

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 THE NATIONAL
MINORITY ORGANIZATIONS:**

100 Black Men
A. Philip Randolph Institute
American Indians in Film and Television
Asian Pacific American Institute for Congressional Studies
Asian/Pacific Islander American Chamber of Commerce & Entrepreneurship
Blacks In Government
Communications Consumers United
Council of Korean Americans
Dialogue on Diversity
Federation of Southern Cooperatives
Hispanic Telecommunications and Technology Partnership
Innovation Generation
International Black Broadcasters Association
Japanese American Citizens League
Latinos in Information Sciences and Technology Association
Leadership Education for Asian Pacifics, Inc.
MANA - A Latina Organization
Minority Business Roundtable
Minority Media and Telecommunications Council
National Association of Black County Officials
National Association of Multicultural Digital Entrepreneurs
National Association of Neighborhoods
National Bankers Association
National Black Caucus of State Legislators
National Black College Alumni Hall of Fame Foundation, Inc.
National Black Farmers Association
National Black Religious Broadcasters
National Coalition for Black Civic Participation
[additional organizations are set out on the following page]

National Policy Alliance
National Congress of Black Women
National Hispanic Caucus of State Legislators
National Hispanic Foundation for the Arts
National Organization of Black County Officials
National Organization of Black Elected Legislative Women
National Puerto Rican Chamber of Commerce
National Puerto Rican Coalition
OCA – Asian Pacific American Advocates
Rainbow PUSH Coalition
SER - Jobs for Progress
The Latino Coalition
Universal Impact
U.S. Black Chambers of Commerce, Inc.

David Honig
President
Jacqueline Clary
Senior Counsel and John W. Jones Fellow
Minority Media and Telecommunications Council
3636 16th St. N.W., Suite B-366
Washington, D.C. 20010
(202) 332-7005
david@davidhonig.org

Counsel for the National Minority Organizations

Of Counsel:

Nicol Turner-Lee, Ph.D., Vice President and Chief
Research and Policy Officer, Minority Media and
Telecommunications Council

July 18, 2014

TABLE OF CONTENTS

EXECUTIVE SUMMARYi

I. INTRODUCTION2

II. SECTION 706 IS FAR BETTER SUITED TO MEETING THE GOALS OF THE COMMISSION AND COMMUNITIES OF COLOR THAN TITLE II RECLASSIFICATION 4

A. The Current Regulatory Structure Promotes Digital Engagement By Communities Of Color, And The Commission Should Maintain This Course.....6

B. Reclassifying Broadband Under Title II Would Adversely Impact Broadband Adoption And Investment8

C. The Commission Should Use Its Section 706 Authority To Protect The Open Internet..... 11

III. CONSUMERS HARMED BY VIOLATIONS OF THE OPEN INTERNET RULES SHOULD HAVE THE RIGHT TO AN ACCESSIBLE, AFFORDABLE, EXPEDITED PROCESS TO RESOLVE COMPLAINTS 12

IV. CONCLUSION..... 15

EXECUTIVE SUMMARY

The National Minority Organizations, a coalition of 42 highly respected national civil rights, social service, and professional organizations representing millions of constituents, urge the Commission to focus its broadband policies on promoting engagement, adoption, and informed broadband use by communities of color, and to exercise its Section 706 authority to protect all consumers' rights to an open Internet. To that end, the Commission should establish an accessible, affordable, and expedited procedure for the resolution of complaints. We recommend such a procedure be modeled after Title VII of the 1964 Civil Rights Act to complement the Commission's proposed expansion of transparency and its Ombudsperson proposal.

Almost every party that has participated before the Commission in this and similar proceedings supports the goal of Internet openness. That includes this coalition, which strongly believes that every consumer, entrepreneur, and business has a right to the protections of an open Internet. The only disagreement before the Commission is on the means to achieve this goal. The National Minority Organizations recognize that access to broadband, adoption, and digital literacy are critical civil rights issues – broadband is essential to living a life of equal opportunity in the 21st century. Without broadband access, low income and middle-class Americans – and particularly people of color – cannot gain new skills, secure good jobs, obtain a quality education, participate in our civic dialogue, or obtain greater access to healthcare through tele-health technologies.

Yet communities of color continue to under-adopt broadband for reasons that include availability, affordability, relevance, and digital literacy. The National Minority Organizations urge the Commission to prioritize a policy agenda that advances first-class digital citizenship and continues to stimulate investment in broadband infrastructure. Our organizations also urge the Commission to avoid Title II reclassification given the still fragile state of minority engagement in the digital ecosystem.

