



**Minority Media &
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November 17, 2014

Marlene Dortch, Esq., Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

RE: Notice of *Ex Parte* Communication, GN Docket No. 14-28 (Open Internet); GN Docket No. 09-191 (Preserving the Open Internet), GN Docket 10-127 (Broadband Framework)

Dear Ms. Dortch:

This letter reports on a meeting with Chairman Tom Wheeler on Thursday, November 13, 2014.¹ FCC representatives included Chairman Tom Wheeler, Dan Alvarez, Legal Advisor, Office of the Chairman, Jonathan Sallet, General Counsel, Office of the General Counsel, Matthew DelNero, Deputy Bureau Chief, Wireline Competition Bureau, Stephanie Weiner, Associate General Counsel, Office of the General Counsel, and Eric Feigenbaum, Office of Media Relations. Other meeting attendees included:

- Fred Campbell, Center for Boundless Innovation in Technology
- Jeff Eisenach, American Enterprise Institute
- Reverend Jesse L. Jackson, Sr., Rainbow PUSH Coalition
- Cheryl Leanza, United Church of Christ
- Randy May, Free State Foundation
- Rosa Mendoza, Hispanic Technology and Telecommunications Partnership
- Sean Mickens, National Urban League
- Berin Szoka, TechFreedom

¹ This letter is submitted on behalf of the Hispanic Technology and Telecommunications Partnership, Minority Media and Telecommunications Council, NAACP, National Urban League, and the Rainbow PUSH Coalition to meet the statutory reporting obligations under the ex-parte rules.

- Hilary Shelton, NAACP
- Hal Singer, Progressive Policy Institute
- Dr. Nicol Turner-Lee, Minority Media and Telecommunications Council

The subject of the meeting was the civil rights communities perspectives² and the Chairman's response to the President's statement on open Internet.³ Free market think tank leaders were also included in the meeting.

The Rainbow PUSH Coalition continues to support open Internet rules adopted under the Commission's Section 706 authority, arguing that this more flexible approach is preferable given the need for investment in deployment, innovation and jobs in communities of color.⁴ The Free State Foundation argued that in light of the absence of market failure and evidence of consumer harm that the Commission does not need to take any action at all. But if the Commission is going to do so, then a "commercial reasonableness" approach grounded in Section 706, properly implemented, would be far preferable to the Title II. According to Free State, the imposition of Title II regulation on Internet service providers is problematic from both a legal and policy perspective and would ultimately harm consumers.⁵

TechFreedom objected to several myths surrounding Title II regulation, most notably the idea that the FCC could categorically ban all forms of paid prioritization under Title II.⁶ Discussion also ensued on how the Commission could regulate paid prioritization under Section 706. Because Title II does not create an absolute ban on prioritization, thus the agency would still need to determine how to policy paid prioritization even under a Title II regime.

² See e.g. Comments of the Communications Workers of America, National Association for the Advancement of Colored People, GN Docket 14-28 (July 15, 2014); Comments of the National Urban League *et al.*, Protecting and Promoting the Open Internet, GN Docket No. 14-28 (July 18, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521710535> (last visited Nov. 17, 2014).

³ See Chairman Tom Wheeler's Statement on President Barack Obama's Statement Regarding Open Internet, *FCC News Release* (Nov. 10, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1110/DOC-330414A1.pdf (last visited Nov. 17, 2014).

⁴ See e.g. Comments of the National Minority Organizations, GN Docket Nos. 14-28, 10-127 (July 18, 2014), available at <http://mmtconline.org/wp-content/uploads/2014/07/Natl-Minority-Orgs-Open-Internet-Comments-071814.pdf> (last visited Nov. 17, 2014); Reply Comments of the National Minority Organizations, GN Docket Nos. 14-28, 10-127 (Sept. 15, 2014), available at http://mmtconline.org/wp-content/uploads/2014/09/FINAL-DOC_Natl-Minority-Orgs-Open-Internet-Reply-091520141.pdf (last visited Nov. 17, 2014).

⁵ See Comments of the Free State Foundation, GN Docket 14-28 (July 15, 2014); Reply Comments of the Free State Foundation, GN Docket No. 14-28 (Sept. 15, 2014).

⁶ See Comments of TechFreedom, Docket Nos. 14-28 *et al.* (July 17, 2014).

The Commission recently began investigating a hybrid model of which there is still legal review and examination by the agency. The United Church of Christ (UCC) advocated that the Commission rely on Title II authority, pointing to the structured enforcement capacities and urging the Commission to support the President’s regulatory route. The Progressive Policy Institute urged the Commission to revisit the Notice for Proposed Rulemaking (NPRM) that primarily gathered substantive comments on the use of Section 706, as directed by the DC Circuit Court decision, noting that there was probably not ample evidence for the use of Title II.⁷ Wheeler also stated that the record has changed over the last few months, thus influencing the agency’s proposed hybrid approach.

