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EXECUTIVE SUMMARY

As national organizations representing the interests of minority consumers, minority-owned businesses, and other disadvantaged businesses (the “National Organizations”), we urge the Commission *not* to reclassify broadband as a Title II telecommunications service as outlined in the agency’s “third way” proposal. While we appreciate the Commission’s effort to respond to concerns raised by the *Comcast* decision, we believe that the FCC’s “third way” proposal is not in the best interests of minority consumers or disadvantaged businesses. Moreover, there is no need to jeopardize the interests of minorities by adopting the “third way.” The Commission has ample legal authority to achieve all of its broadband goals and safeguard the interests of our constituents.

To be sure, our difference with the Commission’s approach is not over where we need to go. Along with those on the Commission, the National Organizations have fought hard over the years for the interests of minority consumers and for small and disadvantaged businesses. We understand that preserving a free and open Internet is necessary so that all Americans can stand as first-class citizens in today’s digital world. Like many other civil rights organizations, as well as labor organizations, we also fully embrace and share the important goals identified in the National Broadband Plan, including the goals of expanding the availability of broadband and making it more affordable for everyone.

We also believe that more must be done to help disadvantaged online businesses compete effectively with earlier-established companies. Fostering an environment in which minority and women owned business enterprises (“MWBEs”) and socially and economically disadvantaged businesses (“SDBs”) can obtain the access to capital necessary to launch and maintain their online enterprises is essential to ensure that merit—not inherited privilege—is the key to success

in the digital age. The Commission must also ensure that MWBEs and SDBs can produce the culturally relevant service options and content that will expand broadband adoption and use in minority communities.

Our difference with the Commission's approach lies in how we achieve these broadband goals. In our view, it is clear that the FCC's "third way" is not in the best interests of minority consumers, MWBEs, or SDBs for a number of reasons.

First, the "third way" will increase the price of broadband for consumers. In fact, it could increase the price of broadband by over 16% by subjecting broadband to a number of Title II regulatory charges and fees that will ultimately be borne by end-users. Increasing the price of broadband will thwart the Commission's efforts to achieve its Commission's broadband goals. Study after study shows that increases in the cost of broadband has a direct and negative impact on broadband adoption metrics. Moreover, minority and low-income consumers would be impacted disproportionately by an increase in the cost of broadband because these groups are more sensitive to price changes than others. Thus, the FCC's "third way" proposal could unintentionally widen the digital divide by pricing broadband out of the reach of our constituents.

Second, while massive investments of capital in our broadband infrastructure are needed to bridge the digital divide—and in turn create jobs and grow the economy—the "third way" could impede the necessary investments. Numerous empirical and objective studies have shown that the FCC's "third way" proposal will have a profoundly negative impact on lending and investment. Indeed, the FCC's decision to consider the proposal has already had a negative financial impact on the telecom sector. In this regard, the FCC's "third way" would be particularly harmful for MWBEs and SDBs. As noted, MWBEs and SDBs are already

struggling to obtain necessary financing and the FCC's "third way" would only make it more difficult for minority entrepreneurs to launch and maintain their businesses. This would have the unintended result of cementing the advantages enjoyed by large, established online companies that do not face the same challenges in accessing capital as MWBEs and SDBs.

The FCC's "third way" proposal could harm the interests of minorities in a number of additional ways. It fails to provide the FCC with authority to protect consumers and small businesses from harms caused by large online content and application providers. It would prohibit the offering of services tailored to small businesses and minority entrepreneurs. The "third way" would also strip the FTC of its authority to protect consumers, and it is diverting the FCC's resources and attention away from efforts to help close the digital divide.

In light of the very real possibility that the FCC's "third way" proposal will end up harming the interests of minority consumers, MWBEs, and SDBs, we urge the Commission to refrain from adopting this approach. It is not only unwise, it is unnecessary. The FCC's existing legal framework gives the Commission sufficient legal authority to achieve all of its broadband goals and does not run the risks that would result from reclassification.

As an initial matter, the FCC can preserve the free and open Internet by adopting an enforceable pro-consumer broadband disclosure obligation that is modeled after the transparency rule proposed in the FCC's Net Neutrality NPRM. As the comments submitted in the net neutrality proceeding show, there is near universal agreement that consumers' transparent access to information regarding their broadband service will help preserve the free and open Internet. As the Commission has stated, "sunlight is the best disinfectant" and ensuring consumer access to accurate information will play a vital role in protecting consumers and maintaining a well-functioning broadband marketplace that encourages competition, innovation, low prices, and

high-quality services. The FCC's existing legal framework provides it with sufficient authority to adopt an enforceable pro-consumer broadband disclosure requirement for at least two independent reasons.

First, the FCC can exercise its ancillary authority pursuant to Sections 201(b) and 623(b) of the Act to adopt this disclosure requirement. Together, these provisions require the FCC to ensure that the rates charged by traditional telephone and cable providers are reasonable. One way the Commission carries out its statutory responsibility to ensure reasonable rates is to rely on sufficient competition in the markets for voice and video services. Increasingly, this competition is coming from providers of "over-the-top" voice and video offerings. Unless consumers know whether their broadband provider will allow them to use these over-the-top services, then the competition offered by these services will be undermined. This will limit the ability of these services to impose competitive pressure on the price of traditional voice and video offerings and thus affect the FCC's ability to ensure reasonable rates for those traditional offerings. Therefore, the FCC has ancillary authority to require broadband providers to include—in their terms of service agreements with customers—adequate disclosure about their network management and other practices that may reasonably affect their customers' online experience.

Second, as noted in the *Comcast* decision, Section 257 could also provides the FCC with a statutory predicate for using its Title I authority to mandate the disclosure obligation discussed above. Section 257(c) contains an express statutory directive that requires the Commission to submit a report to Congress every three years on the barriers to entry faced by entrepreneurs and other small businesses in the provision and ownership of both telecommunications services *and information services*. In its opinion, the D.C. Circuit expressly identified disclosure

requirements as one obligation that would be reasonably ancillary to the FCC's Section 257(c) responsibilities because it would allow the FCC to gather the data it needs for the report.

Thus, the FCC could rely on Sections 201(b) and 623(b) or on Section 257 (or a combination thereof) to adopt a pro-consumer broadband disclosure obligation. Moreover, because this open Internet obligation would be incorporated into the broadband provider's terms of service agreement, it would create an enforceable obligation. If a broadband provider were to block or degrade applications in violation of the provisions of its terms of service, the interests of the consumer would be protected because the consumer could commence an action against the provider for breaching its terms of service agreement. Moreover, the inherent shaming culture of the Internet, which does not tolerate online abuses, helps protect the interests of consumers.

In addition to preserving the free and open Internet by adopting an enforceable broadband consumer disclosure obligation, the FCC's existing legal framework provides the Commission with ample authority to achieve all of the goals identified in the National Broadband Plan. These goals include repurposing the universal service fund so that it can be used to support broadband, allocating additional spectrum for wireless, ensuring consumers' privacy and disability access rights, and protecting public safety interests. In each of these cases, the FCC has an express grant of statutory authority that would allow it to achieve these broadband goals.

However, to the extent the Commission decides not to use its existing authority (or concludes that this authority is not sufficient to meet all of its broadband goals), the Commission should heed the views of a majority of the Members of Congress and the leaders of a number of national civil rights, labor, and environmental organizations and act pursuant to additional statutory authority. Unlike the "third way," a legislative solution would allow the FCC to

achieve its important broadband goals without unnecessarily and unintentionally harming the interests of minorities and disadvantaged businesses.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	
Framework For Broadband Internet Services)	GN Docket No. 10-127
)	
)	
)	

COMMENTS OF THE NATIONAL ORGANIZATIONS

The National Organizations, which are eight highly respected civil rights, professional, service and elected officials organizations,¹ respectfully submit these comments in response to the Commission’s notice of inquiry in the above-captioned proceeding.² The National Organizations fully embrace and share the FCC’s broadband goals, including its goal of preserving a free and open Internet. However, the National Organizations believe that the FCC’s “third way” is not the best way to achieve the agency’s broadband goals. As discussed below, the “third way” will likely harm the interests of minorities and other disadvantaged groups by, among other things, increasing the price of broadband, deterring broadband adoption and use (particularly among minority and low-income communities), and impeding the investments and deployments that are needed to bridge the digital divide, create jobs, and grow the economy. Thus, instead of the “third way,” we urge the Commission to maintain its existing legal

¹ The National Organizations participating in this filing are listed in Attachment 1. These comments represent the views of each organization individually and are not intended to reflect the views of any organization’s officers, directors, advisors, or members. Due to the complexity of the issues, some of the National Organizations needed additional time to consider the filing; therefore, leave to file one day out of time is respectfully requested.

