

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
Restoring Internet Freedom) WC Docket No. 17-108
)
)

**COMMENTS OF THE NATIONAL MULTICULTURAL
ORGANIZATIONS**

Asian Pacific American Institute of Congressional Studies (APAICS)
Consumer Policy Solutions
Hispanic Technology & Telecommunications Partnership (HTTP)
League of United Latin American Citizens (LULAC)
MANA, A National Latina Organization
Multicultural Media, Telecom & Internet Council (MMTC)
National Black Caucus of State Legislators (NBCSL)
National Coalition on Black Civic Participation (NCBCP)
National Congress of Black Women (NCBW)
National Organization of Black County Officials (NOBCO)
National Organization of Black Elected Legislative Women (NOBEL Women)
National Puerto Rican Chamber of Commerce
OCA - Asian Pacific American Advocates
U.S. Hispanic Chamber of Commerce

Kim Keenan
President and CEO

David Honig
President Emeritus and Senior Advisor

Multicultural Media, Telecom and Internet
Council
1620 L Street NW, Suite 250
Washington, DC 20036
(202) 332-0500
kkeenan@mmtconline.org

July 17, 2017

TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
I. INTRODUCTION	2
II. A BIPARTISAN STATUTORY SOLUTION FROM CONGRESS IS THE BEST WAY TO PRESERVE AND PROMOTE AN OPEN INTERNET	4
III. IN THE SHORT TERM, THE COMMISSION CAN ENSURE INTERNET OPENNESS AND PROMOTE INNOVATION AND BROADBAND ACCESS BY RECLASSIFYING BROADBAND AS A TITLE I INFORMATION SERVICE.....	7
A. Two Decades of Bipartisan Light Touch Regulation Promoted an Open Internet and Created Digital Opportunities for Communities of Color	8
B. Utility-Style Regulation is Ill-suited to Ensure a Dynamic and Open Internet	10
IV. THE COMMISSION SHOULD ADOPT ENFORCEABLE RULES TO ENSURE INTERNET OPENNESS PURSUANT TO SECTION 706 OF THE TELECOMMUNICATIONS ACT OF 1996.....	13
A. Section 706 Provides an Independent Grant of Legal Authority on Which the Commission Can Rely to Adopt Enforceable Net Neutrality Rules	13
B. The “General Conduct” Standard Creates Unnecessary Uncertainty and Should be Eliminated.....	17
V. THE COMMISSION MUST MAINTAIN LIFELINE FOR BROADBAND SERVICE.....	18
A. The 2016 Lifeline Modernization Order Makes Clear That Broadband Remains a Supported Service Under the Lifeline Program Even If Broadband Is Reclassified as a Title I Service.....	19
B. Maintaining Lifeline Support for Broadband Is Consistent with the Commission’s Pre-Reclassification “No Barriers” Policy.....	21
C. Section 706 Further Provides the Commission Authority to Maintain Support for Broadband.....	23
VI. THE COMMISSION SHOULD REAFFIRM THAT REDLINING IS PROHIBITED BY SECTION 106	24
VII. THERE MUST BE A MECHANISM FOR CONSUMERS TO SEEK REDRESS TO THE FCC IF THEY ARE HARMED	28
VIII. CONCLUSION.....	29

EXECUTIVE SUMMARY

The National Multicultural Organizations are a coalition of national civil rights, consumer advocates, social service, and professional organizations that represent millions of constituents from across the country. Its members strongly believe that every single person is entitled to the protections of the open internet. In today's technology-first society, broadband access has never been more important. However, millions of people, including communities of color, rural communities, individuals with disabilities, vulnerable consumers, and seniors, do not have access to broadband. The goal of telecommunications policy must be to close the digital divide so that every American has affordable access to broadband. Our digital future depends on it.

The clearest and simplest way to reach this goal is for Congress to pass comprehensive legislation codifying enforceable net neutrality protections. Bipartisan legislation is the best option to provide certainty that the open internet will be protected while furthering the continuing efforts to bridge the digital divide. The Federal Communications Commission can act in the meantime to return broadband classification to a Title I information service and expressly invoke its authority under Section 706 of the Telecommunications Act to adopt enforceable open internet rules. Additionally, the Commission should eliminate the vague general conduct standard, ensure that the Lifeline program remains vital and viable in the effort to support broadband service for low-income Americans, and take all necessary steps to ban digital redlining in all of its forms. Finally, to ensure that net neutrality rules provide meaningful protection for consumers, the Commission should provide a mechanism for consumers to seek redress when rule violations occur.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
Restoring Internet Freedom) WC Docket No. 17-108
To: The Commission)

**COMMENTS OF THE NATIONAL MINORITY
ORGANIZATIONS**

The National Multicultural Organizations, a coalition of 14 highly respected national civil rights, consumer advocates, social service, and professional organizations¹ – representing millions of constituents from across the country – respectfully submit these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding.²

An open and transparent internet has been, and remains, an issue of great importance to our organizations, communities of color, and our nation’s most vulnerable consumers. Access to world-class fixed and wireless broadband networks at affordable rates in all communities, and the innovative services enabled by such networks, are key to ensuring digital equity for every American. Thus, we urge policymakers to focus on policies that promote broadband deployment, engagement, adoption, and informed broadband use by communities of color and vulnerable consumers while simultaneously protecting all consumers’ rights to a free and open internet.

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

² *Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017) (“NPRM”).

I. INTRODUCTION

Virtually every party that has participated before the Commission in this and earlier proceedings supports the principle of net neutrality. This coalition is no exception. To be clear, we have supported, and we continue to support, an open internet with no blocking or throttling, with transparent network management practices, and no unreasonable discrimination in the transmission of lawful network traffic. We strongly believe that every consumer, entrepreneur, and business has a right to the protections of an open internet. The debate is not over whether there should be an open internet, but how best to achieve that objective while also ensuring continued innovation and enhanced broadband access for all communities. Internet freedom, broadband access, adoption, and digital literacy are all critical social justice issues in a digital world. Therefore, we seek a balanced, transparent open internet regime that protects consumers and closes the digital divide for communities of color.

Today, broadband access, adoption, and digital literacy are foundational requirements for successful participation in the internet economy. Broadband is essential for modern education, access to healthcare and government services, securing and maintaining employment, managing the daily needs of families, and civic participation. Broadband impacts fundamental civil rights, and it is central to participation in the modern political process. It is the key to ensuring justice, equality, and democracy and is necessary to living a life of equal opportunity in the 21st century. As FCC Commissioner Mignon 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.”³

³ *National Urban League: Broadband Internet is Fundamental to Civil Rights*, POLITIC365 (July 27, 2012), <http://politic365.com/2012/07/27/national-urban-league-broadband-internet-is-fundamental-to-civil-rights/>.

Echoing these sentiments, FCC Chairman Ajit Pai recently stated that “every American who wants to participate in our digital economy should be able to. Access to digital opportunity shouldn’t depend on who you are or where you’re from.”⁴ We agree.

