

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

In the Matter of)	
)	
Protecting and Promoting the Open Internet)	GN Docket No. 14-28
)	
Framework for Broadband Internet Service)	GN Docket No. 10-127

**COMMENTS OF
INTERNET FREEDOM SUPPORTERS**

[Voices for Internet Freedom; Center for Media Justice; ColorOfChange; Free Press; National Hispanic Media Coalition (NHMC); AimHigh LA; Appalshop; Art Is Change; Chicago Media Action; Clarisel Media; Common Cause; Common Frequency; Dignity and Power Now; Easton Community Access Television; Families For Freedom, Inc.; Generation Justice; Hispanic Association of Colleges and Universities (HACU); Iguana Films; Institute for Intellectual Property and Social Justice; Iraq Veterans Against the War; Latino Rebels; LatinoJustice PRLDEF; Librotraficante Movement; Line Break Media; Main Street Project; Martinez Street Women's Center; May First/People Link; Media Action Grassroots Network (MAG-Net); Media Alliance; Media Literacy Project; Media Mobilizing Project; Message Media Education; Mexican American Opportunity Foundation (MAOF); MujerLatinaToday.com; National Association of Hispanic Journalists (NAHJ); National Association of Latino Independent Producers (NALIP); National Consumer Law Center, on behalf of its low-income clients; National Institute for Latino Policy (NiLP); National Latina Institute for Reproductive Health; News Taco; Organizing Apprenticeship Project; Paper Tiger TV; Presente.org; Radio Bilingüe; Ruth Livier; St. Paul Neighborhood Network; The Greenlining Institute; The People's Press Project; TURN (The Utility Reform Network); Women In Media & News (WIMN); Women, Action & the Media; Working Films; Working Narratives; Young Women United]

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SUMMARY

Voices for Internet Freedom et al., collectively Internet Freedom Supporters, respectfully urge the Commission to adopt strong, enforceable, and sustainable Open Internet rules that will protect the Internet as an open platform. Through the Internet, people of color are able to bypass traditional avenues replete with individual, institutional, and structural discrimination and insurmountable barriers to entry to embrace new opportunities for self-expression, entrepreneurship, political participation, education, employment, housing, healthcare, and many other vitally important human needs.

In order to fully protect the Open Internet, the Commission must take decisive action in the form of strong, proactive rules that apply equally to fixed and mobile services, and are based on sound and defensible legal authority. The Commission must adopt the following rules:

- (1) *No blocking*. Fixed and mobile broadband providers may not block lawful content, applications, services, or non-harmful devices;
- (2) *No unreasonable discrimination*. Fixed and mobile broadband providers may not unreasonably discriminate in transmitting lawful network traffic, and may not enter into paid prioritization agreements with edge providers or other similarly situated parties; and
- (3) *Transparency*. Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services, including any interactions or disputes with edge or transit providers that could impact the overall quality of service that customers receive or the performance of specific applications or services.

Internet Freedom Supporters urge the Commission to reclassify Internet access service as a Title II telecommunications service. As explained by the court in *Verizon v. FCC* and by the Commission in its NPRM, rules that prevent blocking and discrimination are common carrier regulations and can only be enforced using Title II authority.

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COMMENTS OF INTERNET FREEDOM SUPPORTERS

Internet Freedom Supporters,¹ by their attorneys at the National Hispanic Media Coalition, and on behalf of the communities that they represent, respectfully submit these Comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking soliciting input on how best to protect and promote the Open Internet. Internet Freedom Supporters are comprised of civil rights, human rights, and community based organizations and diverse media makers and entrepreneurs from across the country. Internet Freedom Supporters urge the Commission to adopt strong and enforceable Open Internet rules that prevent blocking, discrimination, and paid prioritization online, while enhancing transparency requirements for Internet Service Providers (“ISPs”). Internet Freedom Supporters believe strongly that any rules should apply equally to fixed and mobile services. Further, Internet Freedom Supporters urge the Commission to reclassify Internet access service as a telecommunications service so that Open Internet rules are grounded in the firm authority granted to the Commission in Title II of the Telecommunications Act.

¹ For these comments, Internet Freedom Supporters were organized by Voices for Internet Freedom, a coalition of civil rights and media justice groups led by the Center for Media Justice, Free Press, the National Hispanic Media Coalition, and ColorOfChange. A full list of Internet Freedom Supporters can be found at Appendix A.

BACKGROUND

During a recent online speaking engagement in a forum focusing on the importance of the Open Internet for Latinos, FCC Commissioner Clyburn was asked to explain to the audience the importance of preserving an Open Internet. “If I had to sum it up in one word, I would use the word ‘equality,’” she said.² Commissioner Clyburn went on to say that the Open Internet “levels the playing field ... [I]t is enabling; it allows for the freedom ... of expression. It is so important, particularly with communities who traditionally have been underserved. This platform ... has the greatest potential to *narrow every, single divide that we know is a challenge in our nation.*”³ Internet Freedom Supporters strongly agree.

Beyond the Commissioner’s articulate points, the online event that she attended is notable for a number of reasons. The host of the show was a Latina – a communications expert and entrepreneur – who, afterward, wrote a summary of the event for her blog.⁴ The panelists that joined Commissioner Clyburn, including Arturo Carmona of Presente.org, were both Latino. It was broadcast live, in primetime, using an innovative and free online platform that allowed the host to simultaneously broadcast and connect with multiple on-air guests located in different parts of the country, from the halls of the FCC in Washington, D.C. to Burbank, California. It allowed for instant engagement of people across the country using various social media platforms. The event contained a number of calls to action, urging civic engagement by informing viewers how they could make their voices heard by those in power, whatever their views may be. Further, the video was saved and uploaded for all to access online, whenever and

² Elianne Ramos, *Net Neutrality’s Impact on Latinos*, YOUTUBE (June 25, 2014), <http://www.youtube.com/watch?v=s9o15s1q-rg/>.

³ *Id.* (emphasis added).

⁴ Elianne Ramos, *Recap: #NetNeutrality Hangout with FCC Commissioner Clyburn and Latino Experts*, SPEAKHISPANIC.COM (June 18, 2014), <http://speakhispanic.wordpress.com/2014/06/18/recap-netneutrality-hangout-with-fcc-commissioner-clyburn-and-latino-experts/>.

from wherever they want. While it would have been impressive enough to use these tools and diverse experts to present a balanced examination of net neutrality, an issue that has largely been ignored by traditional media outlets,⁵ this event went even further to focus on a very specific angle – its impact on Latinos.

Simply put, none of this content would exist without a completely open and non-discriminatory Internet. Gatekeepers would have prevented it from reaching an audience via non-diverse and corporate-conglomerate-owned traditional media outlets, which would have determined that such a broadcast would not make good business sense due to the perception that it focused on a niche issue with a small audience – particularly not in a potentially lucrative primetime slot. Neither would the Internet be a feasible broadcast option. Without openness, paid prioritization costs to deliver a smooth and seamless live video stream would be prohibitively high. Certain web cameras or devices used to capture video by each participant may have been blocked from using the network. ISPs may have determined that it would not be in their best interest to allow such a discussion, and exercised their dubious, self-asserted right to “editorial discretion” to decide not to carry such content through their pipes or degrade its transmission until it becomes unwatchable. Without an Open Internet, rather than reaching a global audience starved of such diverse and timely content, the information shared during the conversation would have never made its way into the public consciousness, and never enriched the public discourse surrounding the topic.

⁵ Kenneth Olmstead, Paul Hitlin, and Nancy Vogt, *Net neutrality: a made-for-web debate*, PEW RESEARCH CENTER (May 15, 2014), <http://www.pewresearch.org/fact-tank/2014/05/15/net-neutrality-a-made-for-web-debate/>; Michelle Leung, *Broadcast Nightly News Ignore Landmark FCC Proposal on Net Neutrality*, MEDIA MATTERS FOR AMERICA (Apr. 28, 2014), <http://mediamatters.org/blog/2014/04/28/broadcast-nightly-news-ignore-landmark-fcc-prop/199046>.