² See *Framework For Broadband Internet Services*, Notice of Inquiry, GN Docket No. 10-127, FCC 10-114 (rel. June 17, 2010) (the “NOI”).

framework, which provides the FCC with ample authority to meet its broadband goals and protect the interests of minority consumers and disadvantaged business.

I. THE NATIONAL ORGANIZATIONS HAVE LONG SUPPORTED THE FCC'S BROADBAND GOALS

As discussed in the comments we filed in the FCC's net neutrality proceeding, the National Organizations' fully embrace and share the Commission's goal of preserving a free and open Internet.³ This is a goal that is universally shared by other leading civil rights, labor, and environmental organizations, such as the Communications Workers of America and the AFL-CIO.⁴ Like those groups, the National Organizations know that ubiquitous access to broadband is a fundamental right that all Americans are entitled to enjoy and that broadband is the key to overcoming the civil rights challenges of our day. For this reason, the National Organizations were early and ardent supporters of the FCC's 2005 decision to establish the four Internet principles.⁵ As the Commission recognized in the Net Neutrality NPRM,⁶ these principles have "performed effectively" and have successfully balanced the interests of all participants in the Internet ecosystem—including the interests of consumers, providers of broadband Internet access, and providers of content, applications, and services.⁷

³ See *Preserving the Open Internet*, Reply Comments of the National Organizations, GN Docket No. 09-191 (filed April 26, 2010) (the "National Organizations' Reply Comments"); see also *Preserving the Open Internet*, Comments of the National Organizations, GN Docket No. 09-191 (filed Jan. 14, 2010) (the "National Organizations' Comments").

⁴ See Letter from Leaders of the AFL-CIO, Communications Workers of America, International Brotherhood of Electrical Workers, LULAC, MMTC, NAACP, National Urban League, and Sierra Club to Chairman Rockefeller and Chairman Waxman (June 18, 2010).

⁵ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986, 14987–88 (¶4) (2005) (the "*Internet Policy Statement*").

⁶ See *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93 (rel. Oct. 22, 2009) (the "Net Neutrality NPRM" or the "NPRM").

⁷ See NPRM at ¶88.

One of keys to the success of these four original principles is that they keep the focus of net neutrality where it should be—on consumers and on protecting their interests. Unfortunately, the NPRM departed from this successful pro-consumer approach.⁸ The NPRM “propose[d] to codify the principles as obligations of broadband Internet access service providers, rather than as describing what ‘consumers are entitled’ to do with their service, as the original Internet principles were phrased.”⁹ As discussed in comments submitted in the net neutrality proceeding, the FCC’s decision takes the focus off of consumers and instead protects large incumbent Internet companies at the expense of consumers, new entrants, and small businesses (the latter of which include most minority and women owned business enterprises (“MWBEs”) and socially and economically disadvantaged businesses (“SDBs”)).¹⁰ This is not acceptable.

Given our longstanding interest in ensuring that the online rights and interests of minorities are fully protected, the National Organizations have urged the Commission to build on the successes of its *Internet Policy Statement* and to codify its four existing principles as consumer protections.¹¹ The National Organizations also embraced the FCC’s newly-proposed sixth rule on transparency, which would ensure that consumers have the information necessary to take full advantage of broadband offerings and to make selections that will best meet their needs.¹² This pro-consumer approach to net neutrality would successfully balance the interests

⁸ See Net Neutrality NPRM at ¶90.

⁹ *Id.*

¹⁰ See, e.g., National Organizations’ Reply Comments at 2-14 (collecting data and discussing the potential impact of the FCC’s proposed rules).

¹¹ *Id.* at 2-5.

¹² See *id.* at 1; see also National Organizations’ Comments at 13-14.

of all participants in the Internet ecosystem without running the risk of doing more harm than good and widening the digital divide—a risk that is simply too great for our Nation to chance.¹³

The National Organizations along with the Communications Workers of America, the AFL-CIO, and other unions and civil rights organizations also enthusiastically endorse and support the important broadband goals set forth in the agency’s National Broadband Plan.¹⁴ In our view, the Commission’s Plan is first-rate, hits all of the top priorities and includes a number of solid recommendations. Perhaps most importantly, the Plan recognizes the need to close the racial and economic divides, extend broadband to unserved and underserved communities, increase digital literacy within those communities, repurpose the Universal Service Fund, and secure full participation for MWBEs and SDBs in the new digital economy. We also appreciate the FCC’s recognition of the impact that affordability has on broadband adoption, as affordability remains a key impediment to minorities’ full participation in the digital universe.¹⁵

II. THE “THIRD WAY” IS NOT THE BEST APPROACH FOR MEETING THE AGENCY’S BROADBAND GOALS BECAUSE IT IS LIKELY TO HARM THE INTERESTS OF MINORITIES AND OTHER DISADVANTAGED GROUPS

While the National Organizations fully embrace the Commission’s broadband goals and appreciate the Commission’s attempt to address concerns raised by the *Comcast* decision,¹⁶ we

¹³ See National Organizations’ Reply Comments at 1, 3-14.

¹⁴ Accord MMTC Press Release, MMTC Congratulates the FCC on its Release of the National Broadband Plan (May 16, 2010); see also Letter from Leaders of the AFL-CIO, Communications Workers of America, International Brotherhood of Electrical Workers, LULAC, MMTC, NAACP, National Urban League, and Sierra Club to Chairman Rockefeller and Chairman Waxman (June 18, 2010) (“We are united in our support of those elements of the National Broadband Plan that spur building and upgrading our high-speed networks, providing affordable access and digital skills to every American and building high speed capacity to every community anchor institution.”).

¹⁵ See National Organizations’ Comments at 14 (discussing the wealth gap and the impact of affordability on broadband adoption).

¹⁶ See *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. Apr. 6, 2010).

want to reiterate our dissatisfaction with the agency’s “third way” proposal.¹⁷ We are deeply disappointed that the agency’s NOI is largely silent on the potential for its proposal to affect the interests of minority consumers, MWBEs, and SDBs—groups that should be at the heart of any discussion of broadband policy in America. From our perspective, it appears that the FCC’s “third way” proposal is ill-conceived and the product of rushed thinking in the immediate wake of *Comcast*.¹⁸

In our view, it is clear that the FCC’s “third way” is not in the best interests of minority consumers, MWBEs, or SDBs. We believe the “third way” will increase the cost of broadband, deter broadband adoption and use (particularly among minority and low-income groups), decrease broadband investment and deployment (which is needed to fully bridge the digital divide, create jobs, and grow the economy), and otherwise harm the interests of minorities and other disadvantaged groups.

A. The “Third Way” Could Increase The Price Of Broadband By Over 16% And Thus Disserve The Goal Of Promoting Affordable Broadband To All Americans

The FCC’s “third way” proposal could increase significantly the cost of broadband for consumers, which would negatively impact broadband adoption metrics. The FCC’s proposal to reclassify broadband as a Title II service would subject broadband offerings to a myriad of new

¹⁷ See Letter from David Honig, President and Executive Director, MMTC, and Counsel for the National Organizations, to Marlene Dortch, Esq., Secretary, FCC, GN Docket No. 09-191 (May 12, 2010) (discussing the FCC’s Third Way proposal) (the “May 12th MMTC Letter”); see also Letter from David Honig, President and Executive Director, MMTC, and Counsel for the National Organizations, to Marlene Dortch, Esq., Secretary, FCC, GN Docket No. 09-191 (May 7, 2010) (same) (the “May 7th MMTC Letter”).

