

June 12, 2017

Maureen Ohlhausen
Acting Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Acting Chairman Ohlhausen:

The Federal Trade Commission (FTC) has long protected consumer privacy, in tandem with other agencies, and you recently reiterated your dedication to protecting consumer privacy in the digital age through FTC enforcement. We therefore urge the FTC to quickly resolve the complaint filed one year ago by a coalition of consumer advocates. The complaint provides evidence that the nation's cable and satellite providers have and continue to deceive consumers about their privacy practices by failing to provide adequate notice, in violation of Section 5 of the FTC Act. Since the complaint was filed, leading Internet Service Providers, cable and telephone companies have significantly expanded their ability to gather, analyze and make actionable data that is used to target subscribers, their families, and other consumers.

On June 9, 2016, Public Knowledge, Center for Digital Democracy, TURN – The Utility Reform Network, Consumer Watchdog, Consumer Action, and Consumer Federation of America (hereinafter referred to as “the consumer advocates”) filed a complaint with the FTC alleging that cable operators Comcast Corp., Cablevision Systems Corp., and AT&T Inc. are violating Section 5 of the FTC Act by engaging in deceptive practices. Specifically, the complaint provides evidence that these cable operators failed to adequately disclose (1) the extent to which they were collecting consumer information via their non-common carrier subscription television services; (2) how they shared this information; and (3) how this information was combined with personal information collected through other means, such as information collected via the subscription video provider's Title II internet offering to create comprehensive profiles on consumers, including data about consumers' families, personal habits, and other characteristics. These disclosure failures amount to a violation of the FTC's notice standard, which requires companies to provide their subscribers sufficient notice of their data collection practices to ensure they are not deceptive.¹

Shortly after the consumer advocates filed the complaint, the Ninth Circuit panel's decision in *FTC v. AT&T Mobility* cast doubt on the FTC's ability to consider the complaint. As you know, the Ninth Circuit panel held that because AT&T offered a Title II common carrier service—specifically mobile voice telephony—it had the “status” of a common carrier. With that status,

¹ See *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*, (March 2012), at 60-71
<https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

AT&T, as an entity, was rendered immune to FTC jurisdiction under Section 5 even for the activities of its non-Title II common carrier services.² That decision may have also removed other entities that provide broadband internet service from the FTC's jurisdiction, including those targeted in the complaint, so the FTC appropriately held the complaint in abeyance.

The Ninth Circuit's recent decision to rehear *FTC v. AT&T Mobility en banc* vacates the original panel decision, thereby restoring the FTC's ability to police the non-common carrier activities of entities that provide a common carrier service. Thus, the time is ripe for the FTC to act on the consumer advocates' complaint.³

On numerous occasions, you have made public statements expressing support for strong privacy enforcement at the FTC. In your recent statements, you have professed support for FTC jurisdiction that takes an active role in protecting online privacy in the telecommunications sector. In your March 1 joint statement with Federal Communications Commission (FCC) Chairman Ajit Pai, you said the FTC has a "long track record of protecting consumers' privacy and security throughout the internet ecosystem."⁴ A month later, in your joint op-ed with Chairman Pai, you said you want to "put the nation's most experienced and expert privacy cop back on the beat."⁵ Statements made by Chairman Pai further support the FTC exercising its privacy jurisdiction. Chairman Pai has stated that the *en banc* decision makes it "easier for the FTC to protect consumers' online privacy." Indeed, Chairman Pai has even claimed that—although the *en banc* rehearing has not yet even occurred—the decision "strengthens the case" for his proposed plan to reverse the classification of broadband as a Title II service, which would place broadband provider privacy practices under the FTC's jurisdiction.⁶

² The FTC's decision dealt only with AT&T's conduct prior to reclassification of mobile broadband as a Title II service.

³ The Ninth Circuit is unlikely to decide this case until 2018 and its decision to rehear is a strong indication that it will ultimately reverse the panel decision, thus the FTC should not wait to take enforcement action concerning deceptive practices of entities that engage in common carrier activities.

⁴ Joint Statement of Acting FTC Chairman Maureen K. Ohlhausen and FCC Chairman Ajit Pai on Protecting Americans' Online Privacy (March 1, 2017), <https://www.ftc.gov/news-events/press-releases/2017/03/joint-statement-acting-ftc-chairman-maureen-k-ohlhausen-fcc>.

⁵ Ajit Pai and Maureen Ohlhausen, *No, Republicans didn't just strip away your Internet privacy rights* (April 4, 2017), https://www.washingtonpost.com/opinions/no-republicans-didnt-just-strip-away-your-internet-privacy-rights/2017/04/04/73e6d500-18ab-11e7-9887-1a5314b56a08_story.html?utm_term=.285e2bc47b95.

⁶ Statement of FCC Chairman Ajit Pai on Ninth Circuit Decision To Rehear *FTC v. AT&T* Case (May 9, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0509/DOC-344803A1.pdf. See also *Appropriate Framework For Broadband Access Over Wireline Facilities*, 20 FCC Rcd 14853, 14914 (2005) (stating the direct FCC assertion of authority over broadband provider privacy practices). Consumer advocates filed a complaint with the FCC with regard to the same conduct by the same subscription television operators on the same day, June 9, 2016.

In the absence of sufficiently clear disclosures about these practices, consumers cannot make informed decisions about which services to choose and what privacy options they wish to exercise. You have underscored the important role that the FTC plays as an expert cop on the privacy beat, and now that the *AT&T Mobility* decision has been vacated, it is time for the FTC to do some policing. We ask that you now publicly and expeditiously resolve the pending complaint concerning cable TV and satellite TV privacy, an area of joint jurisdiction with the FCC.

Respectfully,

/s/ Harold Feld
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Public Knowledge

/s/ Susan Grant
*Director of Consumer Protection
and Privacy*
Consumer Federation of America

/s/ Jeffrey Chester
Executive Director
Center for Digital Democracy

/s/ Linda Sherry
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/s/ Richard Hober
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