

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

_____)	
In the Matter of:)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52
_____)	

COMMENTS OF THE NATIONAL ORGANIZATIONS

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EXECUTIVE SUMMARY

Sixteen national organizations (the “National Organizations”) urge the Commission to remain mindful that this proceeding implicates one of the most important civil rights issues of our time. It has the potential to affect, either positively or negatively, the digital divide that exists in this country – a divide that relegates a disproportionate share of minorities to second class status in today’s digital world and sustains the present effects of past discrimination. Put simply, the digital divide is unacceptable because it denies minorities, and other groups lacking in broadband opportunities, equal access to healthcare, education, employment, and opportunities for civic and political engagement. Moreover, the Commission has a statutory obligation to help close the digital divide and to refrain from taking any actions that would undermine efforts aimed at providing ubiquitous access to broadband.

With this divide in mind, the National Organizations fully embrace and share the FCC’s goal of preserving a free and open Internet. Indeed, the National Organizations have long supported the FCC’s existing Internet principles – particularly their recognition of a consumer’s right to access the lawful content of their choice – and agree with the Commission that consumers’ transparent access to accurate information plays a vital role in protecting the interests of minorities and in maintaining a well-functioning marketplace. For this reason, we support, in concept, the objectives of the FCC’s first and sixth proposed rules, but emphasize that if the Commission adopts any new regulations it should carefully consider whether to apply them equally to all Internet gatekeepers that have the potential to shape the Internet experience of minority consumers and minority-owned businesses. We want to ensure that in considering whether to adopt any net neutrality rules the FCC preserves a free and open Internet for *all*

Americans – not just those who currently have affordable access to broadband and are proficient in its use.

Thus, while we are encouraged by the FCC’s decision to seek comment on how its proposed rules could help close the digital divide, we are concerned because the NPRM appears to conclude without full information or debate that net neutrality rules can only have a positive impact on minorities. Yet, this conclusion is inaccurate. If drafted or applied incorrectly, net neutrality rules could increase the price of broadband for minorities, reduce broadband adoption, deter the investments necessary to fully bridge the digital divide, limit job growth and economic opportunity, and harm the interests of minorities in other significant ways. If not carefully drafted, net neutrality rules could have the unintended effect of locking current disparities in place for years to come, thereby consigning minorities to a permanent digital underclass.

Therefore, the National Organizations ask the Commission to proceed cautiously and abide by a “first do no harm” approach. The burden rests on proponents of any new regulations to show, at a minimum, that the interests of minorities will not be harmed in the ways described above or otherwise. Thus, before adopting any net neutrality rules – or any other rules to regulate the Internet for that matter – the Commission should undertake a detailed, granular, and objective analysis to ensure that each of the proposed rules – either standing alone, in conjunction with other rules, or cumulatively as a package of rules – will not depress adoption, increase the price of broadband, reduce employment levels, or otherwise lock current digital disparities in place or widen them. However, even if the Commission concludes on the front end that net neutrality rules will not harm minorities, the agency should adopt mechanisms to monitor the real world impact of its actions and be prepared to respond quickly and aggressively if its rules have negative unintended consequences for minorities.

Finally, if the Commission determines that net neutrality rules are necessary, the agency should also consider carefully whether – under the principle of platform neutrality that has animated much of the FCC’s civil rights jurisprudence – to extend its rules to search engine providers and other entities that have the power to use their gatekeeper control to harm the interests of minorities by, among other things, determining whether small businesses lacking access to capital (a classification that includes most minority businesses) will succeed or fail.

The National Organizations will review the comments in this proceeding carefully and, in its reply comments, may recommend additional steps the Commission could take to ensure that minorities not only have equal access to broadband infrastructure, but to all the other components of the Internet that are necessary for attaining and preserving first class digital citizenship.

The National Organizations, which are sixteen highly respected civil rights, professional, service and elected officials' organizations,¹ respectfully submit these comments in response to the Commission's Net Neutrality NPRM.² As discussed below, the National Organizations support the goal of preserving an open Internet for all Americans and ask the Commission to proceed cautiously and to refrain from adopting any rules that would increase the price of broadband for minorities, reduce broadband adoption, deter the investments necessary to fully bridge the digital divide, reduce employment levels, or otherwise harm the interests of minorities.