The Progressive Policy Institute suggested the use of bright-line tests under Section 706, noting the use of such rules in antitrust to facilitate a rule-of-reason inquiry and lessen the burden on complaining edge providers. The Commission has considered these bright-line tests and desire more information to test its efficacy under judicial and legal scrutiny.⁸ MMTC has also proposed the use of a Title VII consumer enforcement model to strengthen Section 706 authority.⁹ The Commission noted that they are considering this approach, particularly if the record demonstrated likely and sufficient harm.

⁷ See e.g. United Church of Christ, Ex Parte, GN Docket No. 14-28 (Nov. 14, 2014).

⁸ The DC Circuit has ruled out section 706 as a source of authority to regulate priority if the FCC’s non-discrimination standard places the *initial* burden of proof on the ISP—that is, if any priority deal was presumptively in violation of the new standard. To comply with this legal constraint, but also to address the concern that the evidentiary burdens on the edge provider not be prohibitive, PPI advocates a burden-shifting regime, wherein (a) the burden of proof rests *initially* with edge providers to show a private harm, but (b) as soon as the edge provider meets a bright-line test, the burden of proof would shift back to the ISP. Examples of bright-line tests for a private harm would include proof that (i) the edge provider suffered a degradation in quality as a result of declining priority, or (ii) the edge provider was denied access to the same terms for priority extended to an edge rival. (Edge providers would learn of priority deals through a transparency rule, by which ISPs would inform their users of any paid priority arrangement that was struck with an edge provider.) This approach is very similar to the Supreme Court’s use of a bright-line test (the “avoided litigation benchmark”) to streamline a rule-of-reason inquiry in *Actavis* (2013). And the Ninth Circuit did something very similar in *PeaceHealth* (2007) to assess bundled rebates (employing the “discount attribution test” as a filter to streamline the rule-of-reason inquiry). See e.g., Kevin Caves & Hal Singer, *On the Utility of Bright-Line Tests for Rule of Reason Cases*, CPI Antitrust Chronicle (Nov. 2014).

⁹ See Memorandum of the Minority Media and Telecommunications Council, GN Dockets 14-28, 10-27 (Sept. 18, 2014). This memorandum provides a summary of the U.S. Equal Employment Opportunity Commission (EEOC) process for resolving complaints of employment discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”), and describes how this enforcement paradigm could be imported into the FCC’s Internet regulatory process under Section 706 of the telecommunications Act of 1996. In their formal comments and reply comments in the Open Internet proceeding, the 45 National Minority Organizations have proposed implementing the Title VII complaint model to facilitate enforcement of the open Internet. See also n. 4 *supra*.

MMTC also urged the Commission to keep the concerns of the civil rights community top of mind in the agency's final rulemaking and avoid the adoption of utility-like regulation on broadband services. MMTC, and other supporters of Section 706, requested that the Commission consider the unintended consequences of Title II – whether seen or foreseen – on broadband adoption and deployment. The Hispanic Technology and Telecommunications Partnership (HTTP) reiterated this point and pointed to the negative impact of Title II on Latino adoption, especially its potential to chill innovation and investment in their communities.¹⁰ On this point, the Commission asserted that they did not support rate regulation and current efforts to reform the universal service fund, lifeline and e-rate modernization would directly address broadband adoption and deployment concerns. MMTC continued to urge the Commission to explore Section 706 to foster investment, adoption and deployment within communities of color. The agency welcomed studies that would substantiate the impacts of Section 706 authority versus Title II.

The American Enterprise Institute raised concerns about the adoption of utility-like regulation for broadband services, noting that price points likely could not legally be fixed at zero under Title II, thus constraining the FCC's ability to set prices and stifling investment. The Commission again reiterated opposition on rate regulation, prioritization and pointed to the agency's experience with the wireless industry as proof that its forbearance authority could allow the FCC to craft a flexible approach to regulation within Title II.

The Free State Foundation expressed concern that complete bans on prioritization could negatively impact zero rating programs that particularly assist adoption among low-income consumers. Such programs allow data from particular applications to be excluded from subscriber's wireless data plans. MMTC echoed this concern, suggesting that such programs, though not entirely neutral, do facilitate increased engagement among consumers of color and provide an affordable on-ramp for non-Internet-adopters.

The meeting ended with the Chairman reiterating that he is considering the input of all stakeholders.

Respectfully submitted,

Nicol Turner-Lee

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¹⁰ See n. 4 *supra*. See also Martin Chavez, Latinos Will Lose if the Federal Communications Commission (FCC) Adopts Title II as a Means to Regulate the Internet, HTTP (June 6, 2014), available at <http://httponline.org/2014/06/latinos-will-lose-if-the-federal-communications-commission-fcc-adopts-title-ii-as-a-means-to-regulate-the-internet/> (Nov. 17, 2014).