another way, consumers can decide whether an ISP can collect a treasure trove of consumer information, whether it is a web browsing history or the apps a consumer may have on a smartphone. We believe the rules are simple, reasonable, and straightforward.

ISPs, by virtue of their position as gatekeepers to everything on the internet, enjoy a unique window into consumers' online activities. Data including websites consumers visit, videos viewed, and messages sent is very valuable. Small wonder, then, that ISPs are working so hard to have the FCC's new privacy rules thrown out, either through use of the Congressional Review Act or through the reconsideration process at the Commission. But we should make no mistake: abandoning the FCC's new privacy rules is about what benefits big cable companies and not about what is best for consumers.

Unfortunately, one of Chairman Pai's first anticipated actions at the FCC is to unravel these rules. Doing so would clearly be choosing corporations over consumers. Chairman Pai said last week that he will seek to harmonize the FCC's privacy rules with those of the Federal Trade Commission (FTC).[2] Moreover, he claimed consumers were "stripped" of the FTC's privacy

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[2] Statement, Office of Chairman Pai, *FCC Chairman & FTC Chairman on Protecting Americans' Online Privacy* (March 1, 2017), https://www.fcc.gov/document/fcc-chairman-ftc-chairman-protecting-americans-online-privacy

protections in 2015, when ISPs were reclassified as common carriers under Title II by the FCC.[3] Lacking is any mention that the FCC made this change in order to secure the legal footing to enact net neutrality rules. The Chairman also failed to mention the fact that the FCC's rules on broadband privacy were adopted to protect consumers' privacy in the wake of any losses experienced after reclassification.

Chairman Pai has indicated that he believes "jurisdiction over broadband providers' privacy and data security practices should be returned to the FTC, the nation's expert agency with respect to these important subjects,"[4] even though the FTC currently possesses *no* jurisdiction over the vast majority of ISPs thanks to the common carrier exemption—an exemption made stricter by the Ninth Circuit Court of Appeals in last year's *AT&T Mobility* case.[5]

This is such a poor solution that it amounts to no solution at all. For the FTC to regain jurisdiction over the privacy practices of ISPs, the FCC would first have to scrap Title II reclassification—not an easy task which would be both time-consuming and subject to judicial review, and jeopardize the legal grounding of the *2015 Open Internet Order*. Congress, in turn, would have to pass legislation to remove the common carrier exemption, thus granting the FTC jurisdiction over those ISPs who are common carriers. We are skeptical Congress would take such an action. Finally, the FTC does not enjoy the same robust rulemaking authority that the FCC does. As a result, consumers would have to wait for something bad to happen before the FTC would step in to remedy a violation of privacy rights.

Though Chairman Pai's remarks express concern over the "stripped" privacy rights of consumers and the need to fill the "consumer protection gap created by the FCC in 2015,"[6] this ignores the stark reality that the FCC did just that last October by enacting strong rules which favor consumers over corporations. Chairman Pai also fails to acknowledge that the FCC's privacy rules are stronger than the FTC's guidelines. Any fondness for the FTC's approach to privacy is merely support for dramatically weaker privacy protections favored by most corporations.

There is no question that consumers favor the FCC's current broadband privacy rules. Consumers Union launched an online petition drive last month in support of the Commission's strong rules. To date, close to 50,000 consumers have signed the petition and the number is growing. When asked last week to submit comments to the FCC in opposition to industry's petitions of reconsideration, just under 9,000 comments were filed in a matter of days. Consumers

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[3] Id.
[4] Id.
[5] *Federal Trade Commission v. AT&T Mobility LLC,* ___F. Supp. 3d___ No.15-16585 (9th Cir. 2016)
[6] Statement, Office of Chairman Pai, *FCC Chairman & FTC Chairman on Protecting Americans' Online Privacy* (March 1, 2017), https://www.fcc.gov/document/fcc-chairman-ftc-chairman-protecting-americans-online-privacy

care about privacy and want the strong privacy protections afforded to the them by the FCC. Any removal or watering down of those rules would represent the destruction of simple privacy protections for consumers.

We urge you to ask Chairman Pai and his colleagues how favoring the FTC's approach to privacy enforcement is anything less than a weakening of the current FCC broadband privacy rules, and to inquire about the many steps needed for the FTC to exercise comparable jurisdiction over issues critical to consumer privacy.

At Risk: Net Neutrality and the 2015 Open Internet Order

Consumers Union has long been a champion of strong net neutrality rules to ensure non-discrimination of internet traffic, and to prevent throttling or paid prioritization of web content. We supported the adoption of the FCC's *2015 Open Internet Order* and will oppose any attempt by Congress or the Commission to weaken or abolish the rules contained within the *Order*.

