

December 4, 2017

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

Dear Ms. Dortch:

RE: Restoring Internet Freedom, WC Docket 17-108

This will report on five meetings held by David Honig, President Emeritus of the Multicultural Media, Telecom and Internet Council (MMTC) and James Winston, President of the National Association of Black Owned Broadcasters.¹ We met on November 30 with Amy Bender, Wireline Legal Advisor for Commissioner Michael O’Rielly, and with Commissioner Jessica Rosenworcel and Commissioner Rosenworcel’s Chief of Staff, Travis Litman. We met on December 1 with Commissioner Brendan Carr and his Chief of Staff, Jamie Susskind; with Chairman Ajit Pai and his Wireline Advisor, Jay Schwarz; and with Commissioner Mignon Clyburn and her Chief of Staff, David Grossman. Set out below are the points we made, with legal and policy support.

We stated that we appreciated the early release of the *Draft Order*.² The early release enabled us to call a significant issue to the Commission’s attention and propose a reasonable solution.

MMTC and NABOB have long supported net neutrality: an open internet governed by the core principles of no blocking, no throttling, and no unreasonable discrimination. For two decades, MMTC, NABOB, and over 40 other national civil rights, minority business and intergovernmental organizations have embraced the light touch enforcement mechanisms of Section 706 of the 1996 Act³ as preferable to the draconian, public utility style regulations of Title II. Our position was essentially the FCC’s operating standard throughout the Kennard, Powell, Martin, and Genachowski administrations, which promoted investment, innovation, and a reduction of market entry barriers

¹ See www.mmtconline.org and www.nabob.org. This letter reflects the views of each organization institutionally and is not intended to reflect the views of the organizations’ respective officers, directors, advisors, or individual members.

² *Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, WC Docket 17-108, FCCIRC 1712-04 (November 22, 2017) (“Draft Order”)*.

³ Codified at 47 U.S.C. §1302.

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for new entrants, including small businesses and women and minority-owned businesses. It worked quite well.⁴

While we support the Commission's proposed repeal of Title II regulation of the internet, we reaffirmed our recommendation that the Commission continue to be prepared to deploy Section 706 to prevent and proscribe violations of the core net neutrality principles.

In the alternative, we recommended that the Commission issue a Further NPRM and/or find another effective means of addressing the impact of removing reliance on Section 706, particularly as it relates to bridging the digital divide, small business, and online participation. While we hope the FTC will succeed in preventing abuse, an FTC-led approach has never been attempted. Thus the Commission needs a backup plan with a strong deterrent to abuse to enhance the likelihood that the new enforcement plan will succeed.

Finally, we urged the Commission to open a new docket to address digital redlining. In the current Restoring Internet Freedom proceeding, the Commission should expressly state that digital redlining based on race, ethnicity, or income/wealth is unacceptable.

Impact of Repealing Both Title II and Section 706 Regulation

The proposed repeal of Title II regulation of the internet is likely to ensure high rates of investment and job creation in the online space.⁵ The Commission's 2015 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 economically-challenged urban communities. As the uncertainty over popular "free data" offerings played out in 2015, minority consumers were affected the most due to their preference for mobile broadband, and their greater likelihood as smartphone owners to reach their maximum mobile data allowances in a billing period,⁶ to receive monthly bills much higher than expected,⁷ and to cancel or

⁴ See *Draft Order* at 63-66 ¶¶109-116.

⁵ See, e.g., Patrick Brogan, *Broadband Investment Continues Trending Down in 2016*, USTelecom Research Brief, October 31, 2017, available at <https://www.ustelecom.org/sites/default/files/documents/Broadband%20Investment%20Trending%20Down%20in%202016.pdf> (last visited November 23, 2017) (finding that broadband investment has fallen in each of the two years since Title II was imposed, and the pace of decline is accelerating); see also CWA/NAACP Comments, WC Docket 17-108 (filed July 17, 2017) at 15 (concluding that allowing some paid prioritization "provides the broadband providers with a revenue stream, encouraging increased infrastructure investment by increasing the return on that investment.")

