December 4, 2017

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

Re: Restoring Internet Freedom WC Docket No. 17-108

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 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

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[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).
[2] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, Policy Statement, 20 FCC Rcd 14986 (2005).
[3] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities et al*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4853-54 (2002).
[4] *See* Draft Order at ¶180.

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 preempting, 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.

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

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[5] *See FTC v. AT&T Mobility, LLC*, Docket No. 15-16585, Motion of Federal Communications Commission For Leave To File Post-Argument Submission (filed October 20, 2017) and attached Letter of Nicholas Degani, Acting General Counsel to Molly C. Dweyer, Clerk, United States Court of Appeal for the Ninth Circuit (October 20, 2017). Available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-347373A1.pdf

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,

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Chief Technology Officer
City of New York

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