INTRODUCTION

The National Organizations approach this proceeding – like all proceedings – with the caution that flows from the late Congressman Parren Mitchell's declaration that “we have no permanent enemies nor permanent friends, just permanent interests.” As the National Organizations have engaged the issue, we have discerned some potential benefits and some potential risks of the Commission's proposals. It is early in the proceeding and our minds are open. At this point, our goal is to ensure that those among us who lack equal access to broadband remain in the forefront of the Commission's agenda as it proceeds with this rulemaking and that, as the Commission takes up the proposed rules, it does not repeat either of two mistakes the Commission and other federal actors have made again and again when taking up rules initially and idealistically described as “neutral” – *first*, the Commission should ensure that the rules are neither written nor applied adversely to the participation of minorities online

¹ See Attachment listing the National Organizations participating in this filing. 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.

² 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”).

and in society; and *second*, that even if the rules really are neutral in their text and application, they do not, in their very “neutrality,” lock into place and perpetuate into the future the vast current racial disparities in broadband access, adoption, and informed use. Permanent digital second class citizenship is unacceptable on every level. The Commission’s first priority in this proceeding should be to drill deep into the evidence to avoid the enormous social and moral costs that would attend the creation of a permanent digital underclass. In doing so, the Commission should recognize that it is not only permissible to consider the impact of its race-neutral policies on minorities,³ it is sound policymaking and Congress expects nothing less.⁴

I. FIRST CLASS CITIZENSHIP FOR MINORITIES IS ON THE LINE IN BROADBAND POLICY

A. In The Digital Age, Access To Broadband Is The Key To First Class Citizenship

It is accepted wisdom that our economy has transformed from an industrial to a digital economy. This transformation has taken place at warp speed: technologies that once took decades to be adopted universally now take just a few years.⁵ In the 1930s, when the nation was completing its evolution from an agricultural to an industrial economy, people of color were unprepared and they rapidly lost ground in income, employment rates, and other indicators of economic, social, and political progress.⁶ Today, minorities face exactly the same set of risks they faced in the 1930s – only the risks are even greater because the nation’s transformation from

³ See, e.g., *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007) (Kennedy, J., concurring) (approving of the consideration of race in attempting to achieve a diverse student body).

⁴ See, e.g., 47 U.S.C. §257 (directing the Commission to eliminate barriers to entry and to promote diversity).

⁵ See, e.g., Ray Kurzweil, “The Law of Accelerating Returns” (2001) (concluding that the rate of technological change is exponential).

⁶ See, e.g., Ira Katznelson, *WHEN AFFIRMATIVE ACTION WAS WHITE* (W.W. Norton & Co, 2005).

an industrial to a digital economy is taking place at a much faster rate than the transformation it experienced in the 1930s from agricultural to industrial. In aiming to preserve a free and open Internet, it is critical that we not leave another generation of minorities behind.

There is no time to lose. And there is no room for error because it is rapidly becoming impossible to function in society without access to broadband. Broadband adoption and proficiency is already necessary to secure employment opportunities, educational resources, and the opportunity to participate in civic affairs.⁷

All of these opportunities are elements of what Americans have long regarded as the earmarks of first class citizenship.⁸ What is at stake in this proceeding is nothing less than whether, in generations hence, history will regard the agency's actions in 2010 as having broken or having perpetuated second class digital citizenship.

⁷ See, e.g. Pew Internet & American Life Project, *The Internet and Civic Engagement* (Sept. 2009) (available at <http://www.pewinternet.org/Reports/2009/15--The-Internet-and-Civic-Engagement.aspx> (last visited Jan. 14, 2010)); see also Comments of the Asian American Justice Center, League of United Latin American Citizens, Minority Media And Telecommunications Council, National Association for the Advancement of Colored People, National Urban League, and One Economy Corp. In Response To NBP Public Notice #16, GN Docket Nos. 09-47, 09-51, 09-137 (Dec. 2, 2009) (discussing the high costs of digital exclusion) (available at <http://mmtconline.org/lp-pdf/BB-Adoption-Comments-120209.pdf> (last visited Jan. 14, 2010)).