¹⁸ We note, for example, that the FCC’s initial discussion of the “third way” indicated a seeming indifference to one of the key civil rights protections passed by Congress and codified at 47 U.S.C. §257. We commend the Commission, however, for eventually correcting this problem and stating in the NOI that Section 257 will apply regardless of the legal classification of broadband. See NOI at ¶90.

regulatory charges and fees that would ultimately be paid for by consumers. For example, the FCC’s NOI specifically contemplates that its “third way” proposal would subject broadband to USF contribution obligations.¹⁹ Given that the USF contribution factor alone is nearly 14%,²⁰ this one consequence of reclassification could add significantly to the bottom line that end-users pay for broadband.²¹ Moreover, when combined with contribution obligations associated with other programs that might apply under the FCC’s proposed regime—such as the Telecommunications Relay Service (“TRS”) and Local Number Portability (“LNP”), which are approximately 1% of end-user revenues each²²—and with the general regulatory fees that apply to Title II offerings,²³ the burden on consumers would be even higher. In fact, the new charges and fees associated with classifying broadband as a Title II service could tack an additional 16% or more onto the price consumers pay for broadband.²⁴

¹⁹ NOI at ¶80.

²⁰ *See Proposed Third Quarter 2010 Universal Service Contribution Factor*, Public Notice, DA 10-1055, CC Docket No. 96-45 (rel. June 10, 2010).

²¹ The National Organizations enthusiastically support the National Broadband Plan’s recommendation to repurpose the Universal Service Fund so that it can be used to fund broadband networks. However, the NOI gives no indication whether the Commission would use USF distributions to offset completely the USF contributions that our constituencies would have to bear if broadband is reclassified as a Title II service. In other words, using USF distributions to help fund broadband will be counterproductive if the associated contribution side obligation makes broadband unaffordable for some or all of our constituents.

²² *See* 47 C.F.R. § 64.604(c)(5)(iii)(A) (imposing the TRS contribution obligation); *see also Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CG Docket No. 03-123, FCC 10-115 (rel. June 28, 2010) (identifying the TRS contribution factor); *see* 47 U.S.C. § 251(e)(2) (requiring the costs for number portability to be imposed on telecommunications carriers). It is estimated that the LNP contribution factor is similar to the TRS contribution factor.

²³ *See Assessment and Collection of Regulatory Fees for Fiscal Year 2010*, MD Docket No. 10-87, FCC 10-123, at ¶31 (rel. July 9, 2010) (setting the interstate telecommunications service provider regulatory fee rate at “\$0.00349 per revenue dollar”).

²⁴ Unfortunately, the FCC has not been forthright with consumers about how its proposal would affect the prices they pay. On the portion of its website discussing the agency’s “third way” proposal, the Commission has a “frequently asked questions” page. On that website, the

In turn, the FCC's decision to increase the cost of broadband for consumers will have a direct and negative impact on broadband adoption metrics. As study after study shows, affordability remains a key impediment to increased adoption.²⁵ Indeed, "extensive research . . . has found that price is the single largest determinant of broadband subscription" and that "lower-income households are particularly sensitive to higher broadband prices."²⁶ Studies also show that even a 10% increase in the cost of broadband would reduce demand for broadband by 9.8%.²⁷

Moreover, minorities and low-income groups would be impacted disproportionately by an increase in the cost of broadband. Owing to the deep and persistent racial wealth gap and to racial disparities in income and unemployment status, these groups are particularly sensitive to price changes.²⁸ Analyzing the impact of higher prices on minority groups, studies consistently conclude that "a disproportionate share of African American and Hispanic households . . . are

FCC asks "Does this mean broadband prices will go up?" *available at* <http://www.broadband.gov/legal-framework-faq-on-the-third-way.html>. Unfortunately, the FCC does not answer the question that it asked. The FCC's "answer" states that its "proposal should not affect any *broadband provider's* costs." Even if this is true, however, it does not address the affect the FCC's decision will have on the prices *consumers* will have to pay for broadband.

²⁵ See, e.g., FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN ("NATIONAL BROADBAND PLAN") at Chapter 9 (discussing the connection between income and broadband adoption); *see also* National Organizations' Reply Comments at 5-6; National Organizations' Comments at 14-17 (discussing the relationship between affordability and adoption).

²⁶ Robert Shapiro and Kevin Hassett, *A New Analysis of Broadband Adoption Rates By Minority Households* at 10-11 (June 2010) ("Shapiro & Hasset").

²⁷ Paul Rappoport, Lestor D. Taylor, and Donald J. Kridel, *Willingness To Pay And The Demand For Broadband Service*, mimeo, 2003; *see also* Shapiro & Hasset at 11.

²⁸ See National Organizations' Comments at 14-17 (discussing studies and showing that an increase in the price of broadband would be especially harmful for minority and low-income groups); *see also* National Organizations' Reply Comments at 5-6 (same).

more sensitive to such price increases than higher-income households.”²⁹ Studies also show that regulatory action that would increase the price of broadband for all users on an equal basis would “sharply slow broadband adoption for all groups and expand the digital divide for African-American and Hispanic households.”³⁰

Therefore, the “third way” will likely drive up the cost of broadband and drive down adoption rates, particularly among minority and low-income groups. Thus, the “third way” would widen the digital divide and stand as an obstacle to the FCC’s ability to achieve its broadband goals.

B. The “Third Way” Could Impede The Investment And Deployment Necessary To Bridge The Digital Divide, Create Jobs, And Grow The Economy—All Of Which Would Have A Particularly Harmful Impact On Our Constituents

The National Organizations are also concerned about the impact the FCC’s proposed “third way” will have on broadband investment and deployment and, in turn, on job creation and economic growth. The available evidence shows that the FCC’s proposal is having and will continue to have a significant and negative impact on investment, which will prevent us from achieving the FCC’s broadband goals.

As the FCC has determined, massive investments of capital—up to \$350 billion or more—are necessary to bridge the digital divide.³¹ This increase in investment will help extend broadband to the unserved and underserved among us and increase broadband adoption. Thus,

²⁹ Shapiro & Hassett at 17.

³⁰ *Id.* at 14 (analyzing broadband uptake rates by race and ethnicity for the next decade if the price of financing additional investment were recouped by a fixed, monthly fee for all subscribers); *see also* Robert J. Shapiro, *Tiered data plans can help close digital divide*, CNET (June 24, 2010).

³¹ *See, e.g.*, Broadband Task Force Delivers Status Report On Feb. 17 National Broadband Plan, FCC News Release (rel. Sept. 29, 2009); *see also* NATIONAL BROADBAND PLAN at Ch. 8 (discussing the financial resources necessary to close the broadband availability gap).

the Commission must foster a regulatory environment that is conducive to investment in the telecommunications sector.

The FCC's "third way" does not create an environment that is conducive to investing. Far from it. Available evidence and studies show that the FCC's "third way" proposal is already hindering the investments that are necessary for us to achieve the FCC's important broadband goals. In response to the FCC's announcement of its "third way" proposal, financial analysts immediately downgraded telecom stocks.³² And a recent empirical examination of the financial markets shows that the FCC's "third way" proposal "sent the stock prices of the relevant [broadband providers] . . . significantly downward."³³ Economists have concluded that "[t]his is strong evidence that the reclassification scheme will undermine the allocation of new resources to broadband infrastructure."³⁴ Other analysts discussing the FCC's "third way" have stated that "it seems it is going to result in uncertainty" and that "[t]here will be overhang that dampens the willingness of investors to invest in the industry for a while."³⁵ But it is not just regulatory uncertainty that is causing the financial markets to react negatively.

Analysts have determined that "[b]roadband providers have invested hundreds of billions of dollars in the Title I networks" and that, "[u]nder Title I, those investments are likely to continue being made by the private sector. Reclassified under Title II, however, infrastructure

³² See, e.g., Jeffrey Bartash, MARKET WATCH, *Comcast and Cablevision Fall On Cable's Clouded Outlook: Bernstein's Influential Craig Moffet Cuts Sector Rating As FCC Vows Regulatory Move* (May 10, 2010).

³³ George S. Ford and Lawrence Spiwak, *The Broadband Credibility Gap*, Phoenix Center Policy Paper Series, at 30 (June 2010) (Ford and Spiwak).