The *2015 Open Internet Order* faces an uncertain future. Despite overwhelming consumer support for net neutrality rules, many Republicans in Congress have vowed to overturn the *Order* via legislation. At the FCC, Chairman Pai and Commissioner O'Reilly dissented to the *Order's* passage, and thus, many expect they will act to dismantle it in the future.

In support of this position, Chairman Pai's asserted that: "after the FCC embraced utility-style regulation, the United States experienced the first-ever decline in broadband investment outside of a recession. In fact, broadband investment remains lower today than it was when the FCC changed course in 2015."[7] His statement suggests the FCC's net neutrality rules are stifling investment into broadband services. and therefore, the rules should be scrapped. However, thanks to an investigation of this claim by colleagues at *Consumerist*, we now know the facts do not support Chairman's Pai claim.

According to a February 28, 2017, *Consumerist* article, major broadband providers including Comcast, AT&T, Verizon, CenturyLink, and Charter have all spent the same or more on capital expenditures in 2016 since 2014—such spending does not represent a decline in investment.[8] Broadband backbone providers also increased their capital investments since the *2015 Open Internet Order* was adopted. For example, Level 3 Communications spent $1.33 billion in

[7] Ajit Pai, *Remarks Of Federal Communications Commission Chairman Ajit Pai At The Mobile World Congress* (speech, Barcelona, Spain, February 28, 2017), https://www.fcc.gov/document/chairman-pais-keynote-mobile-world-congress-barcelona

[8] Chris Morran, *FCC Chair Claims Broadband Investment At Historic Low Level Because Of Net Neutrality; That's Not What The Numbers Say*, CONSUMERIST.COM (Feb. 28, 2017), http://consumerist.com/2017/02/28/fcc-chair-claims-broadband-investment-at-historic-low-level-because-of-net-neutrality-thats-not-what-the-numbers-say/

2016, more than it spent in either 2015 ($1.23 billion) or 2014 ($1.25 billion). Cogent Communications spent $45.2 million last year, up from $35.6 million in 2015.[9] Again, these are investment *increases*, not declines.

We encourage you to ask Chairman Pai where the facts he cited came from with regard to the historically low levels of broadband investment that he uses as a justification to scuttle the FCC's net neutrality rules. We also ask you to investigate his plans and thinking with regard to net neutrality.

Stemming Rising Cable Prices and the Rapid Growth of Unwarranted, Company-Imposed Monthly Fees

More than six years ago, Charter Communications began charging a "broadcast TV surcharge," purportedly to recoup the rising costs of network programming retransmission consent fees negotiated with broadcasters. Other large pay-TV providers—e.g., Comcast, and Time Warner Cable (now owned by Charter)—followed suit with their own "broadcast fee" in addition to other new charges, such as a "regional sports fee" for sports channels that some consumers never even watch. Some providers even add another "HD technology" fee. These fees are all in addition to set-top box fees that pay-TV providers have been gouging consumers with for years.

Moreover, these add-on fees are tacked on top of the rates advertised to consumers, and are typically shown on the monthly bill near or with government-imposed taxes and fees, misleadingly suggesting that they are also required by law. Company-imposed fees cause consumer confusion, and more importantly, add up. A sample cable bill from December 2016 lists the bundled services rate of $119.99 for video programming and broadband internet. But then there's an "AnyRoom DVR" fee of $10, an "HD Technology Fee" of $9.95, a "Broadcast TV Fee" of $5, and a "Regional Sports Fee" of $3. That's almost $28 in add-ons in one month—nearly a 25 percent surcharge above the advertised base rate—that consumers are often unaware of when signing up for service.

To make matters worse, some of these company-imposed fees have increased dramatically since being introduced a few years ago, and were hiked again for 2017. Taking a look at the same cable bill updated for February reveals a "Broadcast TV Fee" of $7, and a "Regional Sports Fee" of $5—a 50 percent increase over what was charged last year. So, the add-ons rose to $32 a month! This now represents more than a 26 percent surcharge per month on top of the rate for what consumers believe they are paying for cable and broadband service. What better way to camouflage rate increases?

[9] Id.

We agree with the FCC's Consumer Advisory Committee's (CAC's) recommendation that pay-TV providers should provide consumers with the estimated dollar amount of their total monthly bill that includes company-imposed fees and surcharges at the time service is initiated. Even better would be if pay-TV providers did away with these arbitrary add-on fees altogether, and offered a competitive bundled rate that fully represents the cost of programming consumers are purchasing.

We urge the committee to ask what Chairman Pai believes should be done to stem the proliferation of company-imposed fees and whether under his leadership, the FCC will adopt the CAC's modest, consumer-friendly recommendation.