The divides that Commissioner Clyburn referenced are significant and well documented, and have been caused or exacerbated by a long and painful history of discrimination in this country – both overt and implicit. People of color are far more likely to live in poverty than others. We face an educational achievement gap and lack access to specialized education, like STEM fields. It is more difficult for us to access decent housing or healthcare. We are less likely to be registered to vote and more likely to be incarcerated. We are excluded from boardrooms and newsrooms, relegated to inferior classrooms, and face persistent challenges to obtain equal access to the capital needed to become creators, achieve ownership, amplify our voices, and generate wealth.

The advent and expansion of the Open Internet has been an incredible boon to communities of color, who have been historically underserved due to entrenched structural discrimination in existing networks and service providers. On the Internet, opportunities are infinite, barriers to entry are low, and communities are able to bypass broken legacy systems to take advantage of innovative offerings better tailored to suit their needs. Entrepreneurs of color can succeed without access to traditional financial tools and are able to seek investment through a variety of crowdfunding or microfinance websites. Creators and independent content producers can tell their own stories to defy stereotypes and create positive portrayals of their communities without needing buy-in from a major media conglomerate. People of color can engage in the political process, bringing their voices directly to those in power and going around any roadblocks designed to impede them. Beyond making these things possible, the Open Internet makes them practical and has already brought substantial change to the way members of our communities view themselves and interact with each other.

DISCUSSION

Strong and enforceable Open Internet rules are vital to the well being of communities of color, and necessary for the advancement of many of the Commission’s policy goals. Such rules should be applied equally to mobile and fixed networks. Moreover, these rules must rest on Title II of the Communications Act to ensure that they can withstand judicial scrutiny.

I. STRONG AND ENFORCEABLE OPEN INTERNET RULES ARE VITAL TO COMMUNITIES OF COLOR AND NECESSARY FOR ADVANCEMENT OF THE COMMISSION’S POLICY GOALS

The rules that the FCC adopts at the conclusion of this proceeding must protect and promote the Open Internet so that this tremendous platform, which communities of color use to control our own images and shape our own stories, can flourish. To be clear, Internet Freedom Supporters believe that the rules proposed by the Commission in the NPRM, if adopted, will create yet another closed platform where the privileged few will be given the tools to succeed while others will be censored and fall victim to discrimination.

The D.C. Circuit Court of Appeals determined that the Commission’s justification for promulgating its 2010 rules was reasonable and adequately supported by the record, in some instances noting that the threats to openness that ISPs presented were grounded in “common sense and economic reality.”⁶ Indeed, the Court explicitly affirmed that the FCC had “convincingly detailed how broadband providers’ position in the market gives them the economic power to restrict edge-provider traffic,”⁷ and that it had “established that the threat that broadband providers would utilize their gatekeeper ability to restrict edge-provider traffic is not, as the [FCC] put it, ‘merely hypothetical.’”⁸ The Commission’s discrimination and blocking

⁶ *Verizon v. FCC*, 740 F.3d 623, 646 (D.C. Cir. 2014).

⁷ *Id.*

⁸ *Id.* at 648.

rules ultimately lost in court because they were not grounded in the correct legal authority.⁹ Yet rather than following the court's roadmap to propose similar rules under a Title II theory, the Commission has arbitrarily decided to change course, abandon its 2010 non-discrimination rule, and propose rules that allow for conduct that has already been recognized as harmful.

Internet Freedom Supporters urge the Commission to adopt the 2010 rules with some common sense improvements. The 2010 FCC majority, the D.C. Circuit, and Internet Freedom Supporters agree that the 2010 *Open Internet Order* resulted from a sound assessment of the threats facing openness, and an understanding that rules of the road would be necessary to preserve the Internet as a bastion for free expression and a driver of economic growth. The Commission should seize this opportunity to improve on its 2010 rules, to undo its arbitrary decision in 2010 to treat mobile connections differently than fixed connections, to enhance transparency, and to utilize sustainable legal authority. To that end, Internet Freedom Supporters propose that the Commission should adopt the following rules:

- (1) *No blocking*. Fixed and mobile broadband providers may not block lawful content, applications, services, or non-harmful devices;
- (2) *No unreasonable discrimination*. Fixed and mobile broadband providers may not unreasonably discriminate in transmitting lawful network traffic, and may not enter into paid prioritization agreements with edge providers or other similarly situated parties; and
- (3) *Transparency*. Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services, including any interactions or disputes with edge or transit providers that could impact the overall quality of service that customers receive or the performance of specific applications or services.

⁹ *Id.* at 649-651.

A. The Internet’s Openness Has Created A Level Playing Field On Which Communities Of Color Can Innovate, Become Entrepreneurs, Express Ourselves And Participate In Our Democracy

In the NPRM, the Commission seeks comment on “the current role of the Internet’s openness in facilitating innovation, economic growth, free expression, civic engagement, competition, and broadband investment and deployment.”¹⁰ While the Open Internet has certainly been a game-changing force across society, the opportunities that it has presented for communities of color, who have been marginalized and shut out of traditional media, have been truly incredible. True openness on the Internet, which has existed to this point, has eviscerated two of the largest barriers to participation by people of color in traditional markets – lack of access to capital and inability to bypass gatekeepers.

Due to the Open Internet, the amount of capital needed to fund a venture, be it a small business or a media property, has plummeted. Further, when capital is required, it can be obtained in non-traditional ways from sources across the world, through crowdfunding or other microfinance options. Gatekeepers, who have historically picked winners and losers in a number of industries, are virtually non-existent, and media makers and entrepreneurs can bring their products directly to their audience. In terms of political gatekeepers, namely forces attempting to weaken the political power of communities of color, the Open Internet has allowed our communities to organize and raise our voices to those in power like never before. To demonstrate these points, the Media Action Grassroots Network coordinated an activity through the social media platform Instagram to gather images of community leaders based primarily in communities of color who support an Open Internet. These images, collected from rural to urban communities across the country, represent the diversity of voices calling on the FCC to truly

¹⁰ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking at ¶ 34 (rel. May 15, 2014) (“2014 NPRM”).

keep the Internet open.¹¹ These stories, and those listed below, show that Internet openness has contributed a great deal to the well being of many communities.

(1) The Open Internet Has Been A Boon To Innovators Of Color

The Open Internet has given people of color the opportunity to drive innovation like never before. One example can be found in the field of educational technology, in a company called Qlovi. Qlovi is a free, K-12 digital reading and writing platform co-founded by three people of color to address the literacy crisis currently impacting low-income students and students of color.¹² Qlovi co-founder Harlyn Pacheco explained:

I moved to the U.S. in 1991 from Colombia, and I'll never forget how hard acquiring the English language was for me, or how overwhelmed my educators in Dallas were in their attempt to communicate with me or my family. It's our personal stories and the ones we see around us every day [where we are located] in Spanish Harlem that motivate our team to continue to discuss culturally relevant content and provide these literacy services.¹³

While the innovative web-based platform achieved quick success, its popularity surged after Qlovi was able to add culturally relevant content. For instance, in just two weeks after adding books from Arte Publico Press, the largest publisher of literature by U.S. Latino authors, Qlovi grew from 10,000 to 70,000 users.¹⁴ Growing this business and serving the needs of diverse schools across the country would be impossible without an Open Internet. As Pacheco explained, “There are hundreds of schools across the country that don't even have libraries, so in some ways, web-based services are all they have.”¹⁵ Pacheco and his Qlovi co-founders have

¹¹ See Appendix B.

¹² *Qlovi*, EDSURGE, (last accessed July 15, 2014), <https://www.edsurge.com/qlovi>.

¹³ Sabina Bharwani, *Let's Tailor Technology in Classrooms to Serve Marginalized Kids*, HUFFINGTON POST (Mar. 6, 2014), http://www.huffingtonpost.com/sabina-bharwani/lets-tailor-technology-in_b_4908948.html.