⁸ See, e.g. United States Commission on Civil Rights, *CIVIL RIGHTS: A NATIONAL, NOT A SPECIAL INTEREST* 10 (1981) (“Without access to quality education, decent housing, employment opportunities, and socio-economic mobility, blacks and other minorities were relegated to second-class citizenship [under segregation].”); see also Karen Mossberger, Caroline J. Tolbert & Ramona S. McNeal, *DIGITAL CITIZENSHIP: THE INTERNET, SOCIETY AND PARTICIPATION* 1 (2008) (“DIGITAL CITIZENSHIP”) (“British sociologist T.H. Marshall defined citizenship as endowing all members of a political community with certain civil, political, and social rights of membership, including ‘the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society.’”).

B. The Digital Divide Imposes Significant Costs On Minorities

As the Commission has recognized, broadband adoption among minorities and the socially and economically disadvantaged is a significant problem.⁹ According to a recent study, African Americans, Hispanic Americans, and lower income Americans, among others, trail the national average in broadband use at home by large margins.¹⁰ While 63% of all adult Americans have adopted broadband at home, only 46% of African Americans and a mere 40% of Hispanic Americans have broadband at home.¹¹ And estimates show that just 5-8% of Native Americans living on tribal lands are enjoying broadband service in their homes.¹² According to

⁹ See, e.g. NPRM at ¶82 (discussing the disparity in broadband adoption rates between African Americans and other minority groups on the one hand and the national average on the other); see also Broadband Task Force Delivers Status Report On Feb. 17 National Broadband Plan, FCC News Release (rel. Sept. 29, 2009) (stating that “large segments of the population have much lower penetration rates, and adoption varies across demographic groups”); see also Commission Open Meeting Presentation On The Status Of The Commission’s Processes For Development Of A National Broadband Plan, at 82 (Sept. 29, 2009) (the “FCC Open Meeting Presentation”) (providing data on broadband adoption levels across various demographic groups) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf (last visited Jan. 14, 2010)); FCC Identifies Critical Gaps In Path To Future Universal Broadband, FCC News Release (rel. Nov. 18, 2009) (identifying critical gaps in broadband adoption, which “[i]ncreases the cost of digital exclusion to society”).

¹⁰ See Pew Internet & American Life Project, Home Broadband Adoption (June 2009) (the “Pew Home Broadband Adoption Report”) (available at <http://www.pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009.aspx> (last visited Jan. 14, 2010)); see also FCC Open Meeting Presentation at 82.

¹¹ FCC Open Meeting Presentation at 82 (citing the Pew Home Broadband Adoption Report and including both English and Spanish speaking Hispanics).

¹² National Congress of American Indians, National Broadband Plan Priorities and Universal Service Fund Tribal Broadband Program Needs, Resolution PSP-09-084c (Sept. 22, 2009) (available at http://ncai.org/fileadmin/resolutions/PSP-09-084c_final.pdf (last visited Jan. 14, 2010)); see also New America Foundation, “New Media, Technology and Internet Use in Indian Country,” at 4 (finding that “Native Americans are among the last citizens to gain access to the Internet, with access to broadband often unavailable or overly expensive in Native communities.”) (available at http://www.newamerica.net/sites/newamerica.net/files/policydocs/New_Media_Technology_and_Internet_Use_in_Indian_Country.pdf (last visited Jan. 14, 2010)).

additional data, broadband adoption and access among certain Asian Americans, including the Hmong and Filipino populations, are much lower than other groups.¹³

Moreover, 88% of adults living in households with an income over \$100,000 have broadband at home, but only 35% of adults living in households that earn less than \$20,000 have broadband at home.¹⁴ Recognizing the civil rights issues associated with the digital divide, Commissioner Clyburn recently stated that “[w]hile it can be said that most of the country is currently wired for some kind of broadband, a large percentage of Americans – and a disproportionate number of African Americans – have not adopted broadband in their homes.”¹⁵ These disparities are simply unacceptable.