³⁴ *Id.*

³⁵ *Street Talk*, CableFax (June 14, 2010) (quoting Regulatory Source Assoc Anna-Maria Kovacs), available at http://www.cablefax.com/cfp/cfax/previous/newsletters/cfaxdaily/Street-Talk_41773.html.

investments will come to a screeching halt.”³⁶ Craig Moffett of Bernstein Research has stated that reclassifying broadband would lead investors to “run for the hills”³⁷ and that reclassification will have a “profoundly negative impact on capital investment.”³⁸ Similarly, a Standard and Poor’s analyst has stated that the “third-way framework . . . creates potential long-term negative investment (and competitive) implications.”³⁹ Paul Glenchur of the Potomac Research Group “said investors are being scared away by the reclassification proposal.”⁴⁰ Others have made it clear that “capital investment will come down if Title II becomes a reality.”⁴¹ And a recently published study concludes that reclassification will “chill investments.”⁴²

We are particularly concerned about the impact the FCC’s “third way” will have on the ability of MWBEs and SDBs to obtain financing. As noted above, more must be done to help minority-owned online businesses compete effectively with earlier-established companies. Fostering an environment in which MWBEs and SDBs can obtain the access to capital necessary to launch and maintain their online enterprises is essential to ensuring that we achieve the FCC’s broadband goals. As numerous submissions to the Commission show, these entities have the incentives, though not the capital, to serve untapped minority and low-income markets, and they

³⁶ Larry Downes, CNET NEWS, *What’s In A Title? For Broadband, It’s Oz vs. Kansas*, (Mar. 11, 2010).

³⁷ *Id.*; see also Bernstein Research, *U.S. Cable: Pulling The Plug . . . Regulatory Uncertainty Clouds Terminal Growth Rates; Downgrading Sector to Neutral* (May 10, 2010).

³⁸ Todd Shields, *FCC Begins Reclaiming Authority Over Internet Access Providers*, Bloomberg News (May 6, 2010).

³⁹ William Spain, *FCC Chief Broaches New Approach on “Net Neutrality,”* MarketWatch (May 6, 2010).

⁴⁰ Howard Buskirk, *Net Neutrality Caused Market Uncertainty, McDowell Says*, COMMUNICATIONS DAILY at 3 (July 9, 2010).

⁴¹ *Street Talk*, *supra* n. 35 (referring to a statement by Credit Suisse telecom services director Jonathan Chaplin), available at http://www.cablefax.com/cfp/cfax/previous/newsletters/cfxdaily/Street-Talk_41773.html.

⁴² Ford and Spiwak, *supra* n. 33, at 23.

have expertise in understanding and producing the culturally specific service options and content that can drive broadband adoption and use.⁴³ In light of the negative impact the FCC's "third way" proposal is having and is expected to have on lending and investment, it will only become more difficult for MWBEs and SDBs to secure the financing necessary to launch and maintain their businesses. Thus, the FCC's proposal will unintentionally help to cement the advantages enjoyed by large, established online companies and insulate them from the competition and choice that adequately funded MWBEs and SDBs would offer. This is not what the FCC's broadband policies and goals should be about.

The evidence also shows that the FCC's "third way" proposal could have a negative impact on job creation and economic growth. As was made clear in the record of the Commission's National Broadband Plan proceeding, broadband investment has a substantial impact on jobs, both directly and indirectly.⁴⁴ Some studies show that investment in digital infrastructure may create or retain between 1 million and 2.5 million jobs in the near future and, moreover, lead to better paying jobs.⁴⁵ Another study shows that an increase in broadband availability has led to a 6.4% increase in employment growth, which is large relative to the overall national employment growth rate.⁴⁶ In addition, the availability of advanced telecommunications networks is essential to attract and retain businesses in local communities.

⁴³ See, e.g., National Organizations' Comments at 9; see also *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Initial Comments Of The Broadband Diversity Supporters, at 31 (June 8, 2009).

⁴⁴ See *Comment Sought on Relationship Between Broadband and Economic Opportunity*, NBP Public Notice #18, 24 FCC Rcd 13736 (rel. Nov. 12, 2009); see also NATIONAL BROADBAND PLAN at Ch. 13 (discussing the relationship between broadband and economic opportunity).

⁴⁵ See, e.g., U.S. Broadband Coalition, Report On A National Broadband Strategy, at 10 (Sept. 24, 2009) (the "U.S. Broadband Coalition Report") (collecting data).

⁴⁶ Jed Kolko, Public Policy Institute of California, *Does Broadband Boost Local Economic Growth?* (Jan. 2010).

Indeed, study after study has shown the positive impact broadband deployment can have on economic growth.⁴⁷

In light of this evidence—and the current levels of unemployment in this country, which are exceptionally high among minorities—we simply cannot run the risk that the FCC’s “third way” proposal will deter investment in broadband because, if it does, new jobs and economic opportunities will not materialize. Indeed, in his dissenting statement, Commissioner McDowell observed that “one recent economist’s study estimates that a net 1.5 million jobs could be put at risk by a Title II classification.”⁴⁸ Other analysts have reached similar conclusions.⁴⁹ Thus, the National Organizations urge the Commission to refrain from unnecessarily putting jobs at risk by adopting the “third way” proposal.

C. The Interests Of Minorities And Disadvantaged Groups Could Be Harmed In A Number Of Additional Ways

In addition to driving up the cost of broadband and deterring needed investments, the FCC’s “third way” could harm the interests of minorities and disadvantaged groups in a number of additional ways.

1. Failure to Address Online Content and Application Providers

In the FCC’s net neutrality proceeding, the FCC asked for comment on whether its open Internet policies should be applied to entities other than providers of broadband Internet access

⁴⁷ See, e.g., *id.*; see also U.S. Broadband Coalition Report (collecting data and information from various studies and report); see also *Preserving the Open Internet*, Comments of the Communications Workers of America, GN Docket No. 09-191 (Jan. 14, 2010) at 6-8 (providing statistics on the positive impact broadband investment and deployment has on job creation).

⁴⁸ NOI at Dissenting Statement of Commissioner Robert M. McDowell (citing Coleman Bazelon, *The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis* (Apr. 23, 2010)).

⁴⁹ *Internet Regulation Back On The Front Burner*, Bank of America / Merrill Lynch (May 6, 2010) (stating that jobs “could be threatened by this move”).

service, such as online content and application providers.⁵⁰ In response, commenters submitted substantial evidence showing that the interests of minorities, MWBEs, and SDBs can be harmed by large online content and application providers who have demonstrated a willingness and ability to shape the online experience of all broadband users in some decidedly un-neutral ways.⁵¹ Recent revelations about the lack of diversity within certain Silicon Valley companies and their efforts to hide the race and gender makeup of their workforces only underscore the need for the minority community to be concerned about the practices of these companies.⁵²

While the FCC's Net Neutrality NPRM expressed a willingness to extend civil rights obligations to these dominant online companies, the FCC's "third way" proposal appears to abandon this approach altogether. It contains no discussion of how the agency's proposed

⁵⁰ Net Neutrality NPRM at ¶101.

⁵¹ See National Organizations' Comments at 28-32; see also National Organizations' Reply Comments at 8-11.

⁵² See *The Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25, Comments of the Minority Media and Telecommunications Council at 4-5 (May 7, 2010) (discussing reports about the unacceptable minority hiring practices of certain Silicon Valley firms); see also David Honig, *Honig: FCC Chief's Proposal Disregards What Congress and America Want*, Roll Call (June 15, 2010) ("Honig") (discussing the problem of minorities and women being shut out of employment opportunities in Silicon-Valley based firms). It is well documented that Silicon Valley firms have worked hard to hide data about the race and gender of their workforce and that the "unique diversity of Silicon Valley is not reflected in the region's tech workplaces — and the disparity is only growing worse." Mike Swift, *Blacks, Latinos And Women Lose Ground At Silicon Valley Tech Companies*, San Jose Mercury News (Feb. 13, 2010), available at http://www.mercurynews.com/top-stories/ci_14383730; see also Mike Swift, *Five Silicon Valley Companies Fought Release Of Employment Data, And Won*, San Jose Mercury News (Feb. 14, 2010) ("[T]he Labor Department accepted arguments filed by lawyers for Google, Apple, Yahoo, Oracle and Applied Materials that release of the information would cause commercial harm."), available at http://www.mercurynews.com/search/ci_14382477?IADID=Search-www.mercurynews.com-www.mercurynews.com; see also Owen Thomas, *Google, Don't Be Hypocritical*, NBCBayArea.com (Feb. 15, 2010) ("Google has fought to hide data about the race and gender makeup of its workforce."), available at <http://www.nbcbayarea.com/news/tech/Google-Dont-Be-Hypocritical-84405122.html>.

declaratory ruling would give it authority to protect consumers and small businesses with respect to their entire online experience.