¹⁴ *Id.*

¹⁵ *Id.*

won numerous honors for their platform, including first prize at the Bill & Melinda Gates Foundation Literacy Courseware Challenge and a 2013 Black Male Achievement Fellowship from the Open Society Foundations.¹⁶

(2) The Open Internet Has Expanded Entrepreneurial Opportunities For People Of Color

The openness of the Internet has also allowed many people of color to launch small businesses and watch them thrive. Innovative new ways to access capital, such as crowdfunding, have made it much easier for entrepreneurs to connect with individual investors that are interested in their goods and services. Established crowdfunding websites like KickStarter and IndieGoGo have helped fund a variety of projects for entrepreneurs of color.¹⁷

Further, innovative online marketplaces like Etsy have allowed many people of color to operate successful small businesses online. Etsy is an online marketplace of more than 1 million shops that allows customers to buy handmade and vintage goods directly from artists around the world.¹⁸ Etsy, which allows sellers to keep 96.5 percent of the proceeds of each transaction, has a vibrant community called Etsy Artists of Color, which was organized in 2008 and now boasts more than 1,300 members.¹⁹ Many of these members use Etsy and other websites to operate their small businesses and make a living. Tabitha Brown, owner of the Etsy store, *ThePairabirds*,

¹⁶ Monica Olivera, *How These Techies Aim to Close the Achievement Gap*, NBC NEWS (Mar. 26, 2014), <http://www.nbcnews.com/news/latino/how-these-techies-aim-close-achievement-gap-n58676>; Harlyn Pacheco and Ricardo Rodriguez, OPEN SOCIETY FOUNDATIONS (last accessed July 15, 2014), <http://www.opensocietyfoundations.org/about/programs/us-programs/grantees/harlyn-pacheco-ricardo-rodriguez>.

¹⁷ Kimberly Maul, *African Americans and DIY: Using Etsy and Kickstarter to Boost a Business*, MADAMENOIRE (Dec. 19, 2012), <http://madamenoire.com/240286/african-americans-and-diy-using-etsy-and-kickstarter-to-boost-a-business/>.

¹⁸ Comments of Etsy, GN Docket 14-28, filed July 8, 2014, *available at* <https://blog.etsy.com/news/files/2014/07/Etsy-Open-Internet-Comments-7.8.14.pdf>.

¹⁹ *Artists of Color Members*, ETSY (last accessed July 15, 2014), <https://www.etsy.com/teams/6303/etsy-artists-of-color/members>.

explained: “One of the main audiences I try to attract are those who want contemporary artwork featuring people of color. There have been times when customers will tell me, either through Etsy, Facebook, or Twitter, that they are happy to find artwork of people that look like them. And, that’s what makes Etsy a really great marketplace. It allows art, design, and styles that are pretty much ignored by the mainstream to congregate in one spot.”²⁰

(3) The Open Internet Supports Free Expression And Storytelling

The Open Internet has served a vital purpose by allowing diverse voices an opportunity to represent themselves, make a living, and find an audience. As Voices for Internet Freedom has noted, “Government policies have historically allowed just a handful of corporations to control each new media platform. This is why so few people of color own broadcast TV and radio stations. It’s also why, well into the 21st century, many media outlets still depict our communities in stereotypical terms.”²¹ Indeed, the FCC’s most recent media ownership numbers reveal that all of the people of color that own full power commercial television stations in this country could fit comfortably onto one school bus.²² The lack of ownership of media outlets has resulted in a lack of participation by people of color in the media, making unbalanced and

²⁰ Maul, *supra* note 17.

²¹ *Voices Home*, VOICES FOR INTERNET FREEDOM (last accessed July 16, 2014), <http://www.internetvoices.org/voices-home>.

²² *Report on Ownership of Commercial Broadcast Stations*, MB Docket Nos. 14-50, 09-182, 07-294 (rel. June 27, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0627/DA-14-924A1.pdf (According to data compiled by the FCC, of 1,386 full power commercial television stations in the country in 2013, Latinos owned 42 stations, African Americans owned 9, Asian Americans owned 19 (although by the time the report was released, that number had dropped to 5), and American Indians and Alaska Natives owned 11).

stereotypical news and entertainment content the norm.²³ It has also impacted the ability of people of color to make a living in the media industry and has depressed the pipeline of up-and-coming diverse talent. Thankfully, the Open Internet has provided an opportunity to correct many of the shortcomings of traditional media. Ruth Livier, Issa Rae, and Rosa Alonso are just a few examples.

Ruth Livier

Ruth Livier is an accomplished Mexican-American actress, writer, and producer who has seized the opportunities created by a truly Open Internet to bypass traditional gatekeepers and reach an audience with her digital content. Her award-winning, bilingual web series *Ylse* has been hailed as the type of high-quality, stereotype-defying content that is lacking from mainstream media outlets. In fact, thanks to the success of *Ylse*, Ruth became the first writer to join the Writers Guild of America via work on digital content and 'new media.'

In a recent notice of ex parte presentation filed with the Commission,²⁴ Ruth recounted experiences that she had while discussing the show with executives of traditional media companies, including one who questioned whether or not anyone would want to hear her story. She also explained how the lower barriers to entry inherent in producing high quality 'new media' content, thanks in no small part to an Open Internet, made it possible for her to create her show without a great deal of capital, and allowed her to share her story with people all over the world. Ruth mentioned that she views net neutrality as an issue of freedom of speech and expression.

²³ *The Impact of Media Stereotypes on Opinions and Attitudes Towards Latinos*, NATIONAL HISPANIC MEDIA COALITION (Sept. 2012), available at <http://www.nhmc.org/reports/impact-media-stereotypes-opinions-attitudes-towards-latinos/>.

²⁴ Notice of *Ex Parte* filed by the National Hispanic Media Coalition et al., GN Docket No. 14-28, GN Docket No. 10-127 (July 11, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521376614>.

Beyond that, Ruth discussed the lack of opportunities for Latinos and other people of color in traditional media and contrasted that with the number of opportunities that she, alone, was able to create for Latino actors, directors, writers, and crewmembers on her own online series. She explained how the production of her web series earned her membership in the Writers Guild of America (“WGA”), making her the first person to join by writing solely ‘new media’ content. Further, by maintaining a union production under the WGA, the Directors Guild of America, and the Screen Actors Guild, she made it possible for many other people of color to earn credits towards joining a union – an important step that would add them to a pool that would facilitate access to additional job opportunities and career advancement.²⁵

Issa Rae

Issa Rae is an African American producer, writer, and director. According to her website, her content has garnered over 20 million views and almost 160,000 subscribers on YouTube, she has made the Forbes 30 Under 30 list twice, and won the 2012 Shorty Award for Best Web Show for her hit series *The Misadventures of Awkward Black Girl*.²⁶

According to Issa, “The Internet is where you can find what you’re not seeing in TV and film. I’m a fan first; I didn’t see any content of color that I could relate to.”²⁷ With that in mind, she launched *The Misadventures of Awkward Black Girl* online in 2011. When she realized that her show was a hit, she turned to Kickstarter to raise the money necessary to finish her first

²⁵ Lisa Rosen, *How the Web Was Won*, WRITTEN BY: THE MAGAZINE OF THE WRITERS GUILD OF AMERICA, WEST (Oct.-Nov. 2009), available at <http://www.ylse.net/pdfs/wga.pdf>.

²⁶ *About Me*, ISSARAE.COM (last accessed July 16, 2014), <http://www.issarae.com/about-me/>.

²⁷ L Studio Presents, *Issa Rae | The Conversation with Amanda de Cadenet*, YOUTUBE (May 22, 2013), <https://www.youtube.com/watch?v=1RTI65A2U3c>.

season.²⁸ In a short amount of time, she was able to raise almost double the \$30,000 she sought and she was able to complete not only her first season, but a second season as well.²⁹ Later, she powerfully wrote about the differences between the Open Internet and traditional outlets:

I tried to pitch one of my other web series to TV, and I was met with certain ideas and certain forms of criticism that I didn't necessarily agree with. What executives were telling me that networks wanted—I didn't want to produce that. By the time I came up with the idea for this series, it was just a no-brainer that it would go straight to web. I didn't feel like it belonged on TV. I knew that network executives would be like, "[N]o one's gonna watch this." *On the web there are no gatekeepers. I can just put it out there.*³⁰

By simply giving Issa the opportunity to tell her story and find an audience, the Open Internet allowed her to earn the opportunity to participate in the media industry and launch a successful career. Since then, she has created web content for Pharrell Williams, Tracey Edmonds and others. She has worked on developing television projects with well-known show runners Shonda Rhimes and Larry Wilmore.³¹ Beyond that, she was invited to co-host a show on the cable network, *Aspire*.³² When asked whether the show that opened so many doors would have been possible without the Internet, she responded, "No. Not now. Not at all. No way. I just know for a fact that it would not."³³

Rosa Alonso

²⁸ Bim Adewumbi, *Web Comedy Star Issa Rae: "I Think TV Will Become The Internet's Poor Cousin,"* THE GUARDIAN (Apr. 15, 2014), available at <http://www.theguardian.com/culture/2014/apr/16/issa-rae-web-comedy-star-tv-poor-cousin>.

