

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC, 20554**

In the Matter of Accelerating Wireline Broadband)
Deployment by Removing Barriers to) WC Docket No. 17-84
Infrastructure Investment)
)

WRITTEN EX PARTE OF PUBLIC KNOWLEDGE AND COMMON CAUSE

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Chairman Ajit Pai
Federal Communications Commission
445 12th Street SW
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May 31, 2018

Dear Chairman Pai,

Public Knowledge and Common Cause submit this written *Ex Parte* in response to the Federal Communications Commission's ("FCC" or "Commission") Draft Second Report and Order in the above-referenced proceeding.¹

In 2016, the Commission adopted educational and outreach material requirements for carriers seeking section 214 discontinuance processes.² These requirements included 1) the development and distribution of educational materials to all affected customers with specific information about the changes being made to their services; 2) the creation of a telephone hotline for 12 hours a day, including during regular business hours, to answer customer questions about the transition; and 3) designated staff, trained in disabilities access issues to answer consumer questions about the transition.³ These requirements, unlike the rest of the Order in which they were contained, were to go into effect upon approval by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).⁴

¹ *Accelerating Wireline Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order Draft, WC Docket No. 17-84 ("Draft Order").

² *Technology Transitions*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd. 8283 (rel. July 15, 2016) ("2016 Order").

³ *Id.* at paras. 179-86.

⁴ *Id.* at para. 213.

In the 2018 Draft Order, the Commission indicates via footnote⁵ that these requirements were never approved by OIRA and thus have not technically gone into effect. This revelation was not disclosed by the Commission during the FNPRM phase of the rulemaking.⁶ Commenters defending the requirements were only made aware that these rules were never on the books through comments and reply comments in the record filed by Verizon and ITTA.⁷ Even so, the Commission's only official response and notice to public interest groups, carriers and American consumers was a two sentence footnote in a draft of a final order confirming the rules' ineffective status.⁸ Not only has the Commission misled the consumers (contrary to their statutory mandate from Congress), but the Commission has also acted arbitrarily and capriciously in violation of its duty under the Administrative Procedure Act⁹ (APA).

Executive Order 12866 created regulatory oversight by OMB to minimize redundancy in the administrative branch.¹⁰ President Obama facilitated more transparency within the OMB approval process through the creation of the OIRA website and regulatory dashboard.¹¹ In theory, any person searching for information on the status of regulations subject to the OMB approval process can access such information through the website and dashboard tools.

⁵ *Accelerating Wireline Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order Draft, WC Docket No. 17-84, para. 22, fn. 60, (rel. May 17, 2018) ("Draft Order").

⁶ *Accelerating Wireline Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC 11128, paras. 176-77, (rel. nov. 29, 2017) ("2017 Order").

⁷ ITTA Reply Comments at 3; Verizon Comments at 12, fn. 45.

⁸ Draft Order at para. 22, fn. 60.

⁹ 5 U.S.C. §551-559.

¹⁰ Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 190 (Oct. 4, 1993).

¹¹ Executive Order 13563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 14 (Jan. 18, 2011).

Procedurally, OIRA has 90 days to review and act on a piece of regulation submitted to their office for approval.¹² The Director of the OIRA may extend this period once by 30 days.¹³ The only way to stall a proceeding indefinitely, however, is by the head of the agency who first requested the review.¹⁴ Executive Order 12866 does not specifically create OIRA review for independent agencies. However, the Commission has stated in their strategic plan that it will adhere to Executive Order 12866 and thus voluntarily subject its rules to OIRA approval.¹⁵ The 2016 Order containing the education and outreach material requirements was released by the Commission on July 15, 2016.¹⁶ The Order was then published in the Federal Register, and reported to OIRA on September 12, 2016.¹⁷ From this date, OIRA should have made an approval decision in early December 2016, or early January 2017 if the Director of OIRA granted a one-time 30 day extension. Unfortunately, according to the Commission's draft Order,¹⁸ we know this did not happen. We do know, however, that Chairman Pai was selected as President Trump's new FCC Chairman and assumed this role in January 2017.¹⁹ As the head of the agency, Chairman Pai would have had the power to suspend OIRA approval of the rules indefinitely.