2. Prohibiting Services Tailored to Small Businesses and Minority Entrepreneurs

Surprisingly, the FCC's "third way" would disallow price incentives and incubation programs that would stimulate minority broadband entrepreneurship.⁵³ In our Comments in the net neutrality proceeding, the National Organizations urged the Commission to protect the ability of MWBEs or SDBs to enter into agreements with broadband providers that allow for price flexibility and assistance for new entrants. We emphasized that these opportunities were important because they would allow MWBEs and SDBs to sustain a competitive online presence and overcome longstanding obstacles to success.⁵⁴ Indeed, the National Organizations' submissions show that without the ability to enter into voluntary and mutually beneficial agreements with broadband providers, many new entrants, MWBEs, and SDBs would be unable to maintain a toe-hold in the market.⁵⁵ Yet, the FCC's "third way" proposal appears to ignore these needs as it would disallow price incentives and incubation programs that would help MWBEs and SDBs succeed.

3. Effects on FTC Authority to Protect Consumers

The collateral effects of the "third way" proposal are not confined to the FCC and its jurisdiction. Currently, the Federal Trade Commission ("FTC") has considerable authority to eliminate unfair business practices, and it can use this authority to help preserve the free and

⁵³ See Honig, *supra* no. 52 (discussing how "the FCC wants to disallow price incentives and incubation programs that would stimulate minority broadband entrepreneurship").

⁵⁴ See National Organizations' Reply Comments at 16-18; *see also* May 12th MMTC Letter.

⁵⁵ See National Organizations' Reply Comments at 8-14.

open Internet. In fact, the National Broadband Plan recommends that the FCC work with the FTC to protect consumers in the broadband context.⁵⁶ By classifying broadband as a Title II service, however, the FCC would effectively strip the FTC of its ability to protect consumers with respect to their online experience because of the common carrier exception to the FTC's jurisdiction.⁵⁷ Thus, instead of helping to protect the interests of consumers and carry out the recommendations of the National Broadband Plan, the FCC's reclassification decision could have the unintended consequence of actually removing protections currently enjoyed by consumers and undermining the FCC's broadband goals.

4. Diversion of Attention and Resources from Achieving NBP Goals

Finally, the FCC's decision to pursue its "third way" proposal is needlessly diverting the agency's attention and its limited resources away from much more pressing Internet issues identified in the National Broadband Plan. These include the two most urgent broadband policy issues the country faces: expanding the availability of high-speed Internet service to minority and underserved communities, and making it more affordable for all. By refocusing its efforts on these paramount goals, the FCC can play an important role in helping close the digital divide - one of the great civil rights challenges of our time. We simply cannot afford any inaction that

⁵⁶ See NATIONAL BROADBAND PLAN at 55-57; *see also* NOI at ¶39.

⁵⁷ See 15 U.S.C. §45(a)(2) (stating that the Federal Trade Commission does not have jurisdiction over "common carriers subject to the Acts to regulate commerce, air carriers, and foreign air carriers"). The FTC's jurisdiction over broadband arises chiefly under the FTC's statutory mandate to prevent "unfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce" under the FTC Act. See 15 U.S.C. §§41 *et seq.* The FTC has enforced the consumer protection laws by bringing a variety of cases against Internet service providers that have engaged in allegedly deceptive marketing and billing practices. See, e.g., *Am. Online, Inc. & CompuServe Interactive Servs., Inc.*, FTC Dkt. No. C-4105 (Jan. 28, 2004) (decision and order), available at <http://www.ftc.gov/os/caselist/0023000/040203aolcsdo.pdf>; *see also Juno Online Servs., Inc.*, FTC Dkt. No. C-4016 (June 29, 2001) (decision and order), available at <http://www.ftc.gov/os/2001/06/junodo.pdf>. If the FCC reclassifies broadband under Title II, the FTC's ability to bring these actions and protect consumers from unfair or deceptive practices by broadband providers may be eliminated altogether.

will slow the closing of the digital divide. Thus, instead of pursuing the “third way,” the FCC should refocus its efforts on ensuring that all Americans have affordable access to broadband.

III. THE FCC’S EXISTING LEGAL FRAMEWORK GIVES THE COMMISSION AMPLE AUTHORITY TO PRESERVE THE FREE AND OPEN INTERNET AND IMPLEMENT THE NATIONAL BROADBAND PLAN

In light of the very real possibility that the FCC’s “third way” proposal will end up harming the interests of minority consumers, MWBEs, and SDBs, we urge the Commission to refrain from adopting this approach. It is unwise and unnecessary. The FCC does not need to adopt the “third way” to preserve the free and open Internet or achieve the goals set out in the National Broadband Plan. The FCC’s existing legal framework gives the FCC sufficient authority to achieve its broadband goals.

A. The FCC Can Use Its Ancillary Authority To Impose An Enforceable Broadband Consumer Disclosure Requirement That Will Help Preserve The Free And Open Internet

The premise underlying the FCC’s “third way” proposal is that the D.C. Circuit’s *Comcast* decision requires the Commission to alter fundamentally the legal framework it historically and consistently has applied to broadband. The validity of this premise must be established by a legal inquiry that requires the Commission to determine what *Comcast* held and what it did not hold. Unfortunately, this relatively straightforward and objective inquiry has been sidetracked by stakeholders that want the FCC to regulate broadband under Title II, regardless of what *Comcast* actually says. These groups have stated erroneously that *Comcast* requires the FCC to modify dramatically its regulatory approach to broadband in order to preserve the free and open Internet. This is simply not the case. The decision in *Comcast* is considerably more narrow than the advocates of reclassification suggest, and nothing in the D.C. Circuit’s decision compels the FCC to regulate broadband under Title II—and run the risk of

harming the interests of minority consumers and disadvantaged businesses by doing so—to protect the interests of all Internet users.

We believe the FCC can use its existing legal authority to preserve the free and open Internet by adopting an enforceable pro-consumer broadband disclosure obligation that is modeled on the transparency rule proposed in the FCC’s Net Neutrality NPRM.⁵⁸ As the comments submitted in the net neutrality proceeding show, there is near universal agreement that consumer access to information regarding their broadband service will help preserve the free and open Internet. As the Commission has stated, “sunlight is the best disinfectant” and “access to accurate information plays a vital role in maintaining a well-functioning marketplace that encourages competition, innovation, low prices, and high-quality services.”⁵⁹ The Commission has also rightly observed that a disclosure obligation would “protect and empower consumers and . . . maximize the efficient operation of relevant markets by ensuring that all interested parties have access to necessary information about the traffic management practices of networks.”⁶⁰ We also agree with the Commission that a disclosure requirement “would correct information asymmetries and allow users to make informed purchasing and usage decisions.”⁶¹

In fact, in the *Comcast* case itself, it was a lack of transparency and disclosure about network management practices that the Commission identified as causing harm to consumers and

⁵⁸ See Net Neutrality NPRM at ¶119 (“Subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.”)

⁵⁹ *Id.* at ¶118.

⁶⁰ *Id.*

⁶¹ *Id.* at ¶122.

hindering the free and open Internet.⁶² And the Commission acted to remedy that harm by imposing a disclosure requirement on the broadband provider. The Commission required the provider to disclose the “details of the network management practices” it would employ.⁶³ Thus, the Commission determined that a disclosure requirement would help preserve the free and open Internet. The Commission made clear that “disclosure of network management practices to consumers in a manner that customers of ordinary intelligence would reasonably understand would enhance the ‘vibrant and competitive free market . . . for the Internet and interactive computer services’ by allowing consumers to compare and contrast competing providers’ practices.”⁶⁴

Given the ability of a disclosure requirement to preserve the free and open Internet, the National Organizations are on record supporting greater broadband transparency. We stated that “[e]nsuring that all of those online have transparent access to the lawful content of their choice is central to overcoming the civil rights challenges of our day.”⁶⁵ We agreed with the Commission that “consumers’ access to accurate information plays a vital role in maintaining a well-functioning marketplace and encouraging competition, innovation, low prices, and high-quality services.”⁶⁶ Thus, the Commission could protect the interests of consumers and preserve the free and open Internet by adopting an enforceable broadband consumer disclosure obligation that would require broadband providers to disclose to their customers information about the

⁶² See *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd 13028 ¶1 (2008) (identifying the broadband provider’s “failure to disclose the company’s practice to its customers” as causing harm); see also *id.* at 13058-59 ¶52.