²⁹ *The Misadventures of Awkward Black Girl*, KICKSTARTER (last accessed July 16, 2014), <https://www.kickstarter.com/projects/1996857943/the-misadventures-of-awkward-black-girl>.

³⁰ Lily Rothman, *Issa Rae of "Awkward Black Girl" on the Future of the Web Series*, TIME (July 10, 2012), <http://entertainment.time.com/2012/07/10/issa-rae-of-awkward-black-girl-on-the-future-of-the-web-series/> (emphasis added).

³¹ *About Me*, ISSARAE.COM (last accessed July 16, 2014), <http://www.issarae.com/about-me/>.

³² *Issa Rae*, ASPIRE - EXHALE (last accessed July 16, 2014), <http://exhale.aspire.tv/content/host-profile-3>.

³³ Rothman, *supra* note 30.

During a recent ex parte meeting with the Commission, Rosa Alonso spoke extensively as Co-Chair of the Board of the National Association of Latino Independent Producers (“NALIP”), as well as from her experience within the industry and as an entrepreneur and innovator who was able to leverage the Open Internet to lead a tremendously successful career.³⁴ Rosa is founder and creator of the technology lifestyle blog “Mi Vida Tec – with Rosa Alonso” and President of Foraché Productions LLC, a marketing, mobile/digital, multimedia and business consulting firm.³⁵ Based on her work online, she won the 2013 “*The Innovator*” Award at the South by Southwest Film & Interactive Festival (“SXSWi”).³⁶ She is also a television personality and technology expert. Known as “Rosa La Tecnológica” (“Rosa the Techie”) in Spanish-language Latino media, she makes regular appearances on prominent Spanish-language television programs in the New York market and nationally.

In her meeting with the Commission, Rosa explained that the Open Internet put her on equal footing with large, incumbent companies as she built and developed her various entrepreneurial ventures. She also explained how she was “discovered” by traditional media companies through her online content and how that allowed her to advance her career and reach a larger audience with her instructive technology literacy products. Rosa pointed out that, in addition to her success story, she hears similar stories from many of the 10,000 members of NALIP.

³⁴ Notice of *Ex Parte* filed by the National Hispanic Media Coalition et al., GN Docket No. 14-28, GN Docket No. 10-127 (April 18, 2014), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017612421>.

³⁵ *Home*, MI VIDA TEC WITH ROSA ALONSO (last accessed July 16, 2014), <http://www.mividatec.com>.

³⁶ *The SXSWI Innovator: Mi Vida Tec – With Rosa Alonso*, TRENDINGSOURCE.COM (last accessed July 16, 2014), <http://www.trendingsource.com/2013/03/10/the-sxswi-innovator-mi-vida-tec-with-rosa-alonso/>.

(4) **The Open Internet Facilitates Civic Engagement And Public Discourse In Communities Of Color**

The Open Internet has allowed communities of color to organize for change and participate in our democracy in meaningful and unprecedented ways. Organizations that serve people of color, like ColorOfChange, Presente.org, and others, have achieved incredible results by mobilizing communities to create positive social change and holding those in power accountable. They have also shed light on a number of issues that would have otherwise gone unnoticed by mainstream media. Two examples of instances where the Open Internet has facilitated important public dialogue or illuminated societal problems in the coverage of the Trayvon Martin story and the courage of DREAMers.

The Trayvon Martin Story

On February 26, 2012, Trayvon Martin, a 17-year-old African-American boy, was shot to death by George Zimmerman in Sanford, Florida. Although the story, which involved issues of racial profiling and unequal protection for young men and boys of color under the law, eventually became one of the most widely-reported stories involving race in a half a decade,³⁷ it almost didn't make it beyond a single report on the local news.

According to an in-depth report on news coverage of the story performed by the MIT Center for Civic Media, after limited local coverage in the days following the shooting, the news cycle had appeared to move on.³⁸ However, ten days after the shooting, the story began receiving attention once again. According to the MIT analysis:

³⁷ Monica Anderson, *As the Trayvon Martin case goes to trial, remembering a major media event*, PEW RESEARCH CENTER (June 10, 2013), <http://www.pewresearch.org/fact-tank/2013/06/10/as-the-trayvon-martin-case-goes-to-trial-remembering-a-major-media-event/>.

³⁸ Erhardt Graeff, *Mapping the Trayvon Martin Media Controversy*, MIT CENTER FOR CIVIC MEDIA (Feb. 12, 2014), <http://civic.mit.edu/blog/erhardt/mapping-the-trayvon-martin-media-controversy>.

Race-based media led by *Global Grind*, and to a lesser extent activist outlets ColorOfChange and the Black Youth Project, played key roles during this act. ‘Trayvon Martin’ appeared on Google Trends on March 8th for the first time.

...

On March 14th, while other media channels were still relatively quiet on the story, there was a strong increase in signatures on [a] Change.org petition (116,391). ... Using Change.org’s petition traffic data, we were able to link this surge of interest back to supportive tweets from a number of celebrities. Specifically, Change.org employee Timothy Newman elicited supportive tweets from celebrities such as Talib Kweli, Wyclef Jean, Spike Lee, Mia Farrow, and Chad Ochocinco, creating a 900 percent spike in social media traffic to the petition between March 12th and 15th.³⁹

The amplification of this story and participation in the intense public dialogue that it initiated would not have been possible without the crucial contributions of people of color online. And the diverse online outlets that were used to educate and engage so many communities, and raise so many voices, would likely cease to exist without an Open Internet.

DREAMers

DREAMers, or young immigrants who were raised in the United States from a young age yet were born elsewhere, have long used the tools provided by an Open Internet to organize for meaningful change of this country’s broken immigration system. By having the tremendous courage to share their stories, despite the possibility of facing severe consequences, DREAMers have changed the face of the immigration debate in a dramatic way. One incredible example is the story of Erika Andiola, one of the country’s most prominent DREAMer leaders.

In the early morning hours of January 11, 2013, U.S. Immigration and Customs Enforcement (“ICE”) agents raided Erika Andiola’s home in Arizona and took her brother and mother into custody. Shortly after the raid, Erika uploaded a heart-wrenching video explaining what had happened and posted several messages on social media sites asking for the support of

³⁹ *Id.*

the community.⁴⁰ Within 30 minutes, Erika was devising a plan of action to attempt to free her family members, who had done nothing wrong.⁴¹ By the following morning, Erika had planned a press release and began asking the community to sign online petitions and make phone calls asking for the release of her mother and brother. Presente.org was able to generate more than 20,000 signatures on a petition demanding that President Obama and ICE officials release Erika's family.⁴² By that evening, thanks to the outpouring of support from the community, Erika's family was released and yet another moving story of the cruelty of a broken immigration system entered the national discourse.⁴³

These are just some of the incredible stories that demonstrate the power of the Open Internet to allow our communities to organize and create positive social change. The Open Internet is unique in the way it enables anybody to spur such dramatic action and engaging dialogue.

B. The Commission Must Ban Blocking, Unreasonable Discrimination And Paid Prioritization, And Abandon Approaches That Involve Presumptions And Case-By-Case Inquiries

Rules preventing the blocking of lawful content or unreasonable discrimination by ISPs represent the heart of effective net neutrality rules. Without enforceable, bright-line rules preventing this type of harmful conduct and a ban on paid prioritization, the Internet will no longer be the open platform that it is today. Allowing these practices would create corporate gatekeepers and raise barriers to entry, eliminating the exact characteristics that have allowed our

⁴⁰ See *ICE Raids Home of DREAMer Activist Leader Erika Andiola*, LATINO REBELS (Jan. 11, 2013), <http://www.latinorebels.com/2013/01/11/ice-raids-home-of-dreamer-activist-leader-erika-andiola/>.

⁴¹ *Id.*

⁴² *The Presente.org Familia Was Attacked: Erika's Mother Could Be Deported At Any Moment*, PRESENTE.ORG (last accessed July 17, 2014), <http://act.presente.org/sign/erika>.

⁴³ *Id.*

communities to express ourselves and participate in ways and at levels that were previously very difficult or impossible to attain. By not fully preventing these harmful practices, the Commission would be stifling one of the most important agents of change of our time.