Finding ways to close the digital divide is one of the Commission’s most important goals, and is one that all members of the civil rights community can heartily support. First, as the FCC has repeatedly acknowledged, the Commission has a statutory responsibility to close the digital divide. Indeed, in this very proceeding, the FCC has recognized that “[t]his Commission has a *statutory responsibility* to preserve and promote advanced communications networks that are accessible to all Americans and that serve national purposes.”¹⁶ For this reason, the

¹³ See Toward Access, Adoption And Inclusion: A Call For Digital Equality And Broadband Opportunity, A Joint Statement from The National Black Caucus of State Legislators, The National Hispanic Caucus of State Legislators, The National Caucus of Native American State Legislators, The National Asian Pacific American Caucus of State Legislators, In Conjunction with The Joint Center for Political & Economic Studies, and The Hispanic Institute (available at <http://www.nativeamericanlegislators.org/Documents/Joint%20Broadband%20Statement.pdf> (last visited Jan. 14, 2010)).

¹⁴ Pew Home Broadband Adoption Report at 14.

¹⁵ Prepared Remarks Of FCC Commissioner Mignon Clyburn, *Broadband Adoption: Traveling The Consumer’s Last Mile*, The Joint Center For Political And Economic Studies, at 2 (Sept. 21, 2009) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293575A1.pdf (last visited Jan. 14, 2010)).

¹⁶ NPRM at ¶5 (emphasis added).

Commission’s Advisory Committee on Diversity for the Digital Age recently unanimously recommended that the Commission act on its obligation to take affirmative steps to close the digital divide as it proceeds with this rulemaking.¹⁷

Second, there are compelling public policy interests to be served by closing the digital divide because of the untold costs this divide imposes on minorities and our country as a whole. Leaving minorities on the wrong side of the divide denies them the privileges of first class digital citizenship that so many other Americans take for granted.¹⁸ Indeed, the Commission has already acknowledged that the “[t]he disparity among broadband adoption rates . . . impacts efforts to promote employment, education, healthcare, and consumer welfare.”¹⁹ It is more difficult to get a job without access to online job postings and the ability to submit applications online;²⁰ students without broadband connections lack access to the same level of information as their connected peers;²¹ it is becoming increasingly more difficult for the public to gather news and information about current events without broadband access or participate fully in civic and political debates;²² finding medical information without access to online health resources limits patients’ knowledge, choices, and care;²³ and consumers without broadband access end up

¹⁷ See Recommendation of the FCC’s Advisory Committee on Diversity for Communications in the Digital Age (adopted Dec. 3, 2009) (“Dec. 3 Diversity Committee Recommendation”) (available at <http://www.fcc.gov/DiversityFAC/adopted-recommendations/digital-divide-120309.doc> (last visited Jan. 14, 2010)).

¹⁸ “‘Digital citizenship’ is the ability to participate in society online.” DIGITAL CITIZENSHIP at 1.

¹⁹ NPRM at ¶82; see also FCC Open Meeting Presentation, at 83 (discussing the costs of digital exclusion).

²⁰ FCC Open Meeting Presentation, at 83 (citing statistics).

²¹ *Id.* at 83 (citing statistics).

²² *Id.* at 83 (citing statistics); see also DIGITAL CITIZENSHIP at 2, 6-7.

²³ FCC Open Meeting Presentation at 83 (citing statistics).

paying more for goods and services than those who shop online and experience a myriad of other negative economic effects.²⁴

In short, as Commissioner Clyburn correctly observed, “[t]he bottom line is this: We are rapidly becoming a world in which the Internet will be the only way that people can accomplish their most essential tasks and apply for critical services”; thus, broadband “can be the great equalizer” of our time.²⁵ But broadband will not achieve its full potential unless all Americans are given a Digital Equal Opportunity.²⁶

C. Minorities Face The Digital Age Far Behind In Income, Wealth, Education, and Access To Capital

As minorities face the digital divide, they do so saddled by gaps in income, wealth, education, and access to capital. According to the U.S. Census Bureau, the median household income for White Americans in 2008 was \$55,530, but it was only \$37,913 for Hispanic Americans and merely \$34,218 for African Americans.²⁷ Earnings for African American women are significantly worse. African American women earned 64 cents for every dollar earned by a white man, which placed the median earnings of African American women working full-time,

²⁴ *Id.* at 83 (citing statistics); *see also* DIGITAL CITIZENSHIP at 2.