⁶³ *Id.* at 13028 ¶1; see also *id.* at 13060 ¶54.

⁶⁴ *Id.* at 13059 ¶52 (footnotes omitted, quoting 47 U.S.C. §230(b)(2)).

⁶⁵ National Organizations’ Reply Comments at i.

⁶⁶ National Organizations’ Comments at 13.

provider’s network management and other practices that may reasonably affect the ability of customers “to use the devices, send or receive the content, use the services, run the applications, and enjoy the competitive offerings of their choice.”⁶⁷

The FCC could readily adopt greater broadband transparency requirements without resorting to regulation of broadband under Title II. As the NOI recognizes, the FCC’s existing legal framework has provided the Commission with adequate legal authority over the years to perform effectively its core broadband responsibilities, including protecting consumers.⁶⁸ Indeed, the Supreme Court noted in *Brand X* that “the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.”⁶⁹

Comcast did nothing to alter the FCC’s ancillary authority or undermine its ability to adopt enforceable and pro-consumer broadband disclosure obligations. Rather, the D.C. Circuit recognized that, under longstanding Supreme Court and appellate court precedent, the FCC may exercise its ancillary authority when two conditions are satisfied: ““(1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁷⁰ There is and was no dispute that the first prong of this test is satisfied—Title I gives the FCC general jurisdiction over broadband

⁶⁷ NPRM at ¶121.

⁶⁸ NOI at ¶30.

⁶⁹ *Brand X*, 545 U.S. at 996. Even if this language is considered dicta, “carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” *Comcast*, 600 F.3d at 650 (quoting *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997)).

⁷⁰ *Comcast*, 600 F.3d at 646 (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

offerings.⁷¹ Thus, *Comcast* turned on whether the FCC met its burden of showing that the exercise of jurisdiction in that case – which was limited to Comcast’s network management practices – was reasonably ancillary to the FCC’s effective performance of its statutorily mandated responsibilities.

While the D.C. Circuit vacated the FCC’s underlying order, the holding in *Comcast* is quite narrow. The court held that the FCC “failed to tie its assertion of ancillary authority over Comcast’s Internet service to any ‘statutorily mandated responsibility.’”⁷² Significantly, the D.C. Circuit did not find that the Commission lacked ancillary authority to regulate any network management practices of broadband service providers. Rather, the court merely held that the FCC had not properly advanced an appropriate statutory basis for doing so in that case. And the court only reached this narrow holding after concluding that the FCC had forfeited its ability to justify its decision based on a number of statutory authority arguments.⁷³ However, adopting a pro-consumer broadband disclosure requirements would be reasonably ancillary to the FCC’s effective performance of its statutorily mandated responsibilities within the meaning of *Comcast* for at least two independent reasons.

1. The FCC’s Authority To Act Ancillary To Sections 201(b) and 623(b)

First, the FCC could tie its exercise of ancillary authority to adopt broadband disclosure requirements to Sections 201(b) and 623(b) of the Act.⁷⁴ Together, these provisions require the Commission to ensure that the rates subscribers pay for telephone and cable service are

⁷¹ See *id.* at 646-47.

⁷² *Id.* at 661 (quoting *Am. Library*, 406 F.3d at 692).

⁷³ *Id.* at 660-61 (holding that the FCC forfeited a number of grounds for exercising ancillary authority by advancing different arguments on appeal than the ones it relied on in its underlying order).

⁷⁴ See 47 U.S.C. §§201(b),543(b).

“reasonable.”⁷⁵ In particular, Section 201(b) states that “[a]ll charges” for common carrier telephone service “shall be just and reasonable,”⁷⁶ and Section 623(b) states that the “Commission shall, by regulation, ensure that the rates for the basic [cable] service tier are reasonable.”⁷⁷ One way the Commission carries out its statutory responsibility to ensure just and reasonable rates is to rely on sufficient competition in the markets for voice and video services. In fact, the Communications Act itself evinces a preference for the Commission to rely on market forces to ensure that the rates for telephone and cable service are reasonable.⁷⁸

Increasingly, traditional telephone and cable companies are facing competition from providers of “over-the-top” voice and video offerings. For example, there are a growing number of web-based Internet video providers, such as Hulu.com, that are now offering video programming in competition with traditional cable providers.⁷⁹ And the Commission has consistently recognized that consumers are using over-the-top VoIP offerings, like Vonage, as an alternative to traditional telephone service. In particular, the FCC has stated that there is

⁷⁵ See 47 U.S.C. §§201(b), 543(b).

⁷⁶ 47 U.S.C. §201(b).

⁷⁷ 47 U.S.C. §543(b)

⁷⁸ See, e.g., Telecommunications Act of 1996, preamble (stating that the 1996 Act was designed to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers”); 47 U.S.C. §543(a) (expressing a preference for reliance on competition to ensure just and reasonable cable rates).

⁷⁹ See *2010 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, MB Docket No. 09-182, FCC 10-92 ¶42 (May 25, 2010) (recognizing that “[c]onsumers of broadcast video content also have choices for video programming among hundreds of cable channels carried by multichannel video programming distributors (MVPDs), and on many Internet sites such as hulu.com”). Indeed, Hulu recently announced a subscription service for which customers pay \$9.95 a month to view a broader selection of programming available online. See Nancy Tartaglione, “Hulu Plus?,” *Hollywood Wiretap* (April 22, 2010), available at <http://hollywoodwiretap.com/?module=news&action=story&id=47526>.

“growing evidence of consumers substituting interconnected VoIP for traditional voice telephone service”⁸⁰ and that “interconnected VoIP service increasingly is used as a replacement for traditional voice service.”⁸¹

These new forms of competition can help the FCC carry out its responsibility to ensure that the markets for traditional telephone and cable service are competitive and that the rates charged by these traditional providers are reasonable. For example, a customer could switch to Hulu, Vonage, or other over-the-top providers to receive service in response to price increases for traditional voice or video service or to take advantage of lower price service offerings.

However, broadband is a critical component of a customer’s ability to take advantage of over-the-top voice and video services, since a customer’s broadband connection must be able to support a particular over-the-top offering if it is going to be a viable alternative to traditional voice or video service. Thus, the competition offered by over-the-top voice and video providers would be undermined if consumers do not have reasonable information about the extent to which these offerings will function effectively on their broadband connections. For example, if a broadband provider’s network management practices prevent a customer from enjoying fully an over-the-top voice or video offering, such as Vonage or Hulu.com, those offerings would not be viable competitive alternatives to traditional telephone and cable service and would not put competitive pressure on the rates charged by traditional providers.

Because the FCC has an obligation to ensure that the rates charged by traditional telephone and cable providers are reasonable, the FCC has ancillary authority to require broadband providers to include—in their terms of service agreements with customers—adequate

⁸⁰ *Consumer Information and Disclosure*, Notice of Inquiry, 24 FCC Rcd 11380, 11388 ¶18 (2009) (“Consumer Information and Disclosure NOI”).

⁸¹ *IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039, 6044 ¶8 (2009) (“VoIP Discontinuance Obligation Order”).

disclosure about their network management and other practices that may reasonably affect the ability of customers to “use the devices, send or receive the content, use the services, run the applications, and enjoy the competitive offerings of their choice.”⁸² If broadband providers’ practices are properly disclosed, consumers can select the broadband service that would allow them to take full advantage of over-the-top voice and video offerings. Such disclosure would ensure that over-the-top offerings remain viable competitive alternatives and continue to place competitive pressure on traditional telephone and cable rates, and the FCC’s regulation would thus be reasonably ancillary to the effective performance of its Section 201(b) and 623(b) responsibilities.