The NPRM seeks comment on three different approaches to network neutrality: (1) banning blocking, discrimination and paid prioritization; (2) creating a rebuttable presumption against such practices; or (3) a “wait and see” approach whereby the Commission would examine seeming network neutrality violations on a case-by-case basis.⁴⁴

The Commission must adopt a proactive ban on harmful ISP practices – the other two methods are unworkable and place an undue burden on Internet users to police ISP behavior. The public is not prepared to shoulder the burden of identifying and challenging harmful conduct. Indeed, the average consumer is unaware of how Internet traffic management even works, much less the FCC complaint process. Even the most sophisticated and well-funded non-profits lack the capacity to continually fight network neutrality violations. Solutions that include presumptions and case-by-case approaches are therefore shortsighted. Moreover, clear rules of the road will bring certainty to the market and will prevent blocking, discrimination and paid prioritization before they become the status quo.

C. Recent ISP Conduct Demonstrates The Need For More Robust Transparency Rules

The 2010 *Open Internet Order's* transparency requirements, upheld by the D.C. Circuit in *Verizon v. FCC*, are an important first step towards protecting and preserving a free and open Internet,⁴⁵ however, the Commission must go further to achieve meaningful transparency. The existing transparency rules strike the necessary balance between giving providers the flexibility

⁴⁴ 2014 NPRM, *supra* note 10, at ¶¶ 96, 111-112, 126-128, 136, 168.

⁴⁵ *Verizon*, 740 F.3d at 659.

to effectively manage their networks and providing consumers with useful, understandable information regarding network management, performance characteristics, and commercial terms that they can use as a safeguard against abuse.⁴⁶ To ensure that the Internet remains the level playing field that it has always been, regular and accurate disclosures from Internet providers are paramount.

In the NPRM, the Commission asked for comment “as to ways that the transparency rule can be improved, taking into account changes in the nature of the provision of broadband services since 2010.”⁴⁷ The Commission must take this opportunity to enhance this rule, in particular to reach conduct that may occur at peering or interconnection points. The performance of these points in the network directly impacts the performance that end users are able to achieve through specific applications. Consumers’ ability to independently assess potential problems or interference with their service is severely limited due to the technical nature of the issue and the current lack of transparency regarding transactions between companies that impact the network beyond the last mile.

Consumers grow confused when the performance of a certain application or service fails to reflect the speed tier that a customer has purchased, as demonstrated by the recent and highly publicized dispute between Netflix and Comcast. Earlier this year, several Comcast subscribers reported difficulties streaming Netflix content, especially during peak hours. Though Netflix requires only 5Mbps for an HD stream, Comcast customers with bandwidth packages of 6Mbps and much higher still claimed to experience substandard streaming quality.⁴⁸ According to

⁴⁶ 2014 NPRM, *supra* note 10 at ¶¶ 63-66.

⁴⁷ *Id.* at ¶ 65.

⁴⁸ *Internet Connection Speed Recommendations*, NETFLIX (July 14, 2014), available at <https://help.netflix.com/en/node/306>; *Can’t Watch Netflix! Comcast Disrupting Connection?*, TECHNOLOGY PLUS BLOG (July 14, 2014), available at

reports posted online by purported customers of both companies, Comcast representatives seemed to lack candor or precision when addressing the issue and sometimes tried to upsell customers to a higher, costlier speed tier or recommend that they purchase new hardware as a way to solve the problem.⁴⁹ However, it was later revealed that many of the reported problems actually stemmed from a financial dispute between Comcast and Netflix, and not from the users' equipment or service tier.⁵⁰ In disputes like these between end users and ISPs, consumers can be harmed. The apparent inability of ISPs to adequately explain this issue to some consumers and the obvious likelihood of confusion that can be caused by such disputes demonstrates the need for greater transparency and disclosure rules.

<http://technologyplusblog.com/2014/news/internet/cant-watch-netflix-comcast-disrupting-connection/>.

⁴⁹ See REDDIT.COM,

http://www.reddit.com/r/netflix/comments/1vupyc/meta_comcast_probably_throttling_netflix_to (“[Comcast representative suggested that] 30mbit wasn't enough for netflix...and suggested I upgrade to the 50mbit blast plan.”); COMCAST SUPPORT FORUMS,

<http://forums.comcast.com/t5/forums/forumtopicprintpage/board-id/5/message-id/195047/print-single-message/true/page/1> (“[A Comcast technician] determined that their Arris modem/router was at fault, and suggested "off the record" that I go buy my own router, that it would be much better than the one they rent to you. So he installed just a cable modem (Arris CM820), and I installed [a new router]. Disappointingly, the Netflix issue persists.”); COMCAST SUPPORT FORUMS,

<http://forums.comcast.com/t5/forums/forumtopicprintpage/board-id/5/message-id/195932/print-single-message/true/page/1> (“[The Comcast Representative] said my problem with streaming Netflix was that I was on the 25Mbps/sec "Blast" plan and that I needed the 50Mbps/sec plan.”); COMCAST SUPPORT FORUMS, <http://forums.comcast.com/t5/Basic-Internet-Connectivity-And/Xfinity-requires-12Mb-service-for-Netflix/m-p/1180535/highlight/true#M146826> (“Told by a Comcast service representative that upgrading from 6Mb service to 12Mb service was necessary to access Netflix.”) (last accessed July 16, 2014).

⁵⁰ Dawn C. Chmielewski and Meg James, *Netflix-Comcast deal ends Internet consumption dispute*, L.A. TIMES (Feb. 25, 2014), available at

<http://articles.latimes.com/2014/feb/25/entertainment/la-et-ct-comcast-netflix-20140225>.

II. THE FCC’S RULES MUST APPLY EQUALLY TO BOTH FIXED AND MOBILE NETWORKS OR RISK DISPROPORTIONATE HARM TO UNDERSERVED COMMUNITIES

In the NPRM, the Commission asks a number of questions concerning whether or not it should apply the same rules to fixed and mobile service. Among other inquiries, the Commission asks, “[h]ow would treating mobile broadband differently from fixed broadband affect consumers in different demographic groups, including those who rely solely on mobile for broadband Internet access.”⁵¹ Internet Freedom Supporters believe that strong and enforceable Open Internet rules must apply equally to fixed and mobile services.⁵² Anything less risks leaving entire communities behind and frustrating a number of important Commission goals.

Open Internet rules, no matter how robust, will be futile without parity between treatment of mobile and fixed networks, particularly for communities of color. Since the initial deployment of wireline broadband Internet access, low-income, rural, and racially and ethnically diverse communities have long lagged behind affluent, white communities in the rate of home adoption. Indeed, the Commission itself has acknowledged that, based on census and subscription data, people in poor and rural communities are less likely to have access to broadband at their home than those in wealthy and suburban communities.⁵³ For many, mobile networks help bridge the digital divide and provide an onramp to the Internet. Given this reality, Internet Freedom Supporters agreed with former Chairman Genachowski that “[e]ven though each form of Internet

⁵¹ 2014 NPRM, *supra* note 10 at ¶ 106.

⁵² While we decline to address it here, it is possible that what constitutes reasonable network management may differ slightly between fixed and mobile networks. However, it is important that the definition of reasonable network management not be interpreted so expansively that it becomes an exception that swallows the rule.

⁵³ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 11-121, Eighth Broadband Deployment Report at ¶¶ 5, 45-48, 74-79 (rel. Aug. 21, 2012).

access has unique technological characteristics, they are all different roads to the same place” and that “the Internet itself [must] remain open, however users reach it.”⁵⁴ Fixed and mobile Internet access services provide a pathway to the same place and, indeed, are increasingly converging. The services must be treated equally and subject to the same, strong Open Internet rules subject to reasonable network management.

A. Mobile Parity Will Prevent Second Class Digital Citizenship For People Of Color

Should the FCC fail to extend the same Open Internet rules to fixed and mobile services, users in underserved communities who rely exclusively or primarily on mobile broadband for Internet access could be disproportionately affected by conduct which will have been deemed harmful to users of wireline products, severely limiting the ability of mobile users to access a free and Open Internet through the device or service that they prefer or find more affordable.