²⁵ *See* Prepared Remarks Of FCC Commissioner Mignon Clyburn, *Broadband Adoption: Traveling The Consumer’s Last Mile*, The Joint Center For Political And Economic Studies, at 4 (Sept. 21, 2009) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293575A1.pdf (last visited Jan. 14, 2010)).

²⁶ Digital Equal Opportunity is the principle that no person should experience “a disparate impact from lack of access to, or productive use of, high-speed Internet access because of membership in a group identified by geography, social-economic status, race or ethnicity, tribal status, language, age, or physical or mental ability.” *NAACP Resolution to Advance Digital Equal Opportunity* (adopted unanimously by the NAACP National Board of Directors, December 17, 2009) (on file with counsel).

²⁷ *See* U.S. Census Bureau News, “Income, Poverty And Health Insurance Coverage In The United States: 2008” (Sept. 10, 2009) (available at http://www.census.gov/Press-Release/www/releases/archives/income_wealth/014227.html (last visited Jan. 14, 2010)).

year-round at \$29,680 compared to \$46,437 for white men.²⁸ Additionally, in nearly 44% of African American families with children, a woman is the primary breadwinner.²⁹ Likewise, the poverty rate for White Americans in 2008 was 8.6%, but it was much higher for African Americans (24.7%), Hispanic Americans (23.2%), and for Asian Americans (11.8%).³⁰

Differences in wealth associated with these disparities impose significant handicaps on minorities. Studies show that the wealth gap leaves “the average American family of color with only 16 cents for every dollar owned by the average white family.”³¹ This leaves minorities with far less discretionary income on average than other groups.

Unemployment figures also show a wide gap between minorities and other Americans. While the U.S. Bureau of Labor Statistics pegs unemployment for White Americans at 9%, its data show much higher rates for minorities, with African Americans at 16.2% and Hispanic Americans at 12.9%.³²

²⁸ See U.S. Census Bureau, *Current Population Survey, 2006 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2004—People 15 Years Old and Over by Total Money Earnings in 2005, Age, Race, Hispanic Origin, and Sex, Male 15 Years and Over White Alone, Not Hispanic.*, (2007) (available at http://pubdb3.census.gov/macro/032006/perinc/new05_058.htm (last visited Jan. 14, 2010)).

²⁹ See Cecilia A. Conrad, *Black Women: The Unfinished Agenda* (2008) (available at http://www.prospect.org/cs/articles?article=black_women_the_unfinished_agenda (last visited Jan. 14, 2010)).

³⁰ See U.S. Census Bureau News, “Income, Poverty And Health Insurance Coverage In The United States: 2008” (Sept. 10, 2009).

³¹ See Insight Center for Community Economic Development, “Closing the Racial Wealth Gap Initiative” (available at <http://www.insightccd.org/communities/Closing-RWG.html>); see also Meizhu Lui, “The Wealth Gap Gets Wider” THE WASHINGTON POST (March 23, 2009) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/22/AR2009032201506.html> (last visited Jan. 14, 2010)).

³² U.S. Bureau of Labor Statistics, “Employment Situation Summary” (Jan. 8, 2010) (available at <http://www.bls.gov/news.release/empsit.nr0.htm> (last visited Jan. 14, 2010)).

The education gap is equally stark. According to U.S. Department of Education statistics, only 9.9% of White Americans over the age of 25 have not completed high school, but 41.5% of Hispanic Americans, 18.3% of African Americans, and 12.3% of Asian Americans have not.³³ Similarly, while 10.8% of White Americans have attained a graduate degree, only 3.5% of Hispanic Americans and only 5.2% of African Americans have.³⁴

The FCC has also tracked the divide minorities face in access to capital.³⁵ As Commissioner McDowell recently observed, “[t]here is widespread agreement that access to capital is the biggest hurdle facing small business entrepreneurs including minorities and women who hope to enter and thrive in the communications arena.”³⁶ Indeed, numerous submissions to the Commission show that minority and women -owned business enterprises (“MWBs”) and socially and economically disadvantaged businesses (“SDBs”) have the incentives, though not the capital, to serve untapped minority and low-income markets, and have expertise in understanding and producing culturally specific service options and content.³⁷

Despite these clear disadvantages that minorities face as they attempt to cross the digital divide, there has been at least one positive development of note. Due in part to the relative

³³ U.S. Department of Education, “Status and Trends in the Education of Racial and Ethnic Minorities,” at 122 (Sept. 2007) (available at <http://nces.ed.gov/pubs2007/2007039.pdf> (last visited Jan. 14, 2010)).

