ConsumersUnion®
THE ADVOCACY DIVISION OF CONSUMER REPORTS

August 15, 2018

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: August 16, 2018 Oversight of the Federal Communications Commission Hearing

Dear Chairman Thune and Ranking Member Nelson:

Consumers Union, the advocacy division 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 August 16, 2018. This hearing provides a unique opportunity to hold Chairman Ajit Pai accountable to his agency's core mission: protecting consumers, promoting competition, encouraging universal service at reasonable rates, and ensuring an appropriate competitive framework for the "unfolding of the communications revolution" among other things.[2]

In light of recent news reports, we imagine you and other Senators may wish to question Chairman Pai and his fellow Commissioners about the failure of the FCC's Electronic Comment Filing System (ECFS) last year during the net neutrality rulemaking proceeding.[3] When the ECFS crashed last May, we and Congress were told by Commission staff that it was because of a cyberattack. We now know this is not true, and serious questions need to be asked about when Chairman Pai knew about these untruths and why the public was misled. Public participation in the FCC's rulemaking process needs to be transparent and reliable, and we encourage the Commerce Committee to exercise its oversight authority to discover why both such a grave failure and subsequent cover-up via misinformation were allowed to happen.

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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.

[2] *What We Do*, Federal Comm. Commc'ns. https://www.fcc.gov/about-fcc/what-we-do (last visited Aug. 6, 2018).

[3] Dell Cameron, *When Did Ajit Pai Know?*, Gizmodo (Aug. 10, 2018), https://gizmodo.com/when-did-ajit-pai-know-1828254203.

To be sure, there are many other issues that we believe you could raise on behalf on consumers during the hearing, for 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 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 Continued Fight for Net Neutrality

We urge you to ask Chairman Pai and his colleagues about the history of internet regulation under Title II classification, including the changes in 2002 and 2005, and to inquire about what the FCC will do to ensure that ISPs do not completely walk back on their promises to uphold an open internet.

On June 11, 2018, the FCC's rollback of the net neutrality rules contained in the FCC's *2015 Open Internet Order* officially became effective. In the absence of these rules, internet service providers (ISPs) are free to block or throttle content as they choose, or give preferential treatment to certain websites for a fee. Despite public outcry from an overwhelming majority of Americans and pushback from lawmakers, Chairman Pai and the FCC repealed the rules against blocking, throttling, and paid prioritization that were safeguarding consumers' interests online.

Consumers Union has long been a champion of strong net neutrality. We supported the adoption of the FCC's *2015 Open Internet Order* and strongly oppose the repeal of that order by the Commission via the *Restoring Internet Freedom Order* adopted last December. Furthermore, we believe that the core rationale offered by Chairman Pai to justify the elimination of net neutrality was erroneous and misleading.

For example, Chairman Pai has repeatedly said, "the Internet was free and open before the Obama Administration's 2015 heavy-handed Title II Internet regulations, and it will be free and open after they are repealed."[4] The Chairman suggested that the 2015 *Order* was in stark contrast to the regulation of the internet prior to 2015. However, he neglected to mention that the FCC has been enforcing portions of net neutrality for more than a decade. The Chairman brushes over the fact that the FCC didn't actually classify cable broadband as an information service until 2002, and that it wasn't until 2005, after the Supreme Court's decision in the *Brand X* case that the classification was official. The idea that there has been a

[4] FCC Office of the Chairman, *Myth v. Fact: Setting the Record Straight on Chairman Pai's Restoring Internet Freedom Order* (Nov. 28, 2017), https://www.fcc.gov/document/myth-vs-fact-chairman-pais-restoring-internet-freedom-order.

consistent policy position regarding Title II classification from 1996 until 2015 is simply not true.

Consumers Union believes that an open internet free from ISP interference is imperative in our current world. We will continue to fight for the rights of consumers to access the internet free from paid prioritization, throttling, and blocking by their ISP. We believe that internet traffic should be transmitted to all consumers with the same quality regardless of whether an internet service provider has a financial interest in promoting one website over another.[5]

Despite initially claiming to support net neutrality principles, many ISPs have already reneged on their promises. Comcast recently amended the net neutrality pledge on its website which currently contains no promise relating to paid prioritization.[6] And yet the FCC is asking consumers to trust these same ISPs to stay true to their word, held only to account through watered-down transparency requirements.