Mobile parity is essential to ensuring that people of color, who rely disproportionately on mobile devices as their primary Internet access points, have equal access to the Internet. 74 percent of African American users and 68 percent of Hispanic users reported accessing the Internet via their cell phones – in contrast, only 59 percent of white users reported using their cell phones to access the Internet.⁵⁵ Notably, 47 percent of African Americans and 60 percent of Latinos rely on mobile phones as their primary Internet access points.⁵⁶

⁵⁴ Julius Genachowski, Chairman, FCC, Speech to the Brookings Institute (Sept. 21, 2009).

⁵⁵ Maeve Duggan and Aaron Smith, *Cell Internet Use 2013*, PEW RESEARCH CENTER INTERNET AND AMERICAN LIFE PROJECT (Sep. 16, 2013), available at <http://www.pewinternet.org/2013/09/16/cell-internet-use-2013/> (Usage rates among young people are even higher – up to 85 percent for users between ages 18-29, regardless of race.).

⁵⁶ *Id.*

There is evidence that blocking and discriminatory behavior has already occurred in the mobile sector from all four of the major carriers.⁵⁷ For example, AT&T has blocked Apple's FaceTime service⁵⁸ and prohibits users from accessing peer-to-peer file sharing applications or maintaining network connections (such as through a webcam) without an active user on the other end.⁵⁹ T-Mobile has also forbidden users from using peer-to-peer file-sharing applications, and Sprint had a similar prohibition on webcam network connections.⁶⁰ Verizon attempted to block tethering, the practice of using your phone's wireless data for other devices, such as a tablet or laptop, until the FCC required them to allow tethering to continue.⁶¹ Given these behaviors, it is clear that the risk of blocking and discrimination by mobile carriers is real, and strong Open Internet rules are necessary to allow mobile users, who are disproportionately people of color, unencumbered, open access to the entire Internet.

B. Mobile Parity Will Support Efforts To Close The Digital Divide

Mobile technology utilizing mobile broadband networks is increasingly used to address the digital divide. Arbitrarily treating mobile connections differently than fixed connections

⁵⁷ Jeremy Gillula and April Glaser, *Net Neutrality and Transparency Principles Must Extend to Mobile Internet Access Too*, ELECTRONIC FRONTIER FOUNDATION (July 8, 2014), available at <https://www.eff.org/deeplinks/2014/07/net-neutrality-and-transparency-principles-must-extend-mobile-internet-access-too>.

⁵⁸ *AT&T Blocking Facetime*, FREE PRESS (last accessed July 16, 2014), <http://www.savetheinternet.com/att-facetime>.

⁵⁹ AT&T Wireless Consumer Agreement, § 6.2, available at <https://www.att.com/shop/en/legalterms.html?toskey=wirelessCustomerAgreement#whatAreTheIntendedPurposesOfDataServ>.

⁶⁰ T-Mobile Terms & Conditions, § 18 (last accessed July 18, 2014), available at http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true; Sprint Terms & Conditions (last accessed July 16, 2014), available at https://shop2.sprint.com/en/legal/os_general_terms_conditions_popup.shtml.

⁶¹ Marguerite Reardon, *What Verizon's FCC Tethering Settlement Means to You (FAQ)*, CNET (Aug. 2, 2012), <http://www.cnet.com/news/what-verizons-fcc-tethering-settlement-means-to-you-faq/>.

would frustrate the stated goals of Congress and the FCC to close that divide. Congress has explicitly directed the FCC to “provide improved access to broadband service to consumers residing in underserved areas”; in the National Broadband Plan, the Commission itself claims that closing the digital divide will require a “substantial commitment by states and the federal government alike...includ[ing] initial support to cover the capital costs of building new networks in areas that are unserved today, as well as ongoing support for the operation of newly built networks in areas where revenues will be insufficient to cover costs.”⁶² Open Internet rules that set two different standards for fixed and mobile broadband would frustrate these policy goals by stifling efforts to close the digital divide through mobile solutions.

Despite recent efforts to improve broadband adoption rates, a digital divide remains between people of color and whites, poor and wealthy, and rural and urban populations. As of August 2013, 74 percent of white households had adopted broadband technology in the home, but only 64 percent of African-American and 53 percent of Hispanic households had home broadband.⁶³ And those who prefer to speak Spanish at home have proven to be one of the most difficult groups to reach, with only 38 percent having broadband within the home.⁶⁴

Though mobile devices and networks still have some limitations compared to their wired counterparts, communities of color often rely on mobile devices to complete a growing variety of tasks, including making childcare arrangements, receiving health advice, accessing social services, participating in political issues, finding employment, and engaging with friends and

⁶² 47 U.S.C.A. § 1305(b)(2) (2009) (Broadband Technologies Opportunities Program of the American Recovery and Reinvestment Act); Federal Communications Commission, *Connecting America: The National Broadband Plan*, 139 (Mar. 16, 2010).

⁶³ Kathryn Zickuhr and Aaron Smith, *Home Broadband 2013*, PEW RESEARCH INTERNET PROJECT (Aug. 26, 2013), <http://www.pewinternet.org/2013/08/26/home-broadband-2013/>.

⁶⁴ Lee Rainie, Director, Pew Internet and American Life Project, Presentation at Washington Post Live 2013 Bridging the Digital Divide forum (Nov. 5, 2013), *available at* <http://www.pewinternet.org/Presentations/2013/Nov/The-State-of-Digital-Divides.aspx>.

family.⁶⁵ The Commission must adopt mobile parity to ensure that innovative efforts in libraries, rural areas and schools are allowed to meaningfully eradicate the digital divide.

(1) Libraries Are Beginning To Lend Out Mobile Hotspots For Patrons That Lack Home Broadband And Those Hotspots Should Reach The Entire Internet

Without equivalent Open Internet rules for mobile services, the impact of programs, like an innovative new service being offered by libraries, aimed at unconnected members of the population, would be severely diminished. Indeed, failing to provide for mobile parity would actually lock these users into a lower quality Internet service, arguably widening as opposed to closing the digital divide.

Public libraries, which serve over 96 percent of the U.S. population, have become key technology and Internet access centers. 62 percent of public libraries report offering the only free Internet access in their communities, and over 90 percent offer formal or informal technology training.⁶⁶ Latino and African-American communities are particularly reliant on public libraries and the technology services they provide. Latinos (86 percent) and African-Americans (92 percent) are significantly more likely than whites (72 percent) to consider free library access to the Internet and computers to be “very important” to the community.⁶⁷ These figures make libraries the perfect anchor institution to stand at the front line of increasing broadband adoption rates in this county.

⁶⁵ See Michael Scurato, *Trends in Latino Mobile Phone Usage and What They Mean For U.S. Telecommunications Policy*, NATIONAL HISPANIC MEDIA COALITION (Feb. 2012), available at <http://www.nhmc.org/mobilereport>.

⁶⁶ *State of America’s Libraries Report 2013: Public Libraries*, AMERICAN LIBRARY ASSOCIATION (2013), available at <http://www.ala.org/news/state-americas-libraries-report-2013/public-libraries>.

⁶⁷ Lee Rainie, Kristen Purcell, and Kathryn Zickuhr, *Library Services in the Digital Age*, PEW RESEARCH CENTER INTERNET AND AMERICAN LIFE PROJECT (Jan. 22, 2014), available at <http://libraries.pewinternet.org/2013/01/22/part-3-technology-use-at-libraries/>.

Some public library systems are seizing this opportunity and taking steps to provide Internet access outside their walls. For example, the New York Public Library system’s “Check Out The Internet” program, which is launching in Fall 2014, will provide mobile Wi-Fi hotspots to library patrons who do not have wired broadband service at home for up to one year.⁶⁸ The program will be available at branches in neighborhoods with low Internet connectivity. The Chicago Public Library’s “Hotspot at Home” program similarly lends mobile hotspots and laptops to library patrons who do not have broadband access at home for up to three weeks.⁶⁹ Programs like these demonstrate the power of mobile Internet access to close the digital divide, and the risks that we face if these services are not adequately protected by strong Open Internet rules.