Addressing the Punitively High Costs in the Set-Top Box Market

The Commission has a decades-old mandate to inject competition into the market for devices that access and deliver multichannel video programming or pay-TV content—also known as the set-top box market. Titled "Competitive Availability Of Navigation Devices," Section 629 of the 1996 Telecommunications Act could not be clearer:

> The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.[10]

The FCC has tried, on more than one occasion, to meet its obligations to open this market to meaningful competition. But, those efforts have come up short for consumers. For example, the CableCARD experiment barely made a dent in the pay-TV providers' lock on the set-top box market, and 99 percent of consumers still rent a set-top box from their provider.[11]

This common-sense reform is long overdue. It would directly benefit consumers who currently have little, if any, choice but to rent a set-top box from their pay-TV provider for months, and even years, in perpetuity. These costs add up: according to data in the Federal Communication Commission's (FCC) October *Report on Cable Prices*, cable prices increased by nearly triple the

[10] See 47 U.S.C. § 549 (codifying section 629 of the Telecommunications Act of 1996)
[11] Press Release, Senator Ed Markey of Massachusetts, *Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace* (July 30, 2015), http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decry-lack-of-choice-competition-in-pay-tv-video-box-marketplace

rate of inflation in the past twenty years.[12] Liberating consumers from burdensome set-top rental fees—which average more than $231 per household per year[13]—is a critical and long-overdue way to lower unnecessary costs currently reflected in cable bills.

Like the consumers we work alongside, we were disappointed when the *Set-Top Box Order* failed to be enacted last year. We recognize the resistance from the pay-TV and content industries whose multi-billion dollar stranglehold on the set-top box market would finally have been disrupted had the FCC's proposal succeeded. But consumers have been waiting for almost twenty years for an option to view pay-TV—content they have paid for—without having to fork over extra cash to rent a set-top box. Unlocking the set-top box market is more than just a consumer benefit: federal law requires it.

We urge the committee to ask Chairman Pai about his plan to follow the law and open up the set-top box market in a way that would truly benefit consumers.

Ending the Harassment, Nuisance and Scams of Robocalls

Nearly everyone hates robocalls and it remains one of the top consumer complaints we hear about at Consumers Union—we received more than 50,000 complaints about unwanted calls since we started asking the question online last year, and almost 750,000 consumers have joined our End Robocalls campaign which encourages major phone companies to offer free call-blocking tools to their consumers. Consumers Union also works to defend the laws protecting consumers from unwanted robocalls like the Telephone Consumer Protection Act (TCPA). Although the TCPA has been on the books for more than twenty-five years, the increase in unwanted calls, including fraudulent and scam calls, has reached record levels and is only growing. Consumers have every right to be frustrated, annoyed, and skeptical whether the government or the phone companies can help.

The FCC stepped up last year, and former Chairman Wheeler called on the top phone companies to provide "robust" call-blocking technology to their customers at no charge. At Wheeler's request, more than thirty companies joined the Robocall Strike Force (RSF), led by AT&T's CEO, Randall Stephenson, to work together on solutions including call-blocking applications and anti-spoofing measures (caller–ID spoofing is where an incoming call's true identity is masked as a recognizable number or local area code). The RSF most recently convened

[12] Steven Lovely, *Cable Prices Have Risen Faster Than Inflation For Each Of The Past 20 Years*, CORDCUTTING.COM (Oct. 31, 2016), http://cordcutting.com/cable-prices-have-risen-faster-than-inflation-for-each-of-the-past-20-years/

[13] Press Release, Senator Ed Markey of Massachusetts, *Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace* (July 30, 2015), http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decry-lack-of-choice-competition-in-pay-tv-video-box-marketplace

in October of last year, and planned to meet six months later, in this coming April. At this time, we are uncertain if Chairman Pai plans to host the work of the RSF at the Commission.

We are encouraged that Chairman Pai announced the inclusion of an anti-spoofing proposal to the FCC's March Open Meeting agenda. Under this measure, companies will be afforded greater freedom to block spoofed robocalls. Consumers Union supports action by the FCC to combat caller-ID spoofing, and we will continue to work with the Commission to reduce and eliminate robocalls, fraudulent or otherwise.

We suggest asking Chairman Pai if he plans to host a future meeting of the Robocall Strike Force, so it may continue its important work on behalf of consumers with the FCC's support and cooperation. We also suggest asking whether he will push phone companies to promptly provide their consumers free, advanced robocall-blocking tools so that they can protect themselves from unwanted calls and scammers.

We close with a note of appreciation for holding this important hearing overseeing the work of the FCC. Consumers deserve to know whether the Commission is working to create a telecommunications marketplace that promotes their interests and protects their pocketbooks. We stand ready to work with you, your fellow Senators on the Commerce Committee, and other stakeholders to address the issues we identified to help ensure all consumers have reliable access to affordable products and services, and are empowered to participate fully in the modern-day telecommunications marketplace.

Respectfully submitted,

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cc. Members of the U.S. Senate Committee on Commerce, Science, & Transportation