⁶ See Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Center (Apr. 1, 2015) at 16, available at http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf (last visited November 26, 2017).

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cut off wireless service.⁸ Free data offerings addressed many of these issues, delivering benefits to consumers in the form of lower bills and additional data to use on meaningful activities. Closing the door on this type of innovation made the adoption and use of mobile technology cost-ineffective, thereby needlessly delaying the digital inclusion goals sought by communities of color.

Notwithstanding our support for repeal of Title II regulation, we urged the Commission to reexamine its proposal to also abandon reliance on Section 706 to prevent and proscribe blocking, throttling, unreasonable discrimination, and – of especially great significance to our constituents – the potential to combat digital redlining, which contributes to the persistent digital divide by failing to provide broadband in certain neighborhoods.⁹

Impact on Confidence and Participation in the Online Space by the Underserved and Small Business

For blocking, throttling, and unreasonable discrimination, the *Draft Order* contemplates that enforcement would be handled by another agency, the FTC.¹⁰ The FTC has an outstanding investigative staff and is not hesitant to issue large forfeitures. But even assuming that the FTC agrees to allow net neutrality complaints to jump to the head of its rather long complaint queue,¹¹ there is still a learning curve and a big “unknown” associated with any enforcement paradigm that has never before been attempted. We may all hope and even predict that it will work, but no one knows for sure.

When executing any new enforcement paradigm, deterrence is especially critical to ensure that bad actors do not perceive a weakness and exploit it. Although there have been relatively few formally adjudicated instances of blocking, throttling, and unreasonable discrimination since the Madison

⁷ *Id.*

⁸ *Id.* at 15.

⁹ See Remarks of FCC Chairman Ajit Pai at the First Meeting of the Federal Communications Commission’s Advisory Committee on Diversity and Digital Empowerment, Washington, DC, September 25, 2017 (“Another task we’ll assign you is to examine is how we can make sure that disadvantaged communities have access to next-generation networks. Broadband can be a great equalizer when it comes to jobs, health care, education, and civic engagement. But if we don’t bridge the digital divide, communities on the wrong side of that divide will fall further behind in each of these areas. Our goal should be ubiquitous, high-speed networks that bring together all Americans—and I do mean all Americans.”)

¹⁰ *Id.* at 117 ¶204.

¹¹ In 2016, more than 3.1 million complaints were filed with the FTC. See *FTC Releases Annual Summary of Consumer Complaints* (March 3, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/03/ftc-releases-annual-summary-consumer-complaints> (last visited November 24, 2017).

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River VoIP blocking case 12 years ago,¹² this good fortune surely owes, in great part, to potential wrongdoers' recognition that today's misconduct carries the risk of tomorrow's harsh regulation that would devastate their companies. Carrying today's deterrence into tomorrow's FTC-based regulatory paradigm is thus critical.

In the future, even if we only experience a single open internet violation each year, that's one too many. Any such violation could trigger a profound breach of trust in the integrity of an institution that supports virtually every element of our economy; an institution which is a make-or-break for small business.¹³ A blocking, throttling, or unreasonable discrimination violation that's unremedied for weeks would be especially damaging to young, minority online entrepreneurs and innovators – our future business leaders. Already they are struggling to gain a foothold in the online space.¹⁴ The last thing the nation needs is a climate that would cause diverse millennials and others not to trust and invest in internet commerce.¹⁵ This phenomenon already has been on display in other nations

¹² See *Draft Order* at 63-66 ¶¶109-116 (including discussion of *Madison River Communications*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (Enforcement Bureau 2005)).