(2) Mobile Parity Will Help Bridge The Digital Divide In Rural Areas

Mobile parity will aid expanded connectivity to an unencumbered Internet in rural areas. Rural areas have long lagged behind their urban and suburban counterparts when it comes to broadband penetration and access, and 20 percent of Americans in rural areas still lack access to wired broadband.⁷⁰ To overcome the difficulties of reaching rural customers with wired service, several broadband providers have begun to offer home phone and Internet services through their wireless networks. While some wireless services used as home substitutes are marketed as fixed

⁶⁸ Joe Vitale, *Looking to Narrow City's Digital Divide, New York Public Library Announces Wi-Fi Hotspot Lending Program*, THE STATEN ISLAND ADVANCE (June 23, 2014), available at http://www.silive.com/news/index.ssf/2014/06/looking_to_digital_divide_nypl.html.

⁶⁹ Mike Flacy, *Chicago, New York Libraries Will Soon Lend Wi-Fi Hotspots to Patrons*, DIGITAL TRENDS (June 25, 2014), available at <http://www.digitaltrends.com/mobile/chicago-new-york-libraries-will-soon-let-check-wi-fi-hotspots/#!bciaaz>.

⁷⁰ *Broadband in Rural Areas*, BROADBAND.GOV (July 17, 2014, 12:55 PM), http://www.broadband.gov/rural_areas.html; Kathryn Zickuhr, *Main Report: Who's Not Online and Why*, PEW RESEARCH INTERNET PROJECT (Sep. 25, 2013), <http://www.pewinternet.org/2013/09/25/main-report-2/>.

wireless solutions, it is becoming increasingly difficult to distinguish between fixed and mobile wireless home products. For example, Verizon reportedly markets its MiFi Home, as “an affordable, convenient way to... bring fast broadband speeds to areas that are not wired for cable or DSL service, particularly customers living in rural geographies.”⁷¹ The MiFi Home, which provides service over Verizon’s 4G LTE network, connects up to 10 wireless devices and 3 Ethernet-connected devices and can be used for both Internet access and voice telephony and appears as though it can be easily moved within the home and, perhaps, used in locations outside the home.

AT&T provides a similar wireless home phone and broadband Internet service over its own 4G LTE network.⁷² It is advertised as a home service that is also portable. In the fine print, AT&T states clearly that they consider this a "mobile broadband Internet access service" despite the fact that it is marketed as a home substitute.⁷³ As these devices are increasingly used, both to connect underserved areas and as a part of upcoming network transitions, the justification for applying different Open Internet rules to fixed and mobile services weakens considerably.

(3) Mobile Parity Is Critical To Ensuring That School Wireless Programs Meet Their Intended Purposes

Mobile technologies are becoming inextricably linked to education,⁷⁴ and many schools are developing strategies to minimize the digital divide and related educational consequences for

⁷¹ Chuong Nguyen, *Verizon 4G LTE Broadband Router with Voice (MiFi Home) Review*, GOTTA BE MOBILE (Oct. 21, 2013), available at <http://www.gottabemobile.com/2013/10/21/verizon-4g-lte-broadband-router-voice-mifi-home-review/>.

⁷² AT&T Wireless Home Phone & Internet, AT&T.COM (July 13, 2014), available at <http://www.att.com/shop/wireless/devices/att/wireless-home-phone-and-internet-black.html#fbid=7oemHxPLJDF>.

⁷³ *Id.*

⁷⁴ In a survey of 2,462 teachers, 92 percent of them revealed that the Internet has a “major impact” on their teaching and 73 percent of them acknowledged that they or their students use

their students. Teachers of low-income students reported concerns about their students' access to necessary technologies at much higher rates; for example, 56 percent of teachers of the lowest income students say that students' difficulty accessing digital technologies is a "major challenge" to incorporating more digital tools into their teaching, but only 21 percent of teachers of the highest income students report that problem.⁷⁵ The Commission must adopt rules that apply equally to fixed and mobile services to ensure that any school mobile device strategies do not lead students without fixed home broadband to a different Internet experience than those students with access to fixed connections.

Several school districts across the country – including those in Baltimore⁷⁶, Arlington⁷⁷, Los Angeles⁷⁸, and Fresno⁷⁹, are implementing programs that provide tablets and other mobile devices to students. The tablets, which often come pre-loaded with educational software, use wireless networks like AT&T's 4G LTE network to connect to the Internet. Additionally, AT&T itself has pledged \$100 million to the White House's ConnectED program, which will provide

mobile phones in the classroom to complete assignments, but only 18 percent of them say that all or almost all of their students have access to the digital tools they need at home. Judy Buchanan, Linda Friedrich, Alan Heaps, and Kristen Purcell, *How Teachers are Using Technology at Home and in Their Classrooms*, PEW RESEARCH INTERNET PROJECT (Feb. 28, 2013), available at <http://www.pewinternet.org/2013/02/28/how-teachers-are-using-technology-at-home-and-in-their-classrooms/>.

⁷⁵ *Id.*

⁷⁶ Liz Bowie, *Baltimore County Schools Begin Technology Initiative*, BALTIMORE SUN, (Feb. 8, 2014), available at <http://www.baltimoresun.com/news/maryland/education/blog/bs-md-co-technology-initiative-20140208,0,1034541,full.story>.

⁷⁷ Bob Barnard, *Arlington Public Schools Plan to Give Every Student a Tablet*, MYFOXDC.COM (Feb. 28, 2014), available at <http://www.myfoxdc.com/story/24855702/arlington-public-schools-plan-to-give-every-student-a-tablet>.

⁷⁸ Devin Leonard, *The iPad Goes to School*, BUSINESSWEEK (Oct. 24, 2013), available at <http://www.businessweek.com/articles/2013-10-24/the-ipad-goes-to-school-the-rise-of-educational-tablets>.

⁷⁹ *Public Schools in Fresno, Calif., to Provide Tablet Computers to Students*, CBS NEWS, (Sep. 24, 2013), available at <http://www.cbsnews.com/news/public-schools-in-fresno-calif-to-provide-tablet-computers-to-students/>.

schools with free Internet connectivity for educational devices over its 4G mobile network.⁸⁰ If mobile Internet access is not subject to the same Open Internet rules and protections as wired broadband, then the students who rely on programs such as these will have access to an inferior quality of service, making it difficult, if not impossible, for them to keep up with other students who have the means to connect at home.

C. A Variety Of Commission Initiatives Designed To Address Important Policy Goals Rely On Mobile Networks And Would Be Frustrated By Unequal Treatment Of Mobile Connections

Subjecting mobile and wired broadband to different rules would frustrate several of the Commission's other policy goals, in sectors ranging from education to healthcare.

This problem is apparent in the Commission's efforts with regard to mHealth, or mobile health technologies. The FCC has devoted considerable resources and efforts into the exploration of mHealth programs, including hosting an mHealth Innovation Expo in December 2013.⁸¹ Inadequate protections in the mobile sphere will deter investment and innovation in these critical technologies, some of which have the potential of drastically improving the quality of life of users. Though some of the large, corporate health and tech companies may be able to afford prioritization fees, independent developers and entrepreneurs will not. Raising the barrier of entry into this field is damaging both economically, to the developers and innovators, and as a matter of public policy, to the patients who would stand to benefit from the widespread dissemination and adoption of mHealth applications.

⁸⁰ *AT&T Launches Online Application for \$100 Million in Free Classroom Mobile Connectivity*, AT&T NEWSROOM, (June 13, 2014), available at http://about.att.com/story/att_launches_online_application_for_100_million_in_free_classroom_mobile_connectivity.html?sf27181954=1.

⁸¹ Matthew Quinn, *FCC Continues Push on mHealth Innovation*, FCC.gov (Dec. 10, 2013), available at <http://www.fcc.gov/blog/fcc-continues-push-mhealth-innovation>.

This would be particularly harmful for low-income communities and communities of color, who tend to be underserved by the existing healthcare system and experience significant disparities in care.⁸² According to the Center for Innovation and Technology in Public Health:

The high penetration of mobile communications technology among low-income and [diverse] populations in the United States presents unprecedented opportunities to improve the health of the U.S. population and reach traditionally underserved subgroups (e.g., rural communities, low-income groups, and [communities of color]). In particular, mHealth solutions offer the potential to transform safety net care delivery and remove traditional geographic and economic barriers that these populations typically experience in their access to care services.⁸³

For mHealth to become the next major wave of healthcare technologies, the Commission must ensure that mobile healthcare applications will be protected from blocking, discrimination, and paid prioritization, just like applications accessed through wired broadband.