2. The FCC’s Authority To Act Ancillary To Section 257

As noted in the *Comcast* decision, Section 257 could also provide the FCC with a statutory predicate for using its Title I authority to mandate the disclosure obligation discussed above. Section 257(c) contains an express statutory directive that requires the Commission to submit a report to Congress every three years on the barriers to entry faced by entrepreneurs and other small businesses in the provision and ownership of both telecommunications services *and information services*.⁸³ In its decision, the *Comcast* court noted the FCC’s ability to tie its

⁸² NPRM at ¶121.

⁸³ See 47 U.S.C. §257. Section 257(c) states that “[e]very 3 years following the completion of the proceeding required by subsection (a), the Commission shall review and report to Congress on—(1) any regulations prescribed to eliminate barriers within its jurisdiction that are identified under subsection (a) and that can be prescribed consistent with the public interest, convenience, and necessity; and (2) the statutory barriers identified under subsection (a) that the Commission recommends be eliminated, consistent with the public interest, convenience, and necessity.” 47 U.S.C. §257(c). In turn, Section 257(a) states that “Within 15 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information

exercise of ancillary authority over broadband offerings to this express statutory grant of authority. The court stated that it “readily accept[s] that certain assertions of Commission authority could be ‘reasonably ancillary’ to the Commission’s [Section 257(c)] statutory responsibility to issue a report to Congress.”⁸⁴

Significantly, the court expressly identified disclosure requirements as one obligation that would be reasonably ancillary to the FCC’s Section 257(c) responsibilities. “For example,” the court stated, “the Commission might impose disclosure requirements on regulated entities in order to gather data needed for” the FCC to carry out its responsibilities under Section 257.⁸⁵ Thus, the FCC could rely on Sections 201 and 623 or on Section 257 (or a combination thereof) to adopt a pro-consumer broadband disclosure obligation.

Moreover, this approach would give consumers the ability to ensure that broadband providers comply with their stated net neutrality policies. Once incorporated into a broadband provider’s terms of service, the provider would not simply be free to disregard the policy. Rather, if a broadband provider were to block or degrade applications in violation of the provisions of its terms of service, the interests of the consumer would be protected because the consumer could commence an action against the provider for breaching its terms of service agreement. Moreover, the inherent shaming culture of the Internet, which does not tolerate online abuses, helps protect the interests of consumers by focusing consumer attention on alleged online abuses and discouraging such behavior.⁸⁶

services, or in the provision of parts or services to providers of telecommunications services and information services.”

⁸⁴ *Comcast*, 600 F.3d at 659.

⁸⁵ *Id.*

⁸⁶ *See, e.g.*, Net Neutrality NPRM at ¶78 (discussing the argument that a “firestorm of controversy . . . would erupt if a major network owner embarked on a systematic campaign

In the end, an enforceable broadband disclosure requirement would protect the online rights of consumers. As the Commission has stated, this type of a requirement would shine a bright light on the practices of broadband providers and, by doing so, it would “protect and empower consumers[,] . . . maximize the efficient operation of relevant markets” and maintain “a well-functioning marketplace that encourages competition, innovation, low prices, and high-quality services.”⁸⁷ In short, it would preserve the free and open Internet. At the same time, this approach will not require the FCC to reclassify broadband and run the risk of unintentionally harming the interests of minorities or other disadvantaged groups—a risk that is simply too great for our Nation to chance.

B. The FCC Can Also Use Its Existing Legal Framework To Achieve The Goals Identified In The National Broadband Plan

In addition to preserving the free and open Internet by adopting an enforceable broadband consumer disclosure obligation, the FCC’s existing legal framework provides the Commission with ample authority to achieve all of the goals identified in the National Broadband Plan. These goals include repurposing the Universal Service Fund so that it can be used to support broadband, allocating additional spectrum for wireless, ensuring consumers’ privacy and disability access rights, and protecting public safety interests.

As an initial matter, *Comcast* does not undermine the FCC’s ability to achieve any of the goals identified in the National Broadband Plan. *Comcast* only addressed the FCC’s ability to regulate the network management practices of a particular broadband provider. None of the

of censorship on its network”); *see also Preserving the Open Internet*, Reply Comments Of Information Technology And Innovation Foundation, GN Docket No. 09-191 (Apr. 26, 2010) at 3-4 (discussing the ability of industry stakeholders to identify and correct unreasonable network practices); *see also* Googlemonitor.com (website that undertakes to hold search engine provider accountable to its non-discrimination and transparency policies).

⁸⁷ Net Neutrality NPRM at ¶118.

goals identified in the National Broadband Plan require the Commission to regulate a broadband provider's network management practices. Moreover, the key problem the D.C. Circuit identified in *Comcast* was the FCC's inability to tie its regulation in that particular case to an express statutory mandate—as opposed to general policy statements. As discussed below, however, there are a number of statutory mandates that the FCC could reasonably rely on to achieve the goals identified in the National Broadband Plan without having to reclassify broadband.

Turning first to the FCC's USF goals, the National Organizations enthusiastically agree with the Commission that the agency should reform the universal service program and use the USF to support broadband. Making broadband more affordable is one of the keys to bridging the digital divide and ensuring that all of our communities have equal access to broadband. However, the FCC does not need to adopt the “third way” to accomplish this goal. The legal arguments outlined in the FCC's NOI make clear that the FCC's existing framework provides the Commission with ample authority.⁸⁸

As the Commission notes, Section 254 contains an express statutory command that authorizes the Commission to use USF funds to support broadband. In particular, Section 254(b)(2) states that “[a]ccess to advanced telecommunications *and information services* should be provided in all regions of the Nation.”⁸⁹ Section 254(b) is clear that the Commission's universal service program “shall” be based on this and other enumerated principles, including Section 254(b)(3), which states that “Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to

⁸⁸ See NOI at ¶¶32-38.

⁸⁹ 47 U.S.C. §254(b) (emphasis added).

telecommunications and *information services*.”⁹⁰ Thus, Section 254 provides the Commission with the statutory authority it needs to use USF funds to support broadband.

Likewise, the Commission does not need to reclassify broadband to make additional spectrum available for wireless broadband offerings, which is one of the central pillars of the National Broadband Plan.⁹¹ In fact, the FCC does not even need to rely on ancillary authority to accomplish this goal. Title III of the Act gives the FCC express statutory authority over spectrum, and this authority includes the ability to reallocate spectrum for wireless broadband.⁹²

The Communications Act also contains an express statutory grant of authority (Section 222) that the Commission could rely on as the basis for exercising ancillary authority and protecting consumers’ privacy online.⁹³ As the Commission has recognized, “[c]onsumers’ privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services.”⁹⁴ And long before Congress enacted Section 222, “the Commission had recognized the need for privacy requirements associated with the provision of enhanced services.”⁹⁵ Indeed, the FCC has already extended privacy protections to interconnected VoIP services after concluding that doing so was

⁹⁰ *Id.* (emphasis added); *see also* NOI ¶32.

⁹¹ NATIONAL BROADBAND PLAN, Chs. 4-5 (recommending that additional spectrum be made available).

⁹² *See, e.g.*, 47 U.S.C. §303(c) (discussing the FCC’s authority to “[a]ssign bands of frequency to the various classes of stations, and assign frequencies for each individual station”); 47 U.S.C. § 303(a) (discussing the FCC’s authority to “[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class”); *see also* NATIONAL BROADBAND PLAN at 85-86 (discussing the FCC’s authority to revise technical rules to enable mobile broadband use).

⁹³ *See* 47 U.S.C. §222 (discussing the obligation for telecommunications carriers “to protect the confidentiality of proprietary information of . . . customers”).

⁹⁴ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14930 ¶148 (2005).

⁹⁵ *Id.* at 14930, 14931 ¶¶146, 149.

reasonably ancillary to the FCC’s statutory responsibilities, and the FCC’s decision was affirmed on appeal.⁹⁶ As noted, *Comcast* does not undermine or call that decision into doubt. Therefore, the FCC continues to have sufficient ancillary authority to protect consumers’ privacy interests online.