Yet, despite the importance of broadband access, communities of color continue to remain less connected to high-speed broadband networks and the benefits enabled by such access.⁵ To date, millions of Americans have not adopted broadband for a variety of reasons,

⁴ Ajit Pai, Chairman, FCC, *Remarks at Carnegie Mellon University’s Software Engineering Institute: “Bringing the Benefits of the Digital Age to All Americans”*, at 4 (Mar. 15, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-343903A1.pdf.

⁵ See Multicultural Media, Telecom and Internet Council, *Understanding and Appreciating Zero-Rating: The Use and Impact of Free Data in the Mobile Broadband Sector*, at 9-10 (May 2016) (citations omitted), http://mmtconline.org/WhitePapers/MMTC_Zero_Rating_Impact_on_Consumers_May2016.pdf (“Broadband adoption has also long lagged among African Americans and Hispanics. Although the specific reasons for non-adoption vary from community to community, two primary and related impediments to greater connectivity are now widely accepted: many do not see broadband as relevant to their everyday lives, and there is a perception that Internet connectivity is too expensive”). See also David Honig & Nicol Turner-Lee, *Refocusing Broadband Policy: The New Opportunity Agenda For People of Color*, at 7-8, Minority Media & Telecom Council (Nov. 21, 2013) (“MMTC Broadband White Paper”), <http://mmtconline.org/wp-content/uploads/2013/11/Refocusing-Broadband-Policy-112113.pdf> (“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.”); John B. Horrigan & Maeve Duggan, *Home Broadband 2015: The share of Americans with broadband at home has plateaued, and more rely only on their smartphones for online access*, at 8, Pew Research Center (Dec. 21, 2015), <http://www.pewinternet.org/2015/12/21/-home-broadband-2015/> (noting that African Americans and Hispanics significantly saw much lower home broadband adoption rates than whites); John B. Horrigan, *Digital Readiness Gaps: Americans fall along a spectrum of preparedness when it comes to using tech tools to pursue learning online, and many are not eager or ready to take the plunge*, at 3, Pew Research Center (Sept. 20 2016), <http://www.pewinternet.org/2016/09/20/-digital-readiness-gaps/> (noting that minorities were are much more likely than whites to lack digital readiness); While some data shows that Asian-Americans are adopting broadband at high rates, Asian Pacific American Advocates have noted in comments to the FCC that as a result of the lack of disaggregated data about Asian American and Pacific Islander (“AAPI”) communities, in reality many AAPI groups still remain unable to access modern communications due to low incomes, education levels, and language proficiency. See Comments of OCA - Asian Pacific American Advocates; WC Docket No. 11-42 at 2-3 (Aug. 31, 2015).

including availability, affordability, relevance, and digital literacy.⁶ Unleashing the full potential of the communities represented by the National Multicultural Organizations depends on policies that promote access to robust and affordable broadband. Thus, we come together in recognition of the importance of our voices being heard in promoting fundamental principles of internet openness and transparency, along with the need for a balanced regulatory regime that promotes the deployment of broadband and innovative services for all communities. History shows that when businesses contract as a result of over-regulation, it disproportionately impacts consumers on fixed or lower incomes, many of whom are people of color.⁷ Therefore, in establishing net neutrality protections, the Commission must also ensure that its actions do not harm innovation and penetration of broadband networks to all communities.

II. A STATUTORY SOLUTION FROM CONGRESS IS THE BEST WAY TO PRESERVE AND PROMOTE AN OPEN INTERNET

For the last decade, the issue of net neutrality has been a political football at the FCC. With every swing in the political pendulum comes a reopening of the debate over how to achieve open internet policy objectives within an ambiguous statutory environment. While everyone agrees on the overall policy objective, the debate has become convoluted and unnecessarily politicized. Throughout this debate, two things have become crystal clear. First, the internet must be open and accessible. Second, a comprehensive legislative solution is the only means to

⁶ As Commissioner Clyburn has said, affordability remains one of the largest barriers to adoption. Mignon L. Clyburn, Commissioner, FCC, Keynote Remarks at the #Solutions2020 Policy Forum, at 4 (Oct. 19, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341824A1.pdf (“Lack of affordability remains one of the largest barriers to connected communities in this country....”). *See also* MMTC Broadband White Paper at 8.

⁷ *See, e.g.*, MMTC Broadband White Paper at 14 (“over-regulating [the broadband] industry could undermine business models that have essentially kept, and continue to keep, the cost of broadband services lower.”).

put an end to the regulatory see-saw that destabilizes markets, inhibits innovation, and depresses job growth.

A bipartisan statutory solution must contain the following elements:

- (1) Transparency. Fixed and mobile broadband providers must disclose their network management practices, performance characteristics, and terms and conditions of their broadband services;
- (2) No blocking or throttling. Fixed and mobile broadband providers may not block or throttle lawful content, applications, services, or applications that compete with their services;
- (3) No unreasonable discrimination. Fixed and mobile broadband providers may not unreasonably discriminate in transmitting lawful network traffic;
- (4) Privacy rules. The regulation of privacy must be the same across all of the internet, for the protection of consumers. The Federal Trade Commission (“FTC”), the expert consumer protection agency, must be given the tools and the teeth to enforce privacy across the internet ecosystem;⁸
- (5) Redlining must be expressly prohibited. The infrastructure required to serve every American must not be burdened by redlining. Redlining has the effect of stagnating

⁸ The FTC has the necessary authority and experience to provide consumers with privacy protections across the entire internet, authority that cannot be exercised equally across all players in the internet ecosystem if ISPs are regulated as Title II common carriers. The Commission can continue to cooperate with and provide input directly to the FTC, as Chairman Pai and FTC Acting Chairman Ohlhausen [have already agreed](#). *See e.g.* Joint Statement of Acting FTC Chairman Maureen K. Ohlhausen and FCC Chairman Ajit Pai on Protecting Americans’ Online Privacy (Mar. 1, 2017), <https://www.ftc.gov/news-events/press-releases/2017/03/joint-statement-acting-ftc-chairman-maureen-k-ohlhausen-fcc>.

or pillaging communities and relegating them to a past that is unconnected to our digital future; and finally,

- (6) The Lifeline program must be strengthened and streamlined if we are truly interested in connecting every American.

A statutory solution, with the elements set forth above, has clear benefits. First, an unambiguous set of rules that are grounded in a modern internet ecosystem provide certainty and opportunity for innovation. Second, rather than being mired in endless litigation and regulatory reconsideration, the internet would be protected without regard to the winds and whims of politics. Thoughtful and balanced legislation will free up the FCC to focus its energy on other critical issues for communities of color, such as efforts to address affordability challenges, deployment of broadband in unserved areas (including ways to combat digital redlining), and promoting diversity in the communications industry.