¹³ Small business advocates are especially concerned that they will face prohibitive cost barriers to online access. See Tiffany Hsu, F.C.C. Plan to Roll Back Net Neutrality Worries Small Businesses, *The New York Times*, November 22, 2017, available at https://www.nytimes.com/2017/11/22/business/net-neutrality-small-businesses.html?_r=0 (last visited November 23, 2017); Shelly Palmer, The End of Net Neutrality could be Good for Marketers and Bad for Almost Everyone Else, available at <https://www.shellypalmer.com/2017/11/end-net-neutrality-good-marketers-bad-almost-everyone-else/> (last visited November 26, 2017). This concern deserves close attention because 29% of small businesses are owned by minorities. See Small Business Administration, *Minority Business Ownership: Data from the 2012 Survey of Business Owners* (September 14, 2016), available at <https://www.sba.gov/sites/default/files/advocacy/Minority-Owned-Businesses-in-the-US.pdf> (last visited November 24, 2017).

¹⁴ Minorities own only 4% of technology-based growth companies. See Rebecca Bagley, *Why we need more minority-tech entrepreneurs* (November 1, 2013), available at <https://www.forbes.com/sites/rebeccabagley/2013/11/01/why-we-need-more-minority-tech-entrepreneurs/#6235e8d25a72> (last visited November 24, 2017). For EEOC data on minority employment in high tech companies, see n. 32 *infra*.

¹⁵ In our meeting with Ms. Bender, we noted that the cost-benefit analysis ("CBA") contained in the *Draft Order* at 172-177 ¶¶300-319, is incomplete because it fails to consider the cost to the nation's economy of the loss of confidence in the internet – especially among minorities and millennials – that would attend any non-remediation of even the occasional open internet violation. See, e.g., *Review of the Emergency Alert System*, 31 FCC Rcd 2414, 2447 (2016) (Statement of Commissioner Michael O'Rielly), *aff'd sub nom. MMTCC and LULAC v. FCC*, 873 F.3d 932 (D.C. Cir. 2017) (discussing why a thorough CBA is essential to a complete assessment of a proposed new regulatory policy.)

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where internet blocking and throttling (usually by state actors) are common.¹⁶ A version of this phenomenon is playing out right now in our own nation, where some people do not register and vote because many believe – incorrectly – that voting machines can be hacked.¹⁷

Impact on Digital Redlining

If the loss of Section 706 enforcement constrains the FCC's ability to put an end to digital redlining, that would be devastating. As the Chairman has recognized, digital redlining is a major threat to closing the digital divide because it "fenc[es] off lower-income neighborhoods on the map and [says] 'It's not worth our time and money to deploy there.'"¹⁸

Redlining, where businesses provide no service or inferior service to minority or low-income neighborhoods, has been endemic in the banking and insurance industries.¹⁹ Over the years, broadband corporations have exhibited the same moral failings as their banking and insurance predecessors. Redlining in broadband has happened, is happening, and will happen in the future.²⁰ It presents a civil rights crisis of major proportions.

¹⁶ See Beibei Bao, *How Internet Censorship is Curbing Innovation in China* (April 22, 2013), available at <https://www.theatlantic.com/china/archive/2013/04/how-internet-censorship-is-curbing-innovation-in-china/275188/> (last visited November 24, 2017).

¹⁷ See Elizabeth Weise, *Could the U.S. election be hacked?* USA Today (October 10, 2016), available at <https://www.usatoday.com/story/tech/news/2016/10/10/could-us-election-hacked/91866334/> (last visited November 24, 2017); see also Paul Szoldra, *Stop worrying about hackers stealing the election*, Business Insider (October 4, 2016), available at <http://www.businessinsider.com/hacking-the-election-2016-10> (last visited November 24, 2017) (pointing out that "not a single electronic machine is connected to the Internet.")

¹⁸ See Remarks of FCC Chairman Ajit Pai at the Newseum: The Future of Internet Freedom, April 26, 2017.

¹⁹ See Richard Rothstein, *The Color of Law* (W.W. Norton, 2017) (documenting the federal government's extensive role in facilitating decades of *de jure* and *de facto* residential segregation).

²⁰ See Remarks Of FCC Chairman Ajit Pai At Carnegie Mellon University's Software Engineering Institute, "Bringing The Benefits Of The Digital Age To All Americans", Pittsburgh, Pennsylvania, March 15, 2017; see also Comments of the National Multicultural Organizations, WC Docket 17-108 (July 17, 2017) at 24-28; see also Black Women's Roundtable Comments at 5, 6-7 (discussing potential use of Section 706 to address digital redlining).