If strong consumer protections are adopted and enforced, and a presumption against paid prioritization is adopted, Section 706 would be well suited to meet the goals of the Commission and communities of color. This authority will enable the Commission to adopt and enforce *smart* net neutrality rules that meet the goals of transparency and equity, while fostering broadband adoption and informed use. Section 706 has been successful in paving the way for today's open Internet, protecting consumers, promoting digital literacy and civic engagement, connecting schools and communities, and stimulating employment and entrepreneurship. Under the Kennard/Powell/Genachowski regulatory paradigms, communities of color have benefited exponentially, as demonstrated by their use of technology applications, products, and services. Even as these communities struggle with residential broadband adoption, people of color who have adopted broadband engage digitally at rates equal to or surpassing that of the general population, illustrating the benefits of broadband and the critical need to expand adoption for all communities of color. We recommend that the Commission maintain this regulatory course. The Commission should also use its Section 706 authority to ban redlining of fast broadband service – the greatest threat to first class digital citizenship the nation faces today.

In contrast to Section 706, Title II regulation would adversely affect adoption and thereby harm communities of color. Given the still fragile state of minority engagement in the digital ecosystem, our nation cannot afford the impact that reclassification would have on stifling

broadband adoption among vulnerable populations and limiting the investment and innovation that have benefitted our constituents. In particular, the National Minority Organizations fear the impact of strict Title II regulation on adoption and investment in local infrastructure and jobs. A common carrier approach to broadband regulation would slow down broadband adoption and stifle the growth and innovation of the Internet. Title II regulation, with its monopoly telephone-era directives, is not the path to a continued vibrant, growing, innovative, job-creating, empowering open Internet. Moreover, if the Commission chooses to regulate ISPs like utilities, consumers will bear the costs, and communities of color will suffer disproportionately through diminished infrastructure investments and a weakened climate for innovation.

Ensuring that every American has access to broadband is one of the most critical civil rights challenges of the 21st century. Any regulatory framework that does not emphasize broadband adoption, competition, and innovation would be detrimental to communities of color. Faced with important choices in this proceeding, the Commission should focus its broadband policies on promoting engagement, adoption, and informed broadband use by people of color, seniors, rural, and low income families stranded without broadband access. The agency can use Section 706 to ensure that all Americans retain the right to an open Internet without widening the digital divide in the process, and it should establish an accessible, affordable, and expedited procedure for resolution of complaints.

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**COMMENTS OF THE NATIONAL
MINORITY ORGANIZATIONS**

The National Minority Organizations, a coalition of 42 highly respected national civil rights, social service, and professional organizations¹ – representing millions of constituents from across the country – respectfully submit these comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”) and the Wireline Competition Bureau’s Public Notice in the above-captioned proceedings.² We urge the Commission to focus its broadband policies on promoting engagement, adoption, and informed broadband use by communities of color and to exercise its Section 706 authority to protect all consumers’ rights to an open Internet. Communities of color respectfully request a policy agenda that enables first class digital citizenship and continues to stimulate investment in broadband innovation and infrastructure. Our nation cannot afford the impact that Title II reclassification would have on

¹ These comments represent the views of each organization institutionally and are not intended to reflect the views of the organizations’ respective officers, directors, advisors, or members.

² *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No.

stifling broadband adoption among vulnerable populations and limiting the investment and innovation that have benefitted our constituents.

I. INTRODUCTION

Almost every party that has participated before the Commission in this and similar proceedings supports the goal of Internet openness. That includes this coalition of National Minority Organizations, which strongly believe that every consumer, entrepreneur and business has a right to the protections of an open Internet. The only disagreement before the Commission is on the means to achieve this goal. The National Minority Organizations recognize that access to broadband, adoption, and digital literacy are critical civil rights issues, and we seek a balanced, transparent open Internet regime that protects consumers and narrows the digital divide for communities of color.

Fifty years ago this month, President Lyndon Johnson signed into law the landmark Civil Rights Act of 1964. As President Barack Obama said upon marking this milestone anniversary, the legislation “transformed our understanding of justice, equality, and democracy and advanced our long journey to a more perfect Union,” but “[a]s we reflect on the Civil Rights Act and the burst of progress that followed, we also acknowledge that our journey is not complete.”³ Today, broadband access, adoption, and digital literacy join the suite of civil rights prerequisites to first class citizenship in the digital age. Broadband is essential to living a life of equal opportunity in the 21st century. Broadband impacts other fundamental civil rights and it drives our political process. It is the key to ensuring justice, equality, and democracy. Yet despite the importance of

³ Presidential Proclamation – 50th Anniversary of the Civil Rights Act (June 30, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/06/30/presidential-proclamation-50th-anniversary-civil-rights-act> (last visited July 9, 2014).