Despite the rhetoric, a statutory solution has been supported on both sides of the political aisle. For example, in 2010, then-Democratic Chairman of the House Energy and Commerce Committee Henry Waxman socialized a legislative framework that would have codified clear, enforceable rules against blocking, throttling, and discrimination under Title I.⁹ More recently, on the heels of the Commission's action to reclassify broadband as a Title II service in 2015, both the Chairman and Ranking Member of the Senate Commerce Committee indicated support for bipartisan net neutrality legislation. Chairman John Thune (R-SD) stated, "The only way to truly provide certainty for open Internet protections is for Congress to pass bipartisan

⁹ See Cecilia Kang, *House Net Neutrality Bill Seeking Republican Love*, Wash. Post (Sept. 28, 2010), http://voices.washingtonpost.com/posttech/2010/09/house_net_neutrality_bill_seek.html; Sara Jerome, *Draft of Waxman's Net-Neutrality Legislation Leaked Amid Talks*, The Hill (Sept. 27, 2010), <http://thehill.com/policy/technology/121101-read-a-draft-of-waxmans-net-neutrality-bill>.

legislation.”¹⁰ His counterpart, Ranking Member Bill Nelson (D-FL), suggested that “[w]e need to think beyond the rhetoric surrounding Title II and Section 706 that seems to have consumed everyone. I am hoping we have the luxury of looking at the issue anew without being constrained by the limits of the current statutes.”¹¹ That is exactly right. The current Congress therefore should refocus on efforts to identify a bipartisan legislative solution that will guarantee the benefits of an open internet to every consumer, entrepreneur, and business, regardless of size.

III. IN THE SHORT TERM, THE COMMISSION CAN ENSURE INTERNET OPENNESS AND PROMOTE INNOVATION AND BROADBAND ACCESS BY RECLASSIFYING BROADBAND AS A TITLE I INFORMATION SERVICE

The Commission should reclassify broadband as a Title I information service to ensure that the benefits of an open internet are shared by all Americans, including communities of color. For nearly 20 years prior to 2015, regulators from both political parties charted a consistent and successful course for internet policy. The regulatory framework adopted during the tenures of FCC Chairmen William Kennard,¹² Michael Powell,¹³ and Julius Genachowski¹⁴ were highly

¹⁰ See John Thune, *Op-Ed: Protect the Open Internet with a Bipartisan Law*, Ars Technica (Mar. 3, 2015), <https://arstechnica.com/tech-policy/2017/03/op-ed-protect-the-open-internet-with-a-bipartisan-law/>.

¹¹ See Sean Buckley, *Senator Nelson: We Can't Put a Straightjacket on the FCC*, FierceTelecom (Apr. 13, 2015), <http://www.fiercetelecom.com/telecom/senator-nelson-we-can-t-put-a-straightjacket-fcc>.

¹² William E. Kennard, Chairman, FCC, *Remarks Before the National Cable Television Association* (June 15, 1999), <http://transition.fcc.gov/Speeches/Kennard/spwek921.html>; see also William E. Kennard, Chairman, FCC, *Remarks Before the Federal Communications Bar Northern California Chapter* (July 20, 1999) (“Kennard Remarks”), <https://transition.fcc.gov/-Speeches/Kennard/-spwek924.html>.

¹³ Michael K. Powell, Chairman, FCC, *Remarks Preserving Internet Freedom: Guiding Principles for the Industry*, at 2 (Feb. 8, 2004) (“Powell Remarks”), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

¹⁴ Julius Genachowski, Chairman, FCC, *Preserving the Open Internet* (2010), https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A2.pdf (rejecting “extremes in favor of a strong and sensible, non-ideological framework. . . . The rules . . . we adopt today are rooted in ideas first

successful in ensuring an open internet, protecting consumers, promoting digital literacy and civic engagement, connecting community anchor institutions and communities, and stimulating employment and entrepreneurship. The notion that Title II regulation is the only way to create an open internet is contradicted by almost 20 years of internet policy.

A. *TWO DECADES OF BIPARTISAN LIGHT TOUCH REGULATION PROMOTED AN OPEN INTERNET AND CREATED DIGITAL OPPORTUNITIES FOR COMMUNITIES OF COLOR*

The nation’s first African American FCC Chairman, Bill Kennard, laid down a marker in a 1999 speech that, until the 2015 *Title II Order*,¹⁵ had been the foundation for U.S. broadband policy. Determining that regulating the internet as a Title II utility service was the wrong path to take, Chairman Kennard stated:

We can have openness and competition by allowing this market to develop unfettered by regulation. We can have openness and competition by following the FCC’s tradition of “unregulation” of the Internet. . . . We need to follow this course - to allow this competition to flourish – for if we do, we will have the infrastructure needed to keep our economy growing. We will be able to construct a future where there are limitless opportunities.¹⁶

This vision, built upon by Chairman Powell through the articulation of bedrock internet principles in 2004 that remain the basis for the protections we continue to support, and the bipartisan policies of their successors, has made the United States the world leader in broadband.¹⁷

articulated by Republican Chairmen...and endorsed in a unanimous FCC policy statement in 2005.”).

¹⁵ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (“*Title II Order*”).

¹⁶ Kennard Remarks, *supra* note 12.

¹⁷ Powell Remarks, *supra* note 13.

For example, prior to reclassification, nearly 75 percent of African American and 68 percent of Hispanic cell phone owners used their devices to access the Internet.¹⁸ A 2013 report by the Pew Research Center similarly found that African Americans and Latinos used smartphones for non-voice applications, such as web surfing and accessing multimedia content, at a higher rate than the population in general,¹⁹ with English-speaking Asian Americans leading the population overall.²⁰ Leading up to the decision to reclassify, these communities were already using broadband to connect and engage at significant levels. The Commission's bipartisan decisions to encourage, rather than restrain, the growth of the broadband marketplace, produced world-leading wireline and wireless services that were widely available to communities of color. Broadband deployment and technology innovation flourished, allowing for greater digital engagement by all citizens. At the same time, the bipartisan regulatory framework created a broadband marketplace where information and online services were increasingly available for consumers, with little to no evidence to suggest consumers were being blocked from accessing the content of their choice. Classifying broadband as a Title II service was neither necessary nor responsible for these benefits.

¹⁸ Maeve Duggan & Aaron Smith, *Main Findings: Nearly two thirds of cell phone owners use their phone to go online, and one in five cell owners do most of their online browsing on their phone*, Pew Research Center (Sept. 16, 2013), <http://www.pewinternet.org/2013/09/16/main-findings-2/>.

¹⁹ See Kathryn Zickuhr & Aaron Smith, *Home Broadband 2013: Trends and demographic differences in home broadband adoption*, Pew Research Center (Aug. 26, 2013), <http://www.pewinternet.org/2013/08/26/home-broadband-2013/>. See also Nielsen, *More of What We Want: The Cross-Platform Report Q1 2014* (June 30, 2014), <http://www.nielsen.com/us/en/insights/reports/2014/more-of-what-we-want.html> (reporting that African Americans and Hispanics are more likely than other ethnic groups to watch video on demand).

²⁰ See Andrew Perrin, Pew Research Center, *English-speaking Asian Americans Stand Out for Their Technology Use* ((Feb. 18, 2016), <http://www.pewresearch.org/fact-tank/2016/02/18/english-speaking-asian-americans-stand-out-for-their-technology-use>).