Americans should not have to rely on companies' hollow promises to protect their access to the internet. Moreover, the FCC—an agency which has had, and still has, jurisdiction over the large telecom and cable companies who provide internet service—would have us believe that is only the Federal Trade Commission who will act if and when a broadband provider deceives the public.[7] This gives ISPs free rein to block, throttle, or prioritize internet as long as they inform their customers first. We hardly believe that's a worthy substitute for the net neutrality rules consumers enjoyed just a few short months ago.

<u>What the Fee?! Campaign</u>

We encourage you to ask Chairman Pai and the other Commissioners if they believe the FCC has the authority to adopt a rule similar to the Department of Transportation's "full-fare advertising" rule to promote fee transparency. If they believe the Commission does possess such authority, we suggest that you ask why or why not the FCC should pursue such a policy to protect consumers from the increasing number and cost of add-on fees in the pay-TV and internet service market.

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[5] James K. Wilcox, *How You'll Know Net Neutrality is Really Gone*, Consumer Reports (June 11, 2018), https://www.consumerreports.org/net-neutrality/end-of-net-neutrality-what-to-watch-for/.
[6] Comcast, Net Neutrality, (Last visited Aug. 7, 2018), https://corporate.comcast.com/openinternet/open-net-neutrality; *See also,* Jon Brodkin, *Comcast Deleted Net Neutrality Pledge the Same Day FCC Announced Repeal*, ArsTechnica (Nov. 29, 2017), https://arstechnica.com/tech-policy/2017/11/comcast-deleted-net-neutrality-pledge-the-same-day-fcc-announced-repeal/.
[7] FTC, FCC, Outline Agreement to Coordinate Online Consumer Protection Efforts Following Adoption of the Restoring Internet Freedom Order, (Dec. 11, 2017), https://www.ftc.gov/news-events/press-releases/2017/12/ftc-fcc-outline-agreement-coordinate-online-consumer-protection.

More than seven 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 (since purchased 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.

Consumers encounter fees in every facet of everyday life, and we believe consumers are confused, frustrated, and feel helpless as add-on fees proliferate through the marketplace. That is why Consumer Reports (along with Consumers Union) has launched the What The Fee?! (WTF?!) campaign earlier this year to cast a light on the rise of fees that have consumers feeling ripped off. We began the campaign by asking consumers to sign an online petition (found at https://action.consumerreports.org/whatthefee/) calling on cable and other pay-TV providers to price services that include the full cost of service without hiding fees in the fine print. To date, more than 114,000 consumers have signed this petition.

Perhaps the most notable and most complained about fees are in the cable and airline businesses. In 2011, the Department of Transportation (DOT) enacted consumer protections that required the disclosure of fees for certain basic airline services that consumers were not able to opt out of.[8] The "full-fare advertising" rule for airlines mandates that airline pricing include all mandatory taxes and fees, making it easier for passengers to determine the full price of their air transportation. We are exploring if the FCC has the current authority to enact a similar rule applicable to cable and other pay-TV service providers, pursuant to the 1992 Cable Act and the 1996 Telecommunications Act.

Sprint-T-Mobile Merger

The FCC is charged with determining whether "license transfers" (common in most telecom mergers) are in the public interest, and to not approve transactions that fail to meet this important test. Since Chairman Pai and his fellow Commissioners are unlikely to comment upon the specifics of the pending merger before the FCC, we suggest that you might lay out your concerns, and then ask them how they apply the public interest test to mergers that will impact many millions of consumers across the country, and what kind of adverse impact is enough to warrant deciding that a deal should be blocked.

On April 29, 2018, T-Mobile and Sprint, the nation's third and fourth largest wireless carriers, agreed to a $27 billion merger. The merging parties have attempted to justify their merger as the quickest way to secure the best 5G network for American consumers (provided by these companies), and they also claim their new merged company will be stronger and better able to compete with the top two market-dominating companies, AT&T and Verizon.

The April announcement of the merger marks the third time in the last four years that T-Mobile and Sprint have attempted to combine. In 2014, the Obama administration informally discouraged them from attempting to merge, stating that four major market participants were necessary to ensure competition.[9] And just last year, merger talks between the two were scuttled when the companies said that they ended their talks because they were unable to find mutually agreeable terms. Now, only nine months later, here we are again.