broadband access, communities of color continue to under-adopt current and emerging technologies.⁴

To date, millions of Americans have not adopted broadband for a variety of reasons including availability, affordability, relevance, and digital literacy.⁵ This is unacceptable. The National Minority Organizations come together recognizing that communities of color have a high stake in the outcome of broadband policy issues and cannot be bystanders to results that impact our desired outcomes of equity and inclusion. As Commissioner Clyburn has noted, “It is imperative that we get everyone connected. Digital exclusion will further prevent our brothers and sisters, especially those in challenged communities, from truly participating in the most basic facets of today’s society.”⁶

Without broadband access, low income and middle-class Americans – and particularly people of color - cannot gain new skills, secure good jobs, obtain a quality education, participate

⁴ See David Honig, Esq. and Nicol Turner Lee, Ph.D., *Refocusing Broadband Policy: The New Opportunity Agenda For People Of Color*, Nov. 21, 2013 (“MMTC Broadband White Paper”), available at <http://mmtconline.org/wp-content/uploads/2013/11/Refocusing-Broadband-Policy-112113.pdf>, at 7-8 (“While the promise of broadband is being realized by some, a large number of African Americans and Hispanics are still not online, citing relevance first and the lack of digital literacy skills second as critical reasons.”).

⁵ As Commissioner Clyburn has said, affordability is a primary barrier to greater adoption. National Urban League, *Broadband Internet is Fundamental to Civil Rights* (2012), available at <http://politic365.com/2012/07/27/national-urban-league-broadband-internet-is-fundamental-to-civil-rights/> (last visited July 9, 2014) (“NUL Clyburn Remarks”) (“People should not have to choose between feeding their families and paying for the transformational benefits of broadband.”). See MMTC Broadband White Paper at 8 (“[A] large number of African Americans and Hispanics are still not online, citing relevance first and the lack of digital literacy skills second as critical reasons.”).

⁶ NUL Clyburn Remarks. See also John Eggerton, *David Cohen: Broadband Access is Central Civil Rights Issue*, BROADCASTING & CABLE (July 10, 2013), available at <http://www.broadcastingcable.com/news/washington/david-cohen-broadband-access-central-civil-rights-issue/61589> (describing a keynote address delivered by David Cohen of Comcast Corporation at MMTC’s Hall of Fame luncheon and Access to Capital conference, in which Cohen said that getting broadband to every household, regardless of race, color, creed, or economic situation is this century’s central civil rights struggle, and the battle for equal opportunities “won’t be won so long as we have people stranded on the wrong side of the digital divide”).

in our civic dialogue, or obtain greater access to healthcare through tele-health technologies. Thus, any regulatory plan governing broadband *must* promote engagement, adoption, and informed use by people of color.

The National Minority Organizations urge the Commission to exercise its authority under Section 706 to adopt enforceable rules that will ensure an open Internet for all and promote broadband adoption among consumers and communities of color. As a matter of the greatest urgency, the Commission should also use its Section 706 authority to proscribe and prevent redlining, which seriously threatens equal access to essential fast broadband service. While we recognize the importance of the open Internet debate, we urge the Commission to refocus its priorities on the issues – particularly redlining – that directly and profoundly impact first class digital citizenship.⁷

II. SECTION 706 IS FAR BETTER SUITED TO MEETING THE GOALS OF THE COMMISSION AND COMMUNITIES OF COLOR THAN TITLE II RECLASSIFICATION

The Commission should use its Section 706 authority to ensure an open Internet. If it is coupled with a presumption against paid prioritization and with strong and well enforced consumer protections, the Commission’s Section 706 authority would be well suited to enable the Commission to adopt and enforce *smart* net neutrality rules that meet the goals of transparency and equity, while fostering broadband adoption and informed use.

⁷ See Telecommunications Act of 1996, Section 706(b), 47 U.S.C. § 1302(b) (“[In an annual inquiry,] the Commission shall determine *whether [broadband] is being deployed to all Americans* in a reasonable and timely fashion. If the Commission’s determination is negative, *it shall take immediate action to accelerate deployment of such capability by removing barriers* to infrastructure investment and by promoting competition in the telecommunications market.”) (emphasis added). The National Minority Organizations will address this issue in depth in a subsequent filing. The Commission should also modernize the E-rate, facilitate telemedicine and mobile health innovation, and expand broadband employment and entrepreneurship opportunities for people of color. These efforts cannot continue to be placed on hold while the debate over open Internet regulation “consume[s] all of the energies and time that [should] be devoted to these aforementioned issues.” MMTTC Broadband White Paper at 10.