The key challenge before the Commission in 2015 was how to improve digital literacy, increase relevance, and reduce costs.²¹ This remains the key challenge before the Commission today. Unfortunately, as demonstrated in the following section, the decision to reclassify broadband as a Title II service has deterred efforts to foster broadband adoption, which has had profound effects on people of color, particularly those who remain unconnected, lack skills in English, or who lack access to fully participate in a digital society. Cell phone usage is a start, but more is needed to bring the benefits of digital citizenship to every American.

B. UTILITY-STYLE REGULATION IS ILL-SUITED TO ENSURE A DYNAMIC AND OPEN INTERNET

Title II, a 1934 regulatory scheme, was created for the monopoly telephone era of the early 20th century. It is clearly inappropriate for the competitive and innovative internet era of the 21st century. Not surprisingly, the decision to impose utility-style regulation on the provision of broadband internet access has introduced significant legal and regulatory uncertainty into the digital ecosystem. This uncertainty already has produced results that slow needed innovation and broadband adoption, effects that are more acutely felt in rural and socioeconomically-challenged urban communities. One need only drive over our deteriorating roads and bridges, or observe the devastating impact of an aging water and electric infrastructure, to see the lack of innovation or how poorly utility-style regulation meets current needs. Whereas, in the historically lightly-regulated internet ecosystem, fixed and mobile broadband companies must innovate or lose customers to companies that continuously innovate their services to meet the growing demands of price-savvy consumers.

²¹ See Comments of the National Minority Organizations, GN Docket Nos. 14-28 & 10-127, at 7 (July 18, 2014) (“2014 NMO Comments”).

Utility regulation may seem harmless to the casual observer, but increased regulation, or the strong threat of it, undoubtedly has a chilling effect on innovation, which is ultimately felt by consumers, and particularly those in minority communities. Some may argue that the Commission chose to forbear from much of Title II,²² but this is plainly untrue. While the Commission did forbear from imposing some regulations, a future Commission can rescind a forbearance decision at any time. Underscoring this point is the fact that the *Title II Order* makes repeated references to rules that do not apply “at this time” and promises not to apply certain rules “for now.”²³

This constant threat of new and changing regulation has chilled innovation. One need not look further for an example of this than the Commission’s inquiry into popular and pro-consumer zero rating offerings.²⁴ Wherever one stands on the net neutrality debate, the reality is that

²² See, e.g., *Title II Order*, 30 FCC Rcd at 5915 (Statement of Chairman Tom Wheeler).

²³ *Id.* at 5925 (Statement of Commissioner Ajit Pai).

²⁴ See, e.g., Letter from Roger C. Sherman, Chief, Wireless Telecommunications Bureau, FCC, to Kathleen Ham, Sr. VP, Gov’t Affairs, T-Mobile (Dec. 16, 2015); Letter from Roger C. Sherman, Chief, Wireless Telecommunications Bureau, FCC, to Robert W. Quinn, Jr., Sr. VP, Federal Regulatory, AT&T (Dec. 16, 2015); see Letter from Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC, to Robert W. Quinn, Jr., Sr. Exec. VP, External and Legislative Affairs, AT&T (Nov. 9, 2016); Letter from Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC, to Robert W. Quinn, Jr., Sr. Exec. VP, External and Legislative Affairs, AT&T (Dec. 1, 2016); Letter from Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC, to Kathleen Grillo, Sr. VP and Deputy GC, Public Policy and Gov’t Affairs, Verizon (Dec. 1, 2016); FCC, Wireless Telecommunication Bureau Report, *Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero Rated Content and Services* (rel. Jan. 11, 2017) (“WTB Report”), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342987A1.pdf; Letter from Nese Guendelsberger, Acting Chief, Wireless Telecommunications Bureau, FCC, to Robert W. Quinn, Jr., Sr. VP, Federal Regulatory, AT&T (Feb. 3, 2017); Letter from Nese Guendelsberger, Acting Chief, Wireless Telecommunications Bureau, to Kathleen Ham, Sr. VP, Gov’t Affairs, T-Mobile (Feb. 3, 2017); Letter from Nese Guendelsberger, Acting Chief, Wireless Telecommunications Bureau, FCC, to Kathleen Grillo, Sr. VP and Deputy GC, Public Policy and Gov’t Affairs, Verizon (Feb. 3, 2017).

consumers have overwhelmingly demonstrated their preferences for free data offerings.²⁵ These offerings hold enormous promise in the ongoing struggle to close the digital divide, particularly for people of color, who are more likely to use mobile broadband for online access.²⁶ Moreover, these free data offerings provide small, multicultural businesses a means to reach their audiences. Yet the Wheeler Commission’s inquiry into free data offerings demonstrates that these offerings remain vulnerable to the capricious political winds that increasingly shape the broadband ecosystem. This uncertainty chills further experimentation by providers and reduces the associated consumer benefits.

Consumers, particularly those of color, ultimately bear the costs of this uncertainty. While mobile broadband is preferred overall in communities of color, African American and Latino smartphone owners are also more likely to reach their maximum mobile data allowances in a billing period,²⁷ receive monthly bills much higher than expected,²⁸ and cancel or cut off wireless service.²⁹ Free data offerings address many of these issues, delivering to consumers benefits in the form of lower bills and additional data to use on meaningful activities. Closing the door on this type of innovation makes the adoption and use of mobile technology cost-

²⁵ CTIA, *New Survey Shows Overwhelming Majority of Wireless Consumers Want Free Data Services* (Apr. 7, 2016), <https://www.ctia.org/industry-data/press-releases-details/press-releases/new-survey-shows-overwhelming-majority-of-wireless-consumers-want-free-data-services>.

²⁶ See Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Center (Apr. 1, 2015), http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf (finding that “12% of African Americans and 13% of Latinos are smartphone-dependent, compared with 4% of whites”).

²⁷ *Id.* at 16.

²⁸ *Id.*

²⁹ *Id.* at 15.

ineffective in communities of color, thereby needlessly delaying the digital inclusion goals sought by communities of color.

The Commission should implement a regulatory approach that allows innovation to flourish and places communities of color on a positive trajectory of digital engagement.

IV. THE COMMISSION SHOULD ADOPT ENFORCEABLE RULES TO ENSURE INTERNET OPENNESS PURSUANT TO SECTION 706 OF THE TELECOMMUNICATIONS ACT OF 1996

A. SECTION 706 PROVIDES AN INDEPENDENT GRANT OF LEGAL AUTHORITY ON WHICH THE COMMISSION CAN RELY TO ADOPT ENFORCEABLE NET NEUTRALITY RULES

The National Multicultural Organizations support the use of Section 706 of the 1996 Telecommunications Act as a reasonable method to preserve a free and open internet for all Americans. The Commission can use Section 706 authority to adopt open internet rules and remain true to Congress's intent by steering away from archaic models of utility regulation and using light-touch approaches that promote market-based innovation, investment, and openness. In *Verizon v. FCC*, decided in 2014, the D.C. Circuit agreed that the Commission was reasonable in relying on Section 706 to protect the public's rights to transparency, disclosure, and equal access to all services.³⁰ Today, by using its Section 706 authority, the Commission can adopt rules and bring enforcement actions that will ensure the rights of all American consumers to an open internet. The Commission must use this authority to protect consumers, including the most vulnerable new broadband adopters, and keep any ISP missteps in check. Specifically, the Commission should take a straightforward approach that includes:

- Enforcing strict no-blocking and no-throttling rules to protect consumers, with strict enforcement as authorized by Section 706.³¹

³⁰ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (“*Verizon*”).