³⁴ *See id.*

³⁵ *See, e.g.* National Broadband Plan Workshop, Capitalization Strategies For Small And Disadvantaged Businesses (Nov. 12, 2009) (transcript available at http://www.broadband.gov/docs/ws_capitalization_strategies/ws_capitalization_strategies_transcript.pdf (last visited Jan. 14, 2010)).

³⁶ FCC Commissioner Robert McDowell, Speech at the National Broadband Plan Workshop, “Capitalization Strategies For Small And Disadvantaged Businesses” (Nov. 12, 2009).

³⁷ *See, e.g.* *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Initial Comments Of The Broadband Diversity Supporters, at 31 (June 8, 2009).

affordability of wireless offerings, wireless broadband has been a real success story for minorities. Wireless is the only broadband technology for which minority adoption and use currently indexes at higher levels than for White Americans. Among all groups, wireless broadband might be most important to Hispanic Americans. Hispanic Americans “are among the most avid users of mobile broadband.”³⁸ “Hispanics use mobile devices more often than the general population, accounting for more minutes used and for a higher percentage of wireless device ownership.”³⁹ Indeed, as compared with only 33% of White Americans, 53% of Hispanic Americans have used a handheld device to access the Internet.⁴⁰ And “[o]verall, English-speaking Hispanics are the heaviest users of wireless onramps to the internet.”⁴¹ “In fact, mobile broadband access has become a key resource to help many Hispanics succeed and thrive in today’s economy. From improving health care to increasing educational opportunities and access to government resources, wireless devices, services and applications offer Hispanics a new route to take full advantage of many life-enhancing resources.”⁴²

Wireless broadband offerings have also helped African Americans make a significant – yet incomplete – leap toward closing the digital divide. According to one study, “African Americans are the most active users of the mobile internet – and their use of it is also growing

³⁸ The Hispanic Institute & Mobile Future, *Hispanic Broadband Access: Making The Most Of The Mobile, Connected Future*, at 8 (Sept. 15, 2009) (the “Hispanic Mobile Broadband Report”) (available at http://mobfut.3cdn.net/4d6ef851f05e9666d0_xzm6bv939.pdf (last visited Jan. 14, 2010)).

³⁹ Hispanic Mobile Broadband Report at 8.

⁴⁰ Pew Internet & American Life Project, *Wireless Internet Use*, at 35 (2009) (“Pew Wireless Internet Report”) (available at <http://pewinternet.org/Reports/2009/12-Wireless-Internet-Use.aspx?r=1> (last visited Jan. 14, 2010)); *see also* Hispanic Mobile Broadband Report at 8.

⁴¹ Pew Wireless Internet Report at 35.

⁴² Hispanic Mobile Broadband Report at 4.

the fastest. This means the digital divide between African Americans and white Americans diminishes when mobile use is taken into account.”⁴³ The statistics from this study show that while only 33% of White Americans have used a mobile device to go online, 58% of African Americans have.⁴⁴ Similarly, while only 19% of all Americans use mobile devices to access the Internet on an average day, 29% of African Americans do.⁴⁵ Moreover, compared with 2007, when 12% of African Americans used the Internet on their mobile device on the average day, African Americans’ use of mobile devices to access the Internet is up 141%.⁴⁶ African Americans’ relatively high level of Internet usage on mobile devices helps offset their lower levels of access to more traditional Internet onramps, such as desktop computers, laptops, and home broadband connections.⁴⁷ Indeed, “[t]o an extent notably greater than that for whites, wireless access for African Americans serves as a substitute for a missing onramp to the internet – the home broadband connection.”⁴⁸ Commenting on this wireless success story, Commissioner Clyburn has remarked that “[w]ireless adoption – the use of handheld, mobile devices among African Americans is off the charts.”⁴⁹

Like other minority groups, studies show that Native Americans also rely far more heavily on wireless connections than other groups. While only 9% of those responding to a Pew

⁴³ Pew Wireless Internet Report at 4.

⁴⁴ *Id.* at 18.