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Chairman Pai holds the distinction of being the first FCC Chair in a generation to take on this issue, having charged the Advisory Committee on Diversity and Digital Empowerment with finding a way to address digital redlining.²¹

Fighting redlining is much like fighting pollution. The EPA needs the ability to sanction those who would discharge toxins into our air and our water, and it also needs the ability to provide incentives to motivate companies to comply with environmental standards, and to reward consumers and companies such as the manufacturers and purchasers of low-energy-consuming refrigerators and automobiles. The same principle applies to those who regulate our food and pharmaceuticals. Inevitably, some slaughterhouse or drug manufacturer will cut corners. Consequently, the FDA must use every tool it has to maintain public confidence that our food and pharmaceuticals are safe.

Similarly, the Commission needs every tool in its toolbox to fight digital redlining. It needs enforcement tools to fight discrimination on the basis of race, ethnicity, or income/wealth; and it also needs incentive tools, such as those under consideration in pending legislation inspired by former Housing Secretary Jack Kemp's Empowerment Zones.²²

Section 706 is not self-executing. Rather, among other things, subsection (a) of Section 706 contemplates that the Commission will use a variety of well-established tools to combat digital redlining, including "regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."²³ This language openly invites the Commission to conduct a rulemaking proceeding that would put an end to the array of practices that give rise to digital redlining, and that would incentivize practices that would provide a cure.

The *Draft Order* is incorrect in suggesting that simply channeling greater "fast lane" investment dollars to the carriers, all by itself, will solve the digital redlining problem.²⁴ No evidence was

²¹ See FCC News Release, Chairman Pai Announces Intent to Establish Advisory Committee on Diversity and Digital Empowerment (April 24, 2017) (2017) ("ACDDE Committee Establishment") ("the Committee ... could help the FCC... by assisting in the establishment of an incubator program and could identify ways to combat digital redlining.")

²² See Gigabit Opportunity Act, S. 1013, 115th Cong. §2 ("GO Act") (introduced by Senator Shelley Moore Capito, 2017).

²³ Codified at 47 U.S.C. §1302(a).

²⁴ See *Draft Order* at 62 ¶106. We agree that allowing broadband providers to charge edge providers for content delivery network services may help avoid subsidizing heavy users of broadband access at the expense of lighter ones. See *id.* at 147 ¶256; see also CWA/NAACP Comments at 15 ("allowing broadband providers to charge edge providers for content delivery network services and QoS offerings sends efficient market signals, and avoids subsidizing heavy users of broadband access at

provided for this proposition, and history demonstrates otherwise. The nation's wireline and cable companies stopped redlining not because of the very high returns on investment they earned, but because state public utility and cable regulatory commissions cracked down on redlining in the 1970's through the 2000's.

To be sure, eliminating Title II regulation will help accelerate the delivery of service to the already well-served – and to some of the underserved.²⁵ But it's simply not the case that enabling the carriers to earn greater profits, all by itself, will bring about the delivery of service to most or all of the underserved – the people who need fast broadband the most.²⁶ Businesses invest cash, including cash derived from favorable regulations, where the investments can generate the highest returns ("ROI"). Absent specific and carefully tailored incentives such as the not-yet-enacted Gigabit Opportunity Act,²⁷ many corporations do not believe that they will earn the highest ROIs by serving the underserved or by ceasing to engage in race or gender discrimination.²⁸ This explains why the huge wartime surpluses enjoyed by automobile and steel manufacturers did not cause these companies to suddenly stop engaging in employment discrimination against minorities and women. It explains why the major high tech companies, with market caps in the hundreds of billions, nonetheless continue year after year to report minority and women hiring numbers that are a national disgrace.²⁹

If there are no proscriptive rules such as those the Commission could develop under Section 706, and Congress enacts no financial incentives (as is possible, given the gridlock there), there could be no

the expense of lighter users.") But that is a different issue than digital redlining, which is denial of equal or any service to entire neighborhoods.