³¹ *Id.* at 655.

- Proscribing commercially unreasonable discrimination, while affording participants in the broadband economy, particularly minority entrepreneurs, and small businesses the opportunity to enter into new types of reasonable commercial arrangements 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.
- Underscoring the need for transparency with enforceable disclosure requirements.

These benefits can be achieved with the use of Section 706 of the 1996

Telecommunications Act, which states:

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability 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.³²

Relying on this provision, the Commission adopted the *2010 Open Internet Order*, which established three rules – anti-discrimination, anti-blocking, and transparency – grounded on the assumption that Section 706 “authorizes the Commission [...] to take actions [...] that encourage

³² 47 U.S.C. § 1302.

the deployment of advanced telecommunications capability by any of the means listed in the provision.”³³

In its 2014 *Verizon* decision, the D.C. Circuit upheld the Commission’s interpretation, and further held that the Commission does have the authority to regulate broadband service providers under this section.³⁴ The Court ruled that the FCC was fully justified in finding a link between creating an open internet and accelerating broadband deployment. It said that the Commission’s authority to promulgate regulations that promote broadband deployment encompasses the power to regulate broadband providers’ economic relationships with edge providers if, in fact, the nature of those relationships influences the rate and extent to which broadband providers develop and expand services for end users.

In reading Section 706 as conferring independent regulatory authority, the Court has given the FCC a powerful instrument with which to protect the public. The right to use “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,” affords the Commission wide latitude to advance universal deployment and protect the open internet.

After the *Verizon* decision, the Commission released the *2014 NPRM* in which it proposed to adopt enforceable rules to protect and promote the open internet based on the Section 706 blueprint laid out by the *Verizon* court.³⁵ The *2014 NPRM* echoed the *Verizon* Court’s conclusion that:

³³ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17969 ¶ 119 (2010); *see also id.* at 17969 n.370.

³⁴ *Verizon*, 740 F.3d at 642 (agreeing with the Commission’s understanding of Section 706(a) as a grant of regulatory authority represents a reasonable interpretation of an ambiguous statute).

³⁵ *See Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (“*2014 NPRM*”).

[S]ections 706(a) and (b) of the Telecommunications Act grant the Commission affirmative authority to encourage and accelerate the deployment of broadband capability to all Americans through, among other things, measures that promote competition in the local telecommunications market or remove barriers to infrastructure investment [and] the Commission could utilize that section 706 authority to regulate broadband Internet access service.³⁶

Despite this strong language, the Commission ultimately reclassified broadband service providers as telecommunications services.³⁷ The *Restoring Internet Freedom NPRM* in this proceeding proposes to return broadband providers to the information-services classification and asks how Section 706 should be interpreted.³⁸

In the *Restoring Internet Freedom NPRM*, the Commission states that Section 706 “appears more naturally read as hortatory, particularly given the lack of any express grant of rulemaking authority, authority to prescribe or proscribe the conduct of any party, or to enforce compliance.”³⁹ Section 706 is partly hortatory – but not completely so. Read in its entirety, it is a classic non-self-executing instruction to the Commission to take specific affirmative steps, going far beyond mere jawboning, to “encourage” advanced telecommunications capability “to all Americans.” Section 706 instructs the Commission to effectuate this “encouragement” through specific methods that are impossible to perform through the giving of orations: “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” All of the methods identified by Congress direct the FCC to remove archaic models of utility regulation and look to light-touch approaches that promote market-based

³⁶ *Id.* at 5569 ¶ 23; see *Verizon*, 740 F.3d at 635-42.

³⁷ See *Title II Order*, 30 FCC Rcd at 5734 ¶ 308.

³⁸ *NPRM*, 32 FCC Rcd at 4441 ¶ 24.

³⁹ *Id.* at 4466 ¶ 101.

innovation and investment. Indeed, the Commission has already adopted a rule, 47 C.F.R. § 0.91(h), that directs the Wireline Competition Bureau to “[r]eview the deployment of advanced telecommunications capability to ensure that such deployment is reasonable and timely, consistent with section 706 of the Act, and, where appropriate, recommend action to encourage such deployment.” In Section IV *infra*, we discuss a critical topic – redlining – on which additional specific rules implementing Section 706 are urgently needed.

B. THE “GENERAL CONDUCT” STANDARD CREATES UNNECESSARY UNCERTAINTY AND SHOULD BE ELIMINATED

The National Multicultural Organizations support the adoption of clear, enforceable rules that will protect the open internet. The very purpose of legislation is to adopt clear rules that govern the activity of a designated industry. The general conduct standard is absolutely unclear on its face, and, therefore, it should be eliminated as proposed in the *Restoring Internet Freedom NPRM*.⁴⁰

The application of the general conduct standard toward zero rating plans is illustrative of the inherent unpredictability in this subjective regulation. FCC Chairman Tom Wheeler initially praised Bing On and other free data programs, calling them “highly innovative and highly competitive.”⁴¹ This echoed the conclusion the Commission made in its 2015 *Title II Order* regarding free data services, which noted that such new service offerings “could benefit consumers and competition.”⁴² However, the Commission’s Wireless Bureau, using the vague general conduct standard, subsequently decided it was necessary to investigate several free data

⁴⁰ *Id.* at 4459 ¶ 73.

⁴¹ See Dan Meyer, *Wheeler: T-Mobile Bing On Does Not Violate Net Neutrality*, RCR Wireless (Nov. 19, 2015), <http://www.rcrwireless.com/20151119/policy/wheeler-t-mobile-bing-on-does-not-violate-netneutrality-tag2>.

⁴² *Title II Order*, 30 FCC Rcd at 5668 ¶ 152.

programs, resulting in a report concluding that some of these plans violated the general conduct standard.⁴³ After a change in administration, the Wireless Bureau made an about face and retracted this report.⁴⁴ If there was ever an example of why a legislative solution is necessary to provide certainty for everyone, this is it.

As noted earlier, the emergence of free data offerings is a primary example of the types of innovative offerings that benefit communities of color. This innovation has led to new offerings that include unlimited data plans. Consumers have overwhelmingly embraced these data plans because they provide access at a lower cost. Yet the looming general conduct standard subjected consumers to the type of uncertainty that likely chilled further experimentation with free data and other innovative offerings. By eliminating the general conduct rule, the Commission can ensure that consumers, rather than regulators, have the right to choose new competitive offerings that meet their needs.

V. THE COMMISSION MUST MAINTAIN LIFELINE FOR BROADBAND SERVICE

Ensuring that the Lifeline program continues to support high-speed, standalone broadband is essential to ensure the benefits of digital citizenship for America's low-income consumers. Even if broadband is reclassified as an information service, the Commission must continue to support standalone facilities-based and non-facilities-based broadband in the Lifeline program. The Commission has multiple bases of authority to do so, including, for example, the authority granted in Sections 254 and 706 of the Communications Act, as amended (the "Act").