For nearly 20 years, regulators from both political parties have charted a successful course for Internet policy; the Commission should continue on this path. The regulatory paradigms adopted under the regimes of FCC Chairmen William Kennard,⁸ Michael Powell,⁹ and Julius Genachowski¹⁰ have been successful in paving the way for today’s open Internet, protecting consumers,¹¹ promoting digital literacy and civic engagement, connecting schools and communities, and stimulating employment and entrepreneurship.¹² In contrast, Title II would adversely affect adoption and thereby harm communities of color.¹³

⁸ William E. Kennard, Chairman, FCC, *Before the National Cable Television Association* (June 15, 1999), available at <http://transition.fcc.gov/Speeches/Kennard/spwek921.html> (last visited July 14, 2014).

⁹ Michael Powell, Chairman, FCC, *Preserving Internet Freedom: Guiding Principles for the Industry*, at 2 (Feb, 8, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf (last visited July 14, 2014).

¹⁰ Julius Genachowski, Chairman, FCC, *Preserving the Open Internet* (2010) available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A2.pdf (last visited July 14, 2014) (rejecting “extremes in favor of a strong and sensible, non-ideological framework. ... The rules ... we adopt today are rooted in ideas first articulated by Republican Chairmen ... and endorsed in a unanimous FCC policy statement in 2005.”).

¹¹ Since the FCC adopted its Internet Policy Statement in 2005, there have been relatively few examples of content discrimination or other unreasonable behavior by ISPs. See MMTC Broadband White Paper at 12. Moreover, the FCC’s annual “Measuring Broadband America” report details the speed and performance of broadband connections and calls out degradation of services among broadband providers. Any negative effect on broadband performance due to content prioritization is designed to show up on this annual report card, thus making the industry more accountable – and in some cases, more competitive in touting their service quality.

¹² On July 15, the original due date for these Comments, the FCC’s system “crashed” under the weight of one million filings. See Hon. Tom Wheeler, *The Need to Modernize the FCC’s IT Systems*, FCC Blog Post (July 16, 2014), available at <http://www.fcc.gov/blog/need-modernize-fcc-s-it-systems> (last visited July 17, 2014). The fact that it was possible for one million filings to find their way to the FCC in one day is a testament to how successful the Internet has been under the Kennard/Powell/Genachowski paradigms and without Title II classification.

¹³ See Minority Media & Telecom Council Letter, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (March 28, 2014), available at <http://mmtconline.org/wp-content/uploads/2014/03/MMTC-Open-Internet-Letter-032814.pdf> (last visited July 14, 2014).

A. The Current Regulatory Structure Promotes Digital Engagement By Communities Of Color, And The Commission Should Maintain This Course

Under the Kennard/Powell/Genachowski regulatory paradigms, communities of color have benefited exponentially, as demonstrated by their use of technology applications, products, and services. Even as these communities struggle with residential broadband adoption, people of color who have adopted broadband engage digitally at rates equal to or surpassing that of the general population. This engagement clearly illustrates the benefits of broadband in 21st century America and how critical it is to expand broadband adoption for all communities of color.

For example, nearly 75 percent of African American and 68 percent of Hispanic cell phone owners use their devices to access the Internet,¹⁴ and these numbers are increasing.¹⁵ African Americans and Latinos use smartphones for non-voice applications, such as web surfing and accessing multimedia content, at a higher rate than the population in general.¹⁶ Asian Americans have adopted smartphones at a higher rate than the total U.S. population.¹⁷ People of color also have largely embraced social media services, such as Twitter and Instagram. *The Wall Street Journal* reported that “Hispanics tweet more often than other users,” while approximately

¹⁴ Maeve Duggan and Aaron Smith, Pew Research Internet Project, Cell Internet Use 2013 (Sept. 16, 2013), available at <http://www.pewinternet.org/2013/09/16/main-findings-2/> (last visited July 14, 2014).

¹⁵ From April 2012 to May 2013, the number of African Americans using their phone to access the Internet increased ten percentage points, while the number of Hispanics increased five percentage points. Maeve Duggan and Aaron Smith, Pew Research Internet Project, Cell Internet Use 2013 (Sept. 16, 2013), available at <http://www.pewinternet.org/2013/09/16/main-findings-2/> (last visited July 14, 2014).

¹⁶ See Kathryn Zickuhr & Aaron Smith, Home Broadband 2013, Pew Internet & American Life Project (Aug. 2013), available at http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_Broadband%202013_082613.pdf (last visited July 14, 2014). See also Nielsen, More of What We Want – Media and Entertainment (June 30, 2014), available at <http://www.nielsen.com/us/en/insights/reports/2014/more-of-what-we-want.html> (last visited July 14, 2014) (reporting that African Americans and Hispanics are more likely than other ethnic groups to watch video on demand).