²⁵ See National Minority Organizations Comments at 10; LULAC Comments at 2.

²⁶ This does not mean that there are no public interest benefits attendant to a policy choice that results in a strengthening of the carriers' balance sheets. These companies, which compete with much larger ones (Google, Netflix, Apple), are ultimately responsible for financing the largest public works project in the nation's history – broadband buildout. See *Draft Order* at 51 ¶86 ("ISPs cumulatively invested \$1.5 trillion in broadband networks between 1996 and 2015") (sourced to USTelecom, Broadband Investment, available at <http://www.ustelecom.org/broadband-industry/broadbandindustry-stats/investment> (cited in the *Draft Order* at 51 n. 321; last visited November 20, 2017)).

²⁷ See GO Act, *supra* n. 22.

²⁸ This holds true even though it is well established that diverse companies earn higher returns on investment. See Catalyst Knowledge Center, *Why Diversity Matters* (2017), available at <http://www.catalyst.org/knowledge/why-diversity-matters> (last visited November 24, 2017).

²⁹ For the most recent statistics and narrative, see EEOC, *Diversity in High Tech* (2016), available at <https://www.eeoc.gov/eeoc/statistics/reports/hightech/> (last visited November 24, 2017).

way to stop digital redlining at all. Thus, the Commission should open a proceeding aimed at developing a comprehensive plan to deploy all regulatory tools at its disposal to combat digital redlining.

Recommendations

This Commission is establishing an impressive civil rights record. It has delivered AM translator relief tailored to the needs of small and minority broadcasters;³⁰ upgraded the Office of Communications Business Opportunities (OCBO);³¹ rechartered the Advisory Committee on Diversity;³² and issued an NPRM to create a broadcast incubator program after 27 years of bureaucratic delay.³³

That's a lot of civil rights work, and we appreciate all of it deeply. The Commission can preserve and build on this legacy by taking these steps:³⁴

- If the Commission is unwilling to retain Section 706 to prevent and proscribe blocking, throttling, and unreasonable discrimination, it should issue a Further NPRM addressing the potential role of Section 706 in internet regulation, and/or find some other method of ensuring that there is a deterrent to abuse as the responsibility for open internet enforcement is handed over to the Federal Trade Commission.

³⁰ See *Revitalization of the AM Radio Service*, Second Report and Order, 32 FCC Rcd 1724 (2017); *Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd 12145 (2015).

³¹ See <https://www.fcc.gov/communications-business-opportunities> (last visited November 24, 2017).

³² See ACCDE Committee Establishment, *supra* n. 21.

³³ See *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, Notice of Proposed Rulemaking, MB Docket No. 17-289, FCC 17-156 (November 20, 2017).

³⁴ The Office of General Counsel has labored diligently to develop a legal argument that it regarded as superior to previous arguments to the contrary. See *Draft Order* at 154 ¶267. We respect the candor, integrity, and humility demonstrated by the acknowledgement in the *Draft Order* that the position taken by Chairman Genachowski's administration – Title I classification with Section 706 protections – was not invalid, but was simply deemed not to be the “better” interpretation. In fact, the Genachowski Commission's argument, flowing directly from a D.C. Circuit opinion, was highly credible. The Commission may comfortably rely upon it to support wise policy. See *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5569 ¶23 (2014); *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17969 ¶119 (2010); see also *id.* at 17969 n. 370 (establishing rules on anti-discrimination, anti-blocking, and transparency, grounded on the assumption that Section 706 “authorizes the Commission [...] to take actions [...] that encourage the deployment of advanced telecommunications capability by any of the means listed in the provision.”)

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- Further, we recommend the initiation of a new rulemaking proceeding on redlining enforcement through any and all available tools. As it concludes the current Restoring Internet Freedom proceeding, the Commission should expressly state that digital redlining based on race, ethnicity, or income/wealth is unacceptable.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's Rules.

Respectfully submitted,

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