The National Organizations also agree with the Commission that disabilities should not stand in the way of Americans’ “opportunity to benefit from the broadband communications era.”⁹⁷ As outlined in the NOI, the Act includes a number of disability access provisions, including Sections 251 and 255, that would allow the FCC to use its ancillary authority to protect the interests of disabled individuals with respect to their online experience.⁹⁸ In fact, the FCC previously exercised ancillary authority pursuant to Section 255 and extended disability-related requirements to interconnected VoIP services.⁹⁹ In 1999, the Commission similarly relied on its ancillary authority to extend disability-related requirements to voicemail and interactive menu services.¹⁰⁰ Again, nothing in *Comcast* addresses or changes the FCC ability to extend disability access rights to the broadband environment. Thus, the FCC’s ancillary authority is sufficient to achieve these goals.

⁹⁶ See *NCTA v. FCC*, 555 F.3d 996 (D.C. Cir. 2009).

⁹⁷ *Joint Statement on Broadband*, 24 FCC Rcd. 3420 (rel. Mar. 16, 2010).

⁹⁸ See 47 U.S.C. §§251, 255.

⁹⁹ See *IP-Enabled Services*, Report and Order, 22 FCC Rcd 11275, 11286-89 ¶¶21-24 (2007) (concluding that disability access regulations for interconnected VoIP are reasonably ancillary to the Commission’s statutory responsibilities under Sections 1 and 255).

¹⁰⁰ *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 646 ¶106 (1999) (“Where, as here, we have subject matter jurisdiction over the services and equipment involved, and the record demonstrates that implementation of the statute will be thwarted absent use of our ancillary jurisdiction, our assertion of jurisdiction is warranted. Our authority should be evaluated against the backdrop of an expressed congressional policy favoring accessibility for persons with disabilities.”)

In addition, the FCC has sufficient ancillary authority to address public safety issues in the broadband environment. As the NOI recognizes, there are a number of “clearly enumerated Congressional purposes” with respect to public safety and homeland security.¹⁰¹ These give the FCC an adequate basis for protecting public safety in the broadband environment. Indeed, relying on its ancillary authority under Title I and its authority under Section 251(e), the Commission has already required interconnected VoIP providers to supply 911 emergency calling capabilities to their customers, and this decision was upheld on appeal.¹⁰² Since “Comcast did not address questions of national defense, public safety, homeland security, or national security,”¹⁰³ it is clear that the FCC still has the ability to achieve its public safety goals.

IV. IF THE FCC DECIDES NOT TO RELY ON ITS EXISTING LEGAL FRAMEWORK, THE COMMISSION SHOULD SEEK ADDITIONAL STATUTORY AUTHORITY—AS A MAJORITY OF THE MEMBERS OF CONGRESS HAVE RECOMMENDED

If the FCC decides not to use its existing legal framework (or concludes that this authority is not sufficient to meet all of its broadband goals), the National Organizations urge the Commission to remain mindful that classifying broadband as a Title II offering (subject to some or no forbearance) is not the agency’s only other option. There is a true third way available to the agency that would give the Commission additional authority to achieve its goals and ensure that the interests of minority consumers and disadvantaged businesses are not harmed.

In particular, the Commission could obtain clear, targeted legal authority and direction from Congress. A bipartisan majority of Congress (nearly 300 members in fact) have already

¹⁰¹ See NOI at ¶41 (discussing the “clearly enumerated Congressional purposes” with respect to public safety and homeland security); see also 47 U.S.C.A. §§1001 to 1010 (CALEA).

¹⁰² *IP-Enabled*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10246 ¶1 (2005) (“VoIP 911 Order”), *aff’d*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

¹⁰³ NOI at ¶41.

expressed serious concern about the FCC’s reclassification proposal and cautioned the agency against acting without obtaining additional legal authority.¹⁰⁴ Reclassification is not what Congress or America wants.¹⁰⁵ These members have echoed many of the same concerns raised by the National Organizations. They have recognized the serious risk that the FCC’s proposal will do more harm than good by decreasing investment in broadband, slowing broadband deployment, creating regulatory uncertainty, and threatening job creation and economic growth.

Among other representatives, Congressman John Dingell has expressed “strong reservations” about the FCC’s reclassification proposal and “grave concern that the Commission’s current path with respect to the regulation of broadband is fraught with risk.”¹⁰⁶ Congressman Dingell has stated that the “‘third way’ risks reversal by the courts . . . [and] [i]t also puts at risk significant past and future investments, perhaps to the detriment of the Nation’s economic recovery and continued technological leadership.”¹⁰⁷ Similarly, a group of 74 House Democrats have recognized that the FCC’s proposal “will jeopardize jobs and deter needed investment for years to come.”¹⁰⁸ In light of the serious nature of these unintended consequences, our representatives have stated that reclassification “should not be done without additional direction from Congress.”¹⁰⁹ A number of leading national civil rights, labor, and

¹⁰⁴ See, e.g., Letter from 74 House Democrats to FCC Chairman Julius Genachowski (May 24, 2010); Letter from 171 House Republicans to FCC Chairman Julius Genachowski (May 28, 2010); Letter from Representatives John Boehner and Eric Cantor to President Barack Obama (May 12, 2010); Letter from Representative John Dingell to FCC Chairman Julius Genachowski (May 27, 2010).

¹⁰⁵ See Honig, *supra* n. 52.

¹⁰⁶ Letter from Representative John Dingell to FCC Chairman Julius Genachowski (May 27, 2010).

¹⁰⁷ *Id.*

¹⁰⁸ Letter from 74 House Democrats to FCC Chairman Julius Genachowski (May 24, 2010).

¹⁰⁹ *Id.*

environmental organizations—including the Communications Workers of America, the AFL-CIO, the NAACP, and the National Urban League—have also endorsed a targeted legislative approach.¹¹⁰

The National Organizations strongly urge the FCC to abide the views expressed by a majority of our elected representatives and proceed pursuant to additional statutory authority rather than the “third way.” In fact, a number of legislative proposals are currently under active consideration in Congress and the FCC should allow our representatives to address these issues.

Targeted legislation would allow the FCC to adopt the five net neutrality principles endorsed by the National Organizations while, at the same time, ensuring that the FCC’s actions do not unintentionally harm the interests of minorities. Legislation could also make clear that USF funds may be used to support broadband build out and programs that encourage broadband adoption and use, particularly among low-income households. Legislation could also ensure that MWBEs and SDBs are given meaningful opportunities to participate in the build out of high-speed networks.

A legislative solution would also remove the cloud of uncertainty that currently hangs over the FCC’s proposal and its entire net neutrality proceeding. This clarity and certainty would help spur the investments that are necessary to deploy additional broadband infrastructure, upgrade our existing networks, offer faster and more services at affordable prices and, in turn, increase broadband adoption rates and close the digital divide. The regulatory certainty created

¹¹⁰ See Letter from Leaders of the AFL-CIO, Communications Workers of America, International Brotherhood of Electrical Workers, LULAC, MMTC, NAACP, National Urban League, and Sierra Club to Chairman Rockefeller and Chairman Waxman (June 18, 2010) (urging Congress to adopt “narrowly targeted legislation that clarifies Federal Communications Commission authority to protect an Open Internet and to apply Universal Service funding to broadband”).

by a legislative solution would also help MWBEs and SDBs obtain the financing for their business plans that they are currently struggling to obtain.

Clear legislative guidance would also allow the FCC to carefully balance the interests of all participants in the Internet ecosystem and ensure that minorities, MWBEs, and SDBs, are fully protected with respect to all aspects of their online experience—not just their relationships with broadband providers.

CONCLUSION

The National Organizations urge the Commission not to adopt the “third way” proposal. This approach is not the best way of achieving the FCC’s broadband goals because it will needlessly imperil the interests of minorities and disadvantaged businesses. Instead, the FCC should use its existing legal framework, which provides the Commission with ample authority to preserve the free and open Internet and achieve all of the agency’s other broadband goals. In the alternative, the FCC should act pursuant to additional statutory authority.

Respectfully submitted,

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ATTACHMENT 1

NATIONAL ORGANIZATIONS

Hispanic Technology and Telecommunications Partnership
Latinos in Information Sciences and Technology Association
MANA – A National Latina Organization
Minority Media and Telecommunications Council
National Association of Black County Officials
National Conference of Black Mayors
National Conference of Puerto Rican Women
National Puerto Rican Coalition, Inc.