¹⁷ Nielsen, Significant, Sophisticated, and Savvy: The Asian American Consumer at 19 (2013), available at <http://www.aaja.org/wp-content/uploads/2013/12/Nielsen-Asian-American-Consumer-Report-2013.pdf> (last visited July 14, 2014).

18 percent of Twitter's users in the U.S. are African Americans (compared to the ten percent of U.S. Internet users who are African American).¹⁸ African Americans and Hispanics also use Instagram at a significantly higher rate than the general population,¹⁹ and Asian Americans are more frequent purchasers of mobile apps than non-Hispanic whites.²⁰ These communities are using broadband to connect, and those who are not leveraging new technologies are being left behind.

While the promise of home broadband has been fully realized by many Americans, people of color, particularly those that are low income, rural and older, are often offline.²¹ Thanks to the Commission's history of encouraging rather than restraining the growth of the broadband marketplace, the primary public policy challenge today is no longer the universal availability of wireline and wireless service.²² Rather, the key question is how to improve digital literacy, increase relevance, and reduce costs. Policies that deter efforts to foster broadband adoption will have profound effects on people of color, particularly those in need of broadband Internet to fully participate in society.

¹⁸ Yoree Koh, Twitter Users' Diversity Becomes an Ad Selling Point, *The Wall Street Journal* (Jan. 20, 2014), available at http://online.wsj.com/news/articles/SB10001424052702304419104579323442346646168?mg=r_eno64-wsj (last visited July 14, 2014).

¹⁹ *Id.*

²⁰ Nielsen, Significant, Sophisticated, and Savvy: The Asian American Consumer at 11 (2013), available at <http://www.aaja.org/wp-content/uploads/2013/12/Nielsen-Asian-American-Consumer-Report-2013.pdf> (last visited July 14, 2014).

²¹ Twenty-four percent of Hispanics and 15 percent of African-Americans are non-Internet users. *See* Kathryn Zickhur, Who's Not Online and Why?, *Pew Internet & American Life Project* (Sept. 25, 2013), available at <http://www.pewinternet.org/Reports/2013/Non-internet-users.aspx> (last visited July 14, 2014).

²² Similarly, the current regulatory framework has fostered innovation and competition. *See* MMTB Broadband White Paper at 9 (detailing the level of availability, investment, competition, and speeds of the U.S. broadband market).

Thus, we urge the FCC to maintain, through Section 706, a regulatory posture that would incentivize innovation and facilitate ongoing efforts to bridge the digital divide.

B. Reclassifying Broadband Under Title II Would Adversely Impact Broadband Adoption And Investment

Given the still fragile state of minority engagement in the digital ecosystem, the National Minority Organizations fear the impact of stringent Title II regulation on adoption and investment in local infrastructure and jobs.²³ In our view, Section 706 will be very effective in protecting consumers, and it will accomplish that goal without imposing legacy rules designed for monopoly Plain Old Telephone Service (“POTS”) on modern day competitive services. A common carrier approach to broadband regulation would slow down broadband adoption and stifle the growth and innovation of the Internet. Regulating broadband under Title II would also foster a climate of uncertainty, potentially choke innovation and diminish investment.²⁴ Antiquated common carriage requirements, such as rate regulation and limits on content partnerships that do not offend antitrust law – all upon which the Commission would need to make individualized decisions on whether or not to forbear²⁵ – would lead to years of regulatory ambiguity and litigation.

²³ This concern of the National Organizations was also the focus of a letter sent to the Commission by 20 Congressional Members. *See Green Leads Letter to Chairman on Net Neutrality*. May 14, 2014, available at <https://green.house.gov/press-release/green-leads-letter-fcc-chairman-net-neutrality> (last visited July 14, 2014).

²⁴ *See generally* Justin P. Hedge, *The Decline of Title II Common-Carrier Regulations in the Wake of Brand X: Long-Run Success for Consumers, Competition, and the Broadband Internet Market*, *CommLaw Conspectus: Journal of Communications Law and Technology Policy* (2006), available at <http://scholarship.law.edu/cgi/viewcontent.cgi?article=1340&context=commlaw> (last visited July 14, 2014).

²⁵ While the current Commission could choose to forbear from imposing regulations under a Title II approach, today’s Commission cannot bind future commissions. A future commission could rescind a forbearance decision. It does not benefit anyone to have continued legal uncertainty and the corollary drain on resources. A regulatory structure always in flux undoubtedly will chill capital investment in broadband infrastructure - a result directly contrary to the interests of communities of color.