⁴³ WTB Report, *supra* note 24.

⁴⁴ See *Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero Rated Content and Services*, Order, 32 FCC Rcd 1093 (WTB 2017).

Moreover, the Commission asserted Section 706 authority in both the 2012 Lifeline Reform Order and the 2016 Lifeline Modernization Order.

A. *THE 2016 LIFELINE MODERNIZATION ORDER MAKES CLEAR THAT BROADBAND REMAINS A SUPPORTED SERVICE UNDER THE LIFELINE PROGRAM EVEN IF BROADBAND IS RECLASSIFIED AS A TITLE I SERVICE*

In the *2016 Lifeline Modernization Order*, the Commission concluded that broadband is a telecommunications service eligible for Lifeline support for the limited purposes of section 254.⁴⁵ In making its determination that broadband is a “telecommunications service” for the purposes of the Lifeline program, the Commission pointed to two separate and independent rationales.⁴⁶ Only one of these rationales relied upon the Commission’s *Title II Order* classifying broadband as a Title II service.⁴⁷ Consequently, even after reclassifying broadband as a Title I service, the Commission has the express legal authority to continue providing broadband Lifeline support.

Section 254(c)(1) directs the Commission to define universal service as an evolving level of telecommunications services that the Commission establishes periodically based on an analysis of several factors.⁴⁸ For the purposes of a given universal program, section 254(c)(1) authorizes the Commission to define supported services specific to particular universal service programs or rules.⁴⁹ Based on its analysis of the section 254(c)(1) factors in the *2016 Lifeline*

⁴⁵ *Lifeline and Link Up Reform and Modernization et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 3975-76 ¶ 39 (2016) (“*2016 Lifeline Modernization Order*”).

⁴⁶ *See id.* at 3976 n.92.

⁴⁷ *See id.*

⁴⁸ 47 U.S.C. § 254(c)(1).

⁴⁹ *See Modernizing the E-rate Program for Schools and Libraries*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8897 ¶ 72 & n.155 (2014) (discussing the

Modernization Order, the Commission concluded that broadband “is a telecommunication service that warrants inclusion in the definition of universal service” in the context of the Lifeline program.⁵⁰

Specifically, the Commission reasoned that, even during the time that the Commission had classified broadband as an information service prior to the 2015 *Title II Order*, it recognized the possibility of broadband transmission being offered on a common carrier basis as a telecommunications service.⁵¹ For example, in the 2007 *Wireless Broadband Order*, the Commission under Chairman Martin concluded that:

Should the facility provider choose to offer the transmission component of wireless broadband Internet access as a telecommunications service, the regulatory regime appropriate to the nature of the telecommunications service will apply. For example, if a wireless broadband Internet access provider chooses to offer the telecommunications transmission component as a telecommunications service, then it is a common carrier service subject to Title II.”⁵²

To make clear that its determination did not rely solely on the Title II classification of broadband, the Commission in the 2016 *Lifeline Modernization Order* reiterated that “even

Commission’s interpretation of section 254(c)(1) as allowing the definition of supported services specific to particular universal service programs or rules).

⁵⁰ 2016 *Lifeline Modernization Order*, 31 FCC Rcd at 3975-76 ¶ 39.

⁵¹ See *id.* at 3976 n.92 (citing *Appropriate Regulatory Treatment For Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5913-14, ¶ 33 (2007); *United Power Line Council’s Petition For Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13289-90 ¶ 15 (2006); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14900-03 ¶¶ 89-95 (2005)).

⁵² *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5913-14 ¶ 33 (2007) (citations omitted).

beyond the classification of [broadband] generally, we make clear that [broadband] as the supported service for the Lifeline broadband program is a telecommunications service.”⁵³

Thus, even when the Commission reclassifies broadband service as a Title I information service, broadband would be supported as a telecommunications service for the limited purposes of Section 254 based on the reasoning expressed in the Commission’s *2016 Lifeline Modernization Order*.

B. MAINTAINING LIFELINE SUPPORT FOR BROADBAND IS CONSISTENT WITH THE COMMISSION’S PRE-RECLASSIFICATION “NO BARRIERS” POLICY

The Commission has authority to maintain support for broadband in the Lifeline program under existing section 254(b) precedent.

First, the Commission should require Lifeline providers to use Lifeline support “for the provision, maintenance, and upgrading” of broadband services and facilities capable of providing supported services.⁵⁴ As noted in the *Restoring Internet Freedom NPRM*, the *Universal Service Transformation Order* recognized that section 254 grants the Commission authority to support not only the supported service, “but also the facilities over which [the service] is offered” and allows the Commission “to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b)...”⁵⁵ Accordingly, while stating that voice telephony remains the supported service, the Commission determined that the achievement of the

⁵³ *2016 Lifeline Modernization Order*, 31 FCC Rcd at 3976 n.92.

⁵⁴ *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17685 ¶ 64 (2011) (“*Universal Service Transformation Order*”); *see also supra* Section V.A (concluding that broadband remains a supported service under the Lifeline program).

⁵⁵ *Universal Service Transformation Order*, 26 FCC Rcd at 17685 ¶ 64; *see also NPRM*, 32 FCC Rcd at 4457 ¶ 68; 47 U.S.C. § 254(b).

universal service principles outlined in section 254(b) required that carriers receiving universal service high-cost support must “invest in modern broadband-capable networks”⁵⁶ The Commission should use a similar rationale to maintain support for broadband in the Lifeline program. Specifically, the Commission should conclude that achievement of the universal service principles outlined in section 254(b) requires that eligible providers receiving Lifeline support must use such support to invest, either directly or indirectly, in broadband-capable networks.⁵⁷

Second, the Commission should recognize that providing Lifeline support for facilities associated with broadband-only service advances the statutory goal of providing access to advanced telecommunications and information services to consumers in all regions of the nation, particularly in rural and high-cost areas.⁵⁸ In the 2016 *Rate-of-Return Standalone Broadband Order*, the Commission removed the rule limiting high-cost support to only those facilities associated with voice telephony service.⁵⁹ In doing so, the Commission recognized that providing support for facilities associated with broadband-only service advanced the statutory goal of providing access to advanced telecommunications and information services to consumers in all regions of the nation, particularly in rural and high-cost areas. Here, the Commission should use consistent reasoning to maintain Lifeline support for broadband. Providing Lifeline

⁵⁶ *Universal Service Transformation Order*, 26 FCC Rcd at 17686 ¶ 65.

⁵⁷ Because non-facilities based providers stimulate demand for broadband-capable networks, thereby encouraging investment in such networks, the Commission should acknowledge that non-facilities-based providers must resell services provided over broadband-capable networks in order to receive Lifeline support.

⁵⁸ See 47 U.S.C. §§ 254(b)(2), (b)(3).