As advocates for American consumers, Public Knowledge and Common Cause urge Chairman Pai to be transparent and disclose why the educational and outreach

¹² 58 Fed. Reg. 190, §6(b)(2)(B).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Strategic Plan 2018-2022*, Federal Communications Commission, p. 13 (Feb. 12, 2018), <https://www.fcc.gov/document/strategic-plan-2018-2022>.

¹⁶ *See* 2016 Order.

¹⁷ 81 Fed. Reg. 62,632 (Sept. 12, 2016).

¹⁸ Draft Order at para. 22, fn. 60.

¹⁹ Statement of Ajit Pai on Being Designated FCC Chairman by President Donald J. Trump, Federal Communications Commission (Jan. 23, 2017), <https://www.fcc.gov/document/statement-ajit-pai-being-designated-chairman-president-trump>.

requirements of the 2016 Order never went into effect. The Commission should then issue a further notice in this proceeding so that interested parties can respond.

Whatever factors lead to OMB suspending its review, they clearly shaped the Commission's deliberations in this process. Interested stakeholders had a right to respond to these unknown, pre-decided factors that informed the Commission's rulemaking. It is also imperative to evaluate the significance of eliminating these rules before they go into effect in the context of the rules' purpose: to ensure that consumers are well informed and notified, in a meaningful way, about the coming changes in their traditional network services.²⁰ The Commission reasons their appeal is motivated by the burdensome nature of the educational and outreach requirements.²¹ Yet, the Commission neither cites to their own data nor cites more than flesh level claims by industry giants to support this.²² It does not logically follow that rules that have not even taken the effect of law can be so burdensome as to lead to their repeal. The Commission also claims that carriers' own outreach practices are equally as effective as those required by the educational and outreach rules—yet, again, offers no real evidence in support of this claim.²³ Besides the fact that anecdotal evidence strongly contradicts this claim by the commission,²⁴ it still does not logically follow that the Commission can make sweeping judgements about which outreach efforts are more effective if the carriers were never required to abide by the rules passed in 2016. One cannot compare two models of outreach if one of those has never been attempted.

²⁰ See 2016 Order at paras. 179-182.

²¹ Draft Order at para. 22.

²² *Id.* at paras. 22- 28.

²³ *Id.* at paras. 22, 27.

²⁴ CWA Comments at 11-13; Leadership Conference Comments at fn. 11.

Assuming, Chairman Pai suspended OMB approval, he cannot simply halt an FCC proceeding on his own volition. The 2016 rules were fully vetted by the Commission's notice and comment practices and fully complied with the APA.²⁵ Thus, the rules were obligated to go through the full OMB approval process as a final rule.

The Commission, in its purest purpose, has been charged by Congress to protect consumers and to promote access to affordable, reliable and adequate communications services.²⁶ More particularly, the Commission has guided itself through the tech transition proceedings with four pillars of principle: 1) protect consumers; 2) promote competition; 3) ensure universal access; and 4) strengthen public safety.²⁷ Eliminating the educational and outreach requirements before they are able to take effect certainly is not guided by those principles and certainly does not protect consumers.

CONCLUSION

This is not the first time in this proceeding that the Commission has acted to conceal the scope of its intentions. In the first Notice of Proposed Rulemaking (NPRM), the Commission categorized its reconsideration of the "functional test" for Section 214(a) as a "Request for Comment," segregating it from the "Notice of Proposed Rulemaking" section of the Notice and giving every indication that it was not considering revision of the test immediately, only to issue an unprompted Declaratory Ruling reversing the test in November to "settle" the non-existent

²⁵ See generally *Technology Transitions et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968 (2014); 2016 Order.

²⁶ 47 U.S.C. §151.

²⁷ *What We Do*, Federal Communications Commission, available at <https://www.fcc.gov/about-fcc/what-we-do> (last visited May 31, 2018); see also 2016 Order at para. 71.

“controversy” of the tests continued existence.²⁸ While unsurprising that the Commission would seek to hide such blatant anti-consumer actions, such repeated misdirection comports neither with the transparency or fair analysis required by the APA. The Commission should fully disclose why OMB review was suspended preventing the educational requirements from going into effect, and allow interested parties to respond to those previous determinations that obviously shaped the Commission’s conclusions here.

Respectfully Submitted,

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²⁸ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd. 3266 (rel. Apr. 21, 2017); 2017 Order at para. 3.