While some argue that Title II would stabilize pricing for consumers, this out-of-date regulatory framework also could increase prices for consumers through rate rebalancing and the imposition of increased access charges and taxes on an already burdened universal service program.²⁶ These and other regulatory constraints would ultimately limit full digital participation, especially for consumers on fixed or lower incomes.²⁷ Under a Title II regime, communities of color and other disadvantaged communities would shoulder the cost of heavier users that congest the Internet with video streaming and other bandwidth-intensive uses.²⁸ New and late Internet adopters with different online needs would find themselves subsidizing heavier online users,²⁹ a result that will further deter adoption or make it difficult for new users to afford to sustain connectivity.

Title II regulation, with its monopoly telephone-era directives, is not the path to a continued vibrant, growing, innovative, job-creating, empowering open Internet. If the

²⁶ See e.g. Robert Litan, *Regulating Internet Access as a Public Utility*, Brookings Institution, June 2014, available at http://www.brookings.edu/~media/research/files/papers/2014/06/regulating_internet_access_public_utility_litan/regulating_internet_access_public_utility_litan.pdf (last visited July 14, 2014) (“Robert Litan’s Internet as a Public Utility”) (“Understandably, the ISPs oppose that path forward, and so do others who fear that public utility regulation of Internet access – complete with rate filings and FCC approvals, among other requirements – would dampen innovation and investment in more, faster broadband.”)

²⁷ See Daniel A. Lyons, *Internet Policy’s Next Frontier: Data Caps, Tiered Service Plans, and Usage-Based Broadband Pricing*, *Federal Communications Law Journal* 66, no. 1 (2013), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1602&context=lsfp> (last visited July 14, 2014), at 26 (“Usage-based pricing may make entry-level broadband adoption more affordable.”). See also Kevin A. Hassett and Robert J. Shapiro, *Towards Universal Broadband Flexible Broadband Pricing and the Digital Divide*, Georgetown Center for Business and Public Policy, August 2009, available at http://www.gcbpp.org/files/Academic_Papers/AP_Hassett_Shapiro_Towards.pdf (last visited July 14, 2014).

²⁸ See *id.*

²⁹ The Commission has recognized this fact: “Requiring all subscribers to pay the same amount for broadband service, regardless of the performance or usage of the service, would force lighter end users of the network to subsidize heavier end users.” *Preserving the Open Internet: Broadband Industry Practices*, 25 FCC Rcd 17905, 17945 ¶ 72 (2010).

Commission chooses to regulate ISPs like utilities, consumers will bear the costs, and communities of color will suffer disproportionately through diminished infrastructure investments and a weakened climate for innovation.³⁰ Overly burdensome regulations treating broadband as a public utility³¹ would institutionalize second class digital citizenship, needlessly delaying the digital inclusion goals sought by communities of color. This result would harm both consumers of color and minority entrepreneurs, for whom the Internet has been their easiest path to entry to bring new content to their communities and the nation.

Four years ago, the National Broadband Plan recognized the Internet’s potential for achieving equality of opportunity, but also acknowledged that “digital exclusion compounds inequities for historically marginalized groups.”³² Minority and low income communities already suffer disproportionately from lower levels of investment in public goods, such as transportation, the electric grid, and schools.³³ Communities of color deserve an agenda that enables first-class digital citizenship – not rules that would result in underinvestment in broadband infrastructure. Such an outcome in the form of Title II reclassification would be a poor policy choice that our nation cannot afford. To continue the positive trajectory of digital engagement and meet the goals of communities of color, the Commission should avail itself of

³⁰ See Anna Maria Kovacs, *The Internet Is Not a Rotary Phone*, Recode, May 12, 2014, available at <http://recode.net/2014/05/12/the-internet-is-not-a-rotary-phone/> (last visited July 14, 2014) (“Annual broadband investment by phone companies has more than doubled since 2006, culminating in roughly \$18 billion in broadband investment in 2013 (out of a total of \$26 billion). The cable industry, which has never been subject to Title II, spent nearly \$14 billion on its networks in 2013.”).

³¹ See generally Robert Litan’s Internet as a Public Utility.

³² FCC, *Connecting America: The National Broadband Plan* at 129 (2010).