Consumers Union expressed our views on the proposed merger in testimony before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights on June 27, 2018.[10] Our concerns not only stem from reducing the number of competitors in the market, but also the very nature of the two companies in consideration. T-Mobile and Sprint have individually helped to keep the cellular market competitive. T-Mobile, self-nicknamed the "un-carrier," eliminated mandatory contracts, roaming fees, and brought back unlimited data plans. Due to T-Mobile's rank as the third largest cellular carrier, they have relied upon aggressive marketing campaigns and attractive offers to drive customers to subscribe to their service. We believe this is exactly the sort of competition that is important for consumers—

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[8] 49 U.S.C. § 41712; *See also* 14 C.F.R. § 399.
[9] Dana Cimilluca, *Sprint and T-Mobile US: Is Third Time a Charm?*, Wall Street Journal (Apr. 27, 2018) https://www.wsj.com/articles/sprint-nears-deal-to-combine-with-t-mobile-us-1524862751.
[10] *Game of Phones: Examining the Competitive Impact of the T-Mobile-Spring Transaction: Hearing Before the Subcomm. On Antitrust, Competition Policy and Consumer Rights,* 115th Cong. (June 27, 2018) (Testimony of George P. Slover) *Available at* https://www.judiciary.senate.gov/imo/media/doc/06-27-18%20Slover%20Testimony.pdfhttps://www.judiciary.senate.gov/imo/media/doc/06-27-18%20Slover%20Testimony.pdf.

competition that spurs innovation and competitive pricing plans. Sprint, the fourth largest carrier, is known for offering discounted leases on the latest premium phones and has the least expensive basic service plan, $10 cheaper than any of the other carriers.[11]

And it is not just that Sprint and T-Mobile each provide competitive alternatives to Verizon and AT&T in the post-paid market. In important ways, they are each other's main competition. Each has looked to get in front of the other to be the first upstart to shake up the market by offering something the big two do not. That entire dimension of competition, and the benefits consumers get from it, would be lost if the two were allowed to merge.

Moreover, Sprint and T-Mobile dominate the pre-paid market and fiercely compete there with each other. In April 2018, Boost (a subsidiary of Sprint) offered two months of free service for any MetroPCS customer who switched.[12] Only hours later, MetroPCS (owned by T-Mobile) introduced the same offer. The New T-Mobile (which will be the name of the merged companies should the deal be approved) would be far and away the market leader in the pre-paid market, with more than 24 million more pre-paid customers than Verizon and 14 million more than AT&T.[13] Pre-paid wireless plans are important to low-income customers, and the competition that would be lost as a result of the merger could be expected to affect economically-disadvantaged communities especially hard.

The New T-Mobile has emphasized both in public statements and in its filing with the FCC that the main consumer benefit of this merger, as they see it, would be the faster introduction of a 5G network. Framing the merger as an argument for 5G misses the mark. American consumers in many cities will be introduced to 5G at the end of this year—whether or not the government approves the merger. All four companies have already started physically re-wiring cities for 5G capabilities. While the claim of a more powerful 5G network is tempting, 5G capabilities are already in the works in many cities across the nation and will continue to develop regardless of this merger. We believe the country needs and consumers benefit from four competitors in the wireless market.

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[11] Bree Fowler, *Best Low-Cost Cell-Phone Plans*, Consumer Reports (July 18, 2018), https://www.consumerreports.org/cell-phone-plans/best-low-cost-cell-phone-plans/.
[12] Edward Baig, *Boost Mobile Founder is Against the T-Mobile-Sprint Merger: Here's Why*, USA Today (May 21, 2018), https://www.usatoday.com/story/tech/columnist/baig/2018/05/21/boost-mobile-founder-and-ex-ceo-says-no-t-mobile-sprint-merger/624708002/.
[13] Stephanie Atkinson, *The New T-Mobile – Winners in Retail Postpaid Ads, Prepaid Market Share; Needs Work in B2B and IoT*, RCRWireless (May 2, 2018), https://www.rcrwireless.com/20180502/wireless/analyst-angle-new-t-mobile-winner-retail-postpaid-ads-prepaid-market-share-needs-work-in-B2B-and-iot-Tag9.

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