Disparities between mobile and fixed broadband rules would also impact programs like the Commission's "Apps for Communities Challenge," which encourages participants to "develop a software application (app) that delivers personalized, actionable information to people that are least likely to be online."⁸⁴ If mobile broadband providers are free to unreasonably discriminate, block content, or charge prioritization fees, the mobile applications created through this program may never reach the groups they are intended to connect. Programs like these that encompass both fixed and mobile technologies require a consistent framework across both types of platforms to be effective.

⁸² See *About OMH – The Office of Minority Health*, U.S. Dep't of Health and Human Servs., Office of Minority Health (last accessed July 17, 2014), <http://minorityhealth.hhs.gov/templates/browse.aspx?lvl=1&lvlID=7>.

⁸³ *Mobile Health and Underserved Populations*, Center for Innovation and Technology in Public Health (last accessed July 17, 2014), <http://citph.org/targeted-initiatives/mhealth/>.

⁸⁴ *Apps for Communities Challenge*, FCC (last accessed July 15, 2014), <http://www.fcc.gov/encyclopedia/apps-communities-challenge>.

III. TO ACHIEVE RULES THAT ADEQUATELY PROTECT AN OPEN INTERNET, THE FCC MUST RECLASSIFY INTERNET ACCESS SERVICE AS A TITLE II TELECOMMUNICATIONS SERVICE

The Commission must utilize the authority granted to it in Title II of the Telecommunications Act as the only sustainable legal theory available to support the Commission's authority to adopt the type of Open Internet regulations necessary to achieve the FCC's stated goals in the NPRM. Despite public remarks to the contrary, the FCC's proposal to use Section 706 authority as the basis of Open Internet rules prevents the FCC from enacting legally sustainable rules to ban blocking and unreasonable discrimination online. Yet these two rules are the very crux of the fight for an Open Internet. Open Internet rules that fail to ban blocking and unreasonable discrimination are incapable of protecting the even playing field that President Obama, the FCC, edge providers, the D.C. Circuit Court and Internet Freedom Supporters have once agreed was necessary to promote innovation and free speech on the web.⁸⁵ Rules that amount to anything less than bans on blocking and discrimination and instead create pathways for FCC review under a case-by-case basis or presumption standards are unworkable, burdensome to public interest advocates and consumers, and set a dangerous precedent.⁸⁶

In *Verizon v. FCC* the D.C. Circuit Court of Appeals found that Internet regulation “comfortably falls within the [FCC’s] jurisdiction,”⁸⁷ however, the court clarified at the outset of the opinion that rules preventing blocking and discrimination cannot be advanced under Section 706 of the Communications Act, as the Commission has proposed in this NPRM:

⁸⁵ *Technology*, CHANGE.GOV (July 16, 2014, 12:20 PM), http://change.gov/agenda/technology_agenda/; *Preserving the Open Internet Broadband Indus. Practices*, 25 F.C.C. Rcd. 17905 (2010); 2014 NPRM, supra note 10 at ¶¶ 1-4; *Verizon*, 740 F.3d at 628.

⁸⁶ See supra at Section I.B.

⁸⁷ *Verizon*, 740 F.3d at 629.

[T]he Commission has established that section 706 of the Telecommunications Act of 1996 vests it with affirmative authority to enact measures encouraging the deployment of broadband infrastructure. The Commission, we further hold, has reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers’ treatment of Internet traffic, and its justification for the specific rules at issue here — that they will preserve and facilitate the “virtuous circle” of innovation that has driven the explosive growth of the Internet — is reasonable and supported by substantial evidence. ***That said, even though the Commission has general authority to regulate in this arena, it may not impose requirements that contravene express statutory mandates. Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such.*** Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose per se common carrier obligations, we vacate those portions of the Open Internet.⁸⁸

This begs the question: can the FCC ban blocking and discrimination and escape the judicial interpretation that such action treats ISPs as common carriers in violation of the Communications Act? Based on a straightforward reading of *Verizon v. FCC*, Internet Freedom Supporters think not. According to the court,

[g]iven the Commission’s still-binding decision to classify broadband providers not as providers of “telecommunications services” but instead as providers of “information services,” see supra at 9–10, such treatment would run afoul of section 153(51): “A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services.” 47 U.S.C. § 153(51).⁸⁹

The court strongly implies, on multiple occasions, that the FCC could reclassify ISPs under Title II and create a legally sustainable theory on which to rest bans on unreasonable discrimination

⁸⁸ *Id.* at 628 (emphasis added).

⁸⁹ *Id.* at 650.

and blocking.⁹⁰ On the other hand, the court made it very clear that regulations that seem similar to common carrier regulations, like anti-blocking and anti-discrimination rules, would be struck down.⁹¹ Indeed, in the NPRM, the FCC itself acknowledges that *Verizon v. FCC* precludes it from preventing any discrimination unless it allows for individualized agreements to be struck between ISPs and edge providers.⁹²

The FCC appears to want to skirt reclassification while at the same time hold itself out as an Open Internet champion – but these positions are mutually exclusive. In the NPRM, the Commission takes great pains to distinguish the proposed rules from common carrier regulations.⁹³ It goes so far as to water down the very rules that the court found reasonable and justified in the first place, all in apparent attempt to sidestep reclassification. After two failed attempts at regulating ISPs under Section 706, the time is ripe for the FCC to do what is necessary, put consumers first, reclassify ISPs under Title II and adopt real Open Internet rules.

CONCLUSION

For the foregoing reasons, Internet Freedom Supporters urge the Commission to codify strong Open Internet rules that prevent blocking, unreasonable discrimination, and paid prioritization online, while also enhancing ISPs' transparency obligations. Given the fact that diverse, low-income, and rural communities disproportionately rely on mobile services as their primary means of Internet access, and that a number of current initiatives designed to bridge the digital divide rely on mobile technology, Internet Freedom Supporters stress that the Commission must apply any rules equally to fixed and mobile services, or risk causing great harm to these communities. Finally, Internet Freedom Supporters believe that the Commission

⁹⁰ *Id.* at 630-631, 650-652.

⁹¹ *Id.* at 650.

⁹² 2014 NPRM, *supra* note 10, at ¶¶ 5-6, 51, 89-91, 93, 97, 111, 115.

⁹³ *Id.* at ¶¶ 2, 5.

must ground any true Open Internet rules in the authority granted to it by Congress in Title II of the Telecommunications Act. To do so, the Commission must reclassify Internet access service as a telecommunications service.

Respectfully Submitted,

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APPENDIX A

INTERNET FREEDOM SUPPORTERS

1. Voices for Internet Freedom
2. Center for Media Justice
3. ColorOfChange
4. Free Press
5. National Hispanic Media Coalition (NHMC)
6. AimHigh LA
7. Appalshop
8. Art Is Change
9. Chicago Media Action
10. Clarisel Media
11. Common Cause
12. Common Frequency
13. Dignity and Power Now
14. Easton Community Access Television
15. Families For Freedom, Inc.
16. Generation Justice
17. Hispanic Association of Colleges and Universities (HACU)
18. Iguana Films
19. Institute for Intellectual Property and Social Justice
20. Iraq Veterans Against the War
21. Latino Rebels
22. LatinoJustice PRLDEF
23. Librotrifcante Movement
24. Line Break Media
25. Main Street Project
26. Martinez Street Women's Center
27. May First/People Link
28. Media Action Grassroots Network (MAG-Net)
29. Media Alliance
30. Media Literacy Project
31. Media Mobilizing Project
32. Message Media Education
33. Mexican American Opportunity Foundation (MAOF)
34. MujerLatinaToday.com
35. National Association of Hispanic Journalists (NAHJ)
36. National Association of Latino Independent Producers (NALIP)
37. National Consumer Law Center, on behalf of its low-income clients
38. National Institute for Latino Policy (NiLP)
39. National Latina Institute for Reproductive Health
40. News Taco
41. Organizing Apprenticeship Project
42. Paper Tiger TV
43. Presente.org
44. Radio Bilingüe

45. Ruth Livier
46. St. Paul Neighborhood Network
47. The Greenlining Institute
48. The People's Press Project
49. TURN (The Utility Reform Network)
50. Women In Media & News (WIMN)
51. Women, Action & the Media
52. Working Films
53. Working Narratives
54. Young Women United

APPENDIX B

MAG-NET INSTAGRAM ACTION