⁵⁹ See *Connect American Fund et al.*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3120 ¶ 87 (2016).

support for facilities, directly and indirectly,⁶⁰ used to provide broadband service to low-income consumers similarly would further the statutory goal of providing access to advanced telecommunications and information services to consumers in all regions of the nation, including low-income consumers and those in rural, insular, and high cost areas.⁶¹ In addition, providing Lifeline support to non-facilities-based Lifeline providers stimulates demand for wholesale broadband services. This demand would in turn encourage the deployment of broadband-capable networks, thereby furthering the statutory goals under section 254(b).⁶²

Consequently, it is clear that the statutory authority under Section 254(b) and Commission precedent provides the Commission with the ability to maintain support for broadband in the Lifeline program after reclassification.⁶³

C. SECTION 706 FURTHER PROVIDES THE COMMISSION AUTHORITY TO MAINTAIN SUPPORT FOR BROADBAND

Section 706 also provides the Commission with independent authority to provide support for standalone broadband in the Lifeline program. Section 706 squarely addresses the commands of Section 254(c) that the Commission “take into account advances in telecommunications . . . services” and “consider the extent to which such telecommunications services” are “essential to education, public health, or public safety” and “are consistent with the public interest, convenient, and necessity.” In particular, Section 706(a) requires the Commission to use specific

⁶⁰ *See supra* note 57.

⁶¹ 47 U.S.C. §§ 254(b)(1), (b)(2), (b)(3).

⁶² *Id.*

⁶³ Moreover, it appears that Commissioner Michael O’Rielly agrees that Section 254 provides the Commission with such authority. As Commissioner O’Rielly suggested after the May 2017 Commission Open Meeting, “the language in [Section] 254 is quite broad and provides us an opportunity not just for those governed under Title II, but also we can extend. . . .” *See* FCC, May 2017 Open Commission Meeting, Commissioner O’Rielly, Press Conference, at minute mark 163:22 (May 18, 2017).

tools to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” and to do so using specific tools such as “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”

Both of these are steps clearly advanced by Lifeline, a program designed to bring about near-universal adoption by all Americans. Indeed, the Commission in its *2016 Lifeline Modernization Order* and *2012 Lifeline Reform Order* previously concluded that a “key barrier to infrastructure investment is a ‘lack of affordability of broadband Internet access service’” and that “providing support to service providers to subsidize low-income consumers’ purchase of broadband services helps achieve [the Commission’s] 706 objective of ‘removing barriers to infrastructure investment’.”⁶⁴

In sum, the Commission has the legal obligation under multiple provisions of the Act and the *2016 Lifeline Modernization Order* to continue to support high-speed, standalone broadband offered by both facilities-based and non-facilities-based providers through the Lifeline program after reclassification. To the extent there is any ambiguity on this issue in the future, Congress should make clear that standalone broadband offered by both facilities-based and non-facilities-based providers is a supported service when adopting net neutrality legislation.

VI. THE COMMISSION SHOULD REAFFIRM THAT REDLINING IS PROHIBITED BY SECTION 106

One of the hallmarks of a free and open internet is the principle that every American deserves equal access to *fast* broadband. In today’s society, state-of-the-art fast broadband is

⁶⁴ *2016 Lifeline Modernization Order*, 31 FCC Rcd at 3977 ¶43; *Lifeline and Link Up Reform and Modernization et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, 6798-99 ¶¶ 331-32 (“*2012 Lifeline Reform Order*”).

absolutely essential. It allows people to acquire new skills, secure employment, secure urgent and affordable health care, further their education, and participate in civic dialogue. Redlining profoundly threatens all this by inhibiting those living in low-income areas, and particularly minorities by virtue of the history of segregation and the persistence of disparities based on wealth,⁶⁵ from attaining the benefits of digital citizenship. As Chairman Pai has recognized, digital redlining “fenc[es] off lower-income neighborhoods on the map and [says] ‘It’s not worth our time and money to deploy there.’”⁶⁶

Fortunately, Congress has provided the Commission with a legal tool – Section 706 of the 1996 Telecommunications Act⁶⁷ – that proscribes redlining. Section 706 allows the Commission to retain the flexibility to address specific instances of malfeasance while maintaining the previously bipartisan framework for broadband regulation. While reclassification of broadband under Title I would stimulate overall investment, such investment is not adequate because some providers have chosen and will choose to ignore low-wealth, low-income, and minority communities irrespective of how broadband is classified.

Thus, it is vital that regulatory oversight be applied to ensure that all providers invest in broadband infrastructure to the “all Americans” referenced in Section 706. Otherwise, the classic “free rider” problem will ensure that wealthy communities will receive competitive options for broadband while low-wealth minority communities – those who need broadband the

⁶⁵ See *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, Pew Research Center (June 27, 2016), <http://www.pewsocialtrends.org/2016/06/27/1-demographic-trends-and-economic-well-being/#a-growing-wealth-gap-between-blacks-and-whites> (documenting fact that wealth of white households is 13 times that of black households).

⁶⁶ Ajit Pai, Chairman, FCC, *Remarks at the Newseum: The Future of Internet Freedom* (Apr. 26, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0426/DOC-344590A1.pdf.

⁶⁷ 47 U.S.C. § 1302.

most – will usually receive just one broadband provider – generally the local cable system. Competition is a public good, and people of color deserve competition just as much as other Americans do. Americans would find it morally offensive even to conceive of allowing competing banks, competing ambulance companies, competing taxicab companies, or competing charter schools to fail to serve residents of low-income or minority communities. Competing broadband providers, too, must be expected to serve communities regardless of their economic status.

It would be fundamentally unjust for providers to be awarded the regulatory benefits of Title I light-touch regulation on the premise that the use of Title I will stimulate more investment when, in fact, the providers intend to invest only in the wealthier neighborhoods and not in low-income, low-wealth, minority neighborhoods. The FCC must have and exercise the power to prevent redlining.⁶⁸ Investment – and the good jobs that go with it – cannot be steered away from the communities where multicultural citizens predominately reside.

Finally, the Commission should recognize that although minorities and others living in broadband-deficient communities are those most directly harmed by redlining, redlining harms *all* Americans. We are all interconnected, and “network effects” diminish the quality of service received by all of us when some of us do not receive high-speed, high-quality service. When some of us cannot ride the wave of education, employment, entrepreneurship, healthcare, and civic engagement that flow from fast broadband, all of us suffer, and the societal costs are real.

⁶⁸ See, e.g., 2014 NMO Comments at 10 (in which 42 national organizations argued that “[c]ommunities of color deserve an agenda that enables first-class digital citizenship – not rules that would result in underinvestment in broadband infrastructure.”).

As Reverend Dr. Martin Luther King taught us, “injustice anywhere is a threat to justice everywhere.”⁶⁹

Therefore, the Commission should use its affirmative authority under Section 706 to adopt clear anti-redlining rules so that every American has equal access to fast broadband service. Such a rule, designed at least initially for urban areas,⁷⁰ should be written to establish reasonable and prompt time limits to build out service throughout municipalities they undertake to serve. The rule would recognize that while it is physically impossible to build out a municipality in its entirety instantaneously, it is unacceptable for a carrier to build out last, or not at all, the areas that need fast broadband the most. This type of rule would allow for the flexibility of providers to invest their money into infrastructure as they see fit, so long as they are providing equal access to fast broadband in all areas they provide service, and as long as those residing in vulnerable, underserved communities have a clear, rapid pathway to digital equality.