³³ See, e.g., Thomas W. Sanchez, *et al.*, *Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities* (June 2003), available at <http://civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/transportation/moving-to-equity-addressing-inequitable-effects-of-transportation-policies-on-minorities> (last visited July 14, 2014); Linda Darling-Hammond and Laura Post, *Inequality in Teaching and Schooling: Supporting High-Quality Teaching and Leadership in Low-Income Schools* (2000), available at <http://stanford.edu/~ldh/publications/LDH-Post-Inequality.pdf> (last visited July 14, 2014).

its judicially-upheld legal authority under Section 706³⁴ and avoid the consumer harms that would spring from Title II reclassification.

C. The Commission Should Use Its Section 706 Authority To Protect The Open Internet

The National Minority Organizations support the existing regulatory course – built on a foundation of transparency, disclosure and equal access to all services – which has helped preserve a free and open Internet for all Americans. By using its Section 706 authority, the Commission can adopt rules and bring enforcement actions that will ensure the right of people of color and all American consumers to an open Internet. The Commission must use this authority to protect consumers, including the most vulnerable new broadband adopters, and to keep any ISP missteps in check. Specifically, the Commission should take a straightforward approach that includes:

- The immediate reinstatement of no-blocking rules to protect consumers.
- Creating a new rule barring commercially unreasonable actions, while affording participants in the broadband economy, particularly minority entrepreneurs, the opportunity to enter into new types of reasonable commercial arrangements³⁵ and, through monitoring by the FCC’s Office of Communications Business Opportunities, ensuring that minority entrepreneurs are never overlooked by carriers seeking to develop these new commercial arrangements.
- Establishing a rebuttable presumption against paid prioritization that protects against “fast lanes” and any corresponding degradation of other content, while ensuring that such presumption can be overcome by business models that sufficiently protect consumers and have the potential to benefit consumer welfare (for example, telemedicine applications). Any prioritized service that overcomes the presumption would remain subject to enforcement, and consumers would be able to obtain rapid relief by working with the Ombudsperson and/or through the complaint process based on Title VII of the 1964 Civil Rights Act, discussed in Section III, below.
- Underscoring the need for transparency. Enforceable disclosure requirements are the key to consumer protection online. The existing transparency rule has

³⁴ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

³⁵ NPRM, ¶ 116.

worked, and the enhanced transparency proposed in the NPRM is laudable.³⁶ The Commission correctly notes that some consumers may have difficulty understanding commonly used terms associated with the provision of broadband services,³⁷ and thus there may be ways to make the content and format of disclosures more accessible and understandable to end users.³⁸ The National Minority Organizations agree that the “manner in which providers display information to consumers can have as much impact on consumer decisions as the information itself.”³⁹

- Using Section 706 to punish bad actors, especially those engaged in blocking, as the D.C. Circuit confirmed the Commission has authority to do.⁴⁰

With these actions, the Commission can ensure that consumers remain well protected and continue to enjoy the benefits of an open Internet.

III. CONSUMERS HARMED BY VIOLATIONS OF THE OPEN INTERNET RULES SHOULD HAVE THE RIGHT TO AN ACCESSIBLE, AFFORDABLE, EXPEDITED PROCESS TO RESOLVE COMPLAINTS

The National Minority Organizations believe that enforceable open Internet rules under Section 706 will work only if consumers, particularly the most vulnerable, have access to an affordable and expedited process to resolve complaints. First, the Commission should adopt its proposal to create the position of Open Internet Ombudsperson, an individual “whose duty will be to act as a watchdog to protect and promote the interests of edge providers, especially smaller entities.”⁴¹ The Ombudsperson must be equally responsible for protecting and promoting the interests of consumers, particularly individuals from more vulnerable populations, who may be new to using broadband and may have less confidence in their digital literacy. In addition, the Commission appropriately asks what “pleading or procedural requirements [should] be adopted

³⁶ NPRM, ¶¶ 67-73.

³⁷ NPRM, ¶ 68.

³⁸ NPRM, ¶ 72.

³⁹ *Id.*

⁴⁰ *Id.* (citing *Verizon*, 740 F.3d at 655).

⁴¹ NPRM, ¶ 171.

*that make access to Commission processes by individuals or small businesses less cumbersome.*⁴² One approach that would avoid placing an unfair burden and cost on consumers would be to use a consumer-friendly complaint process such as that established under Title VII of the 1964 Civil Rights Act⁴³ as a model. Title VII was designed to eliminate discrimination in employment based on race, color, sex, religion, or national origin. The Title VII complaint process⁴⁴ was created to offer rapid and affordable remedies for employment discrimination faced by people of color and women.⁴⁵ Congress determined in 1964 that the path to enforceable employment equality was a complaint process that could be used at little to no cost to the complainant, with no need to hire a lawyer or write a complicated filing. In like manner, the Commission should adopt an accessible open Internet complaint process that protects consumers who have been harmed and serves as a deterrent to would-be bad actors.