Without regulatory power under 706, there is no guarantee that broadband providers will invest in the low-income communities they may have neglected previously.⁷¹ In lieu of the “general conduct” standard, which we have opposed (*see* §IV(B) *supra*), the Commission should write explicit *per se* practices that broadband providers must not engage in, such as carefully-

⁶⁹ Dr. Martin Luther King, Jr., *Letter from a Birmingham Jail [King, Jr.]*, African Studies Center-University of Pennsylvania (Apr. 16, 1963), https://www.africa.upenn.edu/Articles-Gen/Letter_Birmingham.html.

⁷⁰ Rural broadband presents a unique set of deployment issues due to terrain and population density considerations. These are discussed at length in the National Broadband Plan. *See* Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 110 (2010).

⁷¹ *See, e.g.*, Allan Holmes et al., *Rich People Have Access To High Speed Internet; Many Poor People Still Don't*, Center For Public Integrity (May 12, 2016), <https://www.publicintegrity.org/-2016/05/12/19659/rich-people-have-access-high-speed-internet-many-poor-people-still-dont> (“More than 13 percent of low-income areas in the United States don’t have access to broadband, compared to fewer than 3 percent of the wealthiest areas.”).

defined redlining. This would remove any ambiguity while allowing the Commission to exercise enforcement measures against ISPs that redline. We note that the Chairman plans to delegate to the Advisory Committee on Diversity and Digital Empowerment the task of addressing redlining.⁷² It would be appropriate for the Advisory Committee to take up the issue of crafting specific anti-redlining rules implementing Section 706.

With Section 706, we can maximize innovation, ban redlining, *and* bring about universal first class digital opportunity.

VII. THERE MUST BE A MECHANISM FOR CONSUMERS TO SEEK REDRESS TO THE FCC IF THEY ARE HARMED

The National Multicultural Organizations believe that enforceable net neutrality rules must be accompanied by a mechanism that allows consumers to seek redress if harm occurs as a result of violations of the net neutrality rules. Without an accessible, affordable, and expedited way to resolve complaints, the net neutrality rules may not adequately protect consumers, particularly those most vulnerable. Accordingly, the Commission should not eliminate the ombudsperson as proposed in the *Restoring Internet Freedom NPRM*.⁷³ Not only does the Ombudsperson provide a mechanism for initiating enforcement of the rules, the Ombudsperson serves the important role of protecting and promoting the interest of consumers, particularly

⁷² FCC, News Release, *Chairman Pai Announces Intent to Establish Advisory Committee on Diversity and Digital Empowerment* (Apr. 24, 2017) (“Every American should have the opportunity to participate in the communications marketplace, no matter their race, gender, religion, ethnicity, or sexual orientation. In order to help the FCC advance that goal, I am pleased to announce that I intend to establish the Advisory Committee on Diversity and Digital Empowerment. This Committee will be charged with providing recommendations to the FCC on empowering *all* Americans. **For example, the Committee could help the FCC promote diversity in the communications industry by assisting in the establishment of an incubator program and could identify ways to combat digital redlining.**”) (emphasis added).

⁷³ *NPRM*, 32 FCC Rcd at 4466 ¶ 97.

individuals from more vulnerable populations, who may be new to using broadband and have less confidence in their digital literacy.

However, if the Commission does eliminate the Ombudsperson, the Commission should look to Title VII of the 1964 Civil Rights Act as a model for a replacement mechanism.⁷⁴ Title VII was designed to eliminate discrimination in employment based on race, color, sex, religion, or national origin.⁷⁵ To ensure a path to enforceable employment equality, the Title VII complaint process was created to offer rapid, accessible, and affordable remedies for employment discrimination faced by people of color and women. A complaint mechanism based on the Title VII complaint process would protect those consumers who have been harmed by net neutrality violations and serve as a deterrent to would-be bad actors.⁷⁶

VIII. CONCLUSION

Access to broadband for every American, regardless of their circumstance, is one of the most critical social justice challenges of the 21st century. Yet, the 2015 decision to impose Title

⁷⁴ Civil Rights Act of 1964, 42 U.S.C. 2000(e) 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).

⁷⁵ See e.g., U.S. Equal Employment Opportunity Commission, *Significant EEOC Race/Color Cases*, <http://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm>; see also U.S. Equal Employment Opportunity Commission, *Administrative Enforcement and Litigation*, http://www.eeoc.gov/eeoc/enforcement_litigation.cfm; U.S. Equal Employment Opportunity Commission, *Enforcement and Litigation Statistics, Title VII of the Civil Rights Act of 1964 Charges*, <https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm>; *id.* (The enforcement program has been successful in resolving cases with monetary and non-monetary benefits. For example, in Fiscal-Year 2016, 65,090 charges were filed under Title VII with 69,673 resolutions).

⁷⁶ A thorough discussion of how this procedure would operate can be found in the 2014 NMO Comments at 12-14. In the *Title II Order*, the Commission wrote favorably about this approach but, without explanation, failed to adopt it. *Title II Order*, 30 FCC Rcd at 5715 n.665. Now, however, as the Commission proposes to eliminate the Ombudsperson and rely instead on line staff to receive complaints, it should revisit the National Minority Organizations' proposal for a complaint mechanism modeled after Title VII of the 1964 Civil Rights Act.

II utility-style regulation on broadband has served only to create uncertainty, confusion, and lawsuits. To provide certainty for consumers and innovators, the National Multicultural Organizations strongly urge Congress to pass comprehensive legislation codifying enforceable net neutrality protections. A legislative solution is the best way to provide long-lasting certainty for an open internet and ongoing efforts to bridge the digital divide. In the interim, the Commission should reclassify broadband as a Title I information service and use its authority under Section 706 to adopt enforceable open internet rules. While doing so, the Commission should eliminate the general conduct standard, ensure that the Lifeline program can continue to support broadband service for low-income Americans, and take all necessary steps to ban telecommunications redlining. Finally, to ensure that net neutrality rules provide meaningful protection for consumers, the Commission should provide a mechanism for consumers to seek redress when rule violations occur. Each of these steps, acting in concert with the other, will ensure that every American has access to our digital future.

Asian Pacific American Institute of Congressional Studies (APAICS)
Consumer Policy Solutions
Hispanic Technology & Telecommunications Partnership (HTTP)
League of United Latin American Citizens (LULAC)
MANA, A National Latina Organization
Multicultural Media, Telecom & Internet Council (MMTC)
National Black Caucus of State Legislators (NBCSL)
National Coalition on Black Civic Participation (NCBCP)
National Congress of Black Women (NCBW)
National Organization of Black County Officials (NOBCO)
National Organization of Black Elected Legislative Women (NOBEL Women)
National Puerto Rican Chamber of Commerce
OCA - Asian Pacific American Advocates
U.S. Hispanic Chamber of Commerce

Respectfully submitted,

Kim Keenan
President and CEO

David Honig
President Emeritus and Senior Advisor

Multicultural Media, Telecom and Internet
Council
1620 L Street NW, Suite 250
Washington, DC 20036
(202) 332-0500
kkeenan@mmtconline.org

July 17, 2017