If the Commission looks to Title VII as a model, the National Minority Organizations would be glad to serve as a resource in designing an effective enforcement mechanism that translates the key components of the Title VII approach into the FCC context. The critical aspect

⁴² *Id.* (emphasis added).

⁴³ Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (Pub. L. 88-352), as amended by the Civil Rights Act of 1991 (Pub. L. 102-166) and the Lily Ledbetter Fair Pay Act of 2009 (Pub. L. 111-2).

⁴⁴ Before judicial review can be sought under Title VII, a complainant first files an employment discrimination claim with the Equal Employment Opportunity Commission. *See* How to File a Charge of Employment Discrimination, available at <http://www.eeoc.gov/employees/howtofile.cfm> (last visited July 14, 2014).

⁴⁵ *See e.g.* U.S. Equal Employment Opportunity Commission, Significant EEOC Race/Color Cases, available at <http://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm> (last visited July 15, 2014). *See also* U.S. Equal Employment Opportunity Commission, Administrative Enforcement and Litigation, available at http://www.eeoc.gov/eeoc/enforcement_litigation.cfm (last visited July 16, 2014); U.S. Equal Employment Opportunity Commission, Enforcement and Litigation Statistics, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm> (last visited July 16, 2014; *id.* (follow link to “Title VII of the Civil Rights Act of 1964 Charges”) (The enforcement program has been successful in resolving cases with monetary and non-monetary benefits. For example, in Fiscal-Year 2013, 67,558 charges were filed under Title VII with 70,175 resolutions.)

of such a mechanism is that it will offer *rapid* resolution for consumers, who need to have confidence that the Commission’s rules will protect them so that they continue to be comfortable participating in the broadband ecosystem. As a general matter, the Commission’s primary focus should be to create a user-friendly form that easily can be completed and submitted by a consumer without the need for an attorney. To ensure a smooth and fair process, a consumer should be required to file the complaint within a reasonable period of time – perhaps the 180 days afforded for Title VII complaints. The complainant would have a clear duty to provide sufficient information to establish a *prima facie* case, for example, to state that she was harmed in a specific way by a specific practice. A complainant also could file a complaint based on a perceived systemic problem causing widespread harm. The Commission (likely at the Bureau level on delegated authority) would undertake an initial screening process to be completed quickly; to ensure that the process operates in the expedited manner that is intended, it might be useful to set a specific time frame for agency action. If the Commission finds probable cause to believe that its rules have been violated, the agency could immediately implement a mediation process or take enforcement action.

The Commission can defend consumers’ right to an open Internet⁴⁶ by establishing a process that allows consumers, even those with little income or limited digital literacy skills, to pursue relief when they are harmed. In Title VII, Congress developed an approach that empowers consumers, achieves results, and is fair to all parties. As communities of color actively pursue greater social and economic equality through broadband, the same considerations of accessibility, affordability, and expeditious process that underlie Title VII should be foundational precepts for the submission and prompt resolution of open Internet complaints.

⁴⁶ See, e.g., Remarks of Tom Wheeler, Chairman, FCC, National Cable & Telecommunications Association (Apr. 30, 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-326852A1.pdf (“Let me be clear. If someone acts to divide the Internet between ‘haves’ and ‘have-nots,’ we will use every power at our disposal to stop it.”).

IV. CONCLUSION

Ensuring that every American has access to broadband is one of the most critical civil rights challenges of the 21st century. Time is of the essence to avoid further widening of the digital divide. Any regulatory framework that does not emphasize broadband adoption, competition, and innovation would be detrimental to communities of color. Faced with important choices in this proceeding, the Commission should focus its broadband policies on promoting engagement, adoption, and informed broadband use by people of color, seniors, and low income families stranded without broadband access. The agency can use Section 706 to ensure that all Americans retain the right to an open Internet without widening the digital divide in the process. Finally, to ensure that the Commission remains a strong protector of consumers, the Commission should establish an accessible, affordable, and expedited procedure for resolution of complaints, such as a process modeled after Title VII of the 1964 Civil Rights Act.

Respectfully submitted,

By: _____

David Honig
President
Jacqueline Clary
Senior Counsel and John W. Jones Fellow
Minority Media and Telecommunications Council
3636 16th St. N.W., Suite B-366
Washington, D.C. 20010
(202) 332-7005
david@davidhonig.org

Counsel for the National Minority Organizations

Of Counsel:

Nicol Turner-Lee, Ph.D., Vice President and Chief
Research and Policy Officer, Minority Media and
Telecommunications Council

July 18, 2014