⁴⁵ *Id.* at 4.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 35.

⁴⁹ Prepared Remarks Of FCC Commissioner Mignon Clyburn, “Broadband Adoption: Traveling The Consumer’s Last Mile,” The Joint Center For Political And Economic Studies at 3 (Sept. 21, 2009) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293575A1.pdf (last visited Jan. 14, 2010)).

survey reported using a high-speed wireless connection at home, a much larger percentage of Native Americans (19.4%) have a high-speed home wireless connection.⁵⁰

The statistics also show that lower income consumers rely more heavily on wireless offerings. A recent study reflects that while 16% of higher income adults live in households with only wireless telephones, some 30.9% of adults living in poverty and 23.8% of adults living near poverty live in wireless-only households.⁵¹ Moreover, another recent report showed that iPhone sales rose 48% among those earning between \$25,000 and \$50,000 in the third quarter of 2009 – three times the growth rate among those earning more than \$100,000 per year.⁵² These data indicate that “lower-income mobile subscribers are increasingly turning to their mobile devices to access the Internet, email and their music collections.”⁵³ Despite this positive story, it is clear that more work must be done.

II. AN OPEN INTERNET IS VITAL TO DEMOCRATIC VALUES

Like most commenters in this proceeding, the National Organizations appreciate the concept of the open Internet and are inspired by its basic premise and its possibilities. Indeed, many of the National Organizations have been strong supporters of the Commission’s existing Internet principles – particularly the first principle, which recognizes consumers’ interests in

⁵⁰ New America Foundation, “New Media, Technology and Internet Use in Indian Country,” at 18 (available at http://www.newamerica.net/sites/newamerica.net/files/policydocs/New_Media_Technology_and_Internet_Use_in_Indian_Country.pdf (last visited Jan. 14, 2010)).

⁵¹ Stephen J. Blumberg, Ph.D., and Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey* (July-December 2008) (available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200905.htm> (last visited Jan. 14, 2010)).

⁵² comScore, *In Tough Economy, Lower Income Mobile Consumers Turn to iPhone As Internet & Entertainment Device* (Oct. 27, 2008) (available at [http://www.comscore.com/Press_Events/Press_Releases/2008/10/Lower_Income_Mobile_Consumers_use_Iphone/\(language\)/eng-US](http://www.comscore.com/Press_Events/Press_Releases/2008/10/Lower_Income_Mobile_Consumers_use_Iphone/(language)/eng-US) (last visited Jan. 14, 2010)).

⁵³ *Id.*

accessing the lawful Internet content of their choice.⁵⁴ In fact, few principles are more dear to the civil rights movement.⁵⁵

The Commission's existing content discrimination principle appears to be working well, as there have been relatively few examples of content discrimination since the Commission adopted its Internet Policy Statement. Nonetheless, we still believe that the FCC can continue to play an important role in protecting consumers' rights to access lawful content. And, as result, we are supportive of the FCC's inquiry into whether there is a need to codify this principle and consider whether to apply it broadly to all entities that shape the Internet experience of others. The fact that there has not been a significant problem with content discrimination does not counsel against continued vigilance on this front. Indeed, while we take the public accommodations section of the 1964 Civil Rights Act for granted today, *see* 42 USCA § 2000a, no one seriously suggests that the statute is no longer necessary. And while most adult Americans remember the Annapolis Denny's Restaurant's horrible refusal to serve breakfast to six African American secret service agents as though it happened yesterday, the incident actually happened seventeen years ago.⁵⁶

The National Organizations also agree 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.⁵⁷ Transparency – the full disclosure and consumer understanding of the terms and conditions of all Internet

⁵⁴ *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986, 14987–88 ¶4 (2005).

⁵⁵ *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (protecting the ability to report on and access information about the civil rights movement in the South).

⁵⁶ *See* Stephen Labaton, "Denny's Restaurants to Pay \$54 Million in Race Bias Suits," THE NEW YORK TIMES (May 25, 1994).

⁵⁷ *See* NPRM at ¶118 (discussing the benefits of truthful and accurate information).

offerings – is a necessary condition to the justification of any choice to rely on the marketplace rather than on regulation to protect the citizenry. Therefore, the National Organizations generally support the FCC’s efforts to encourage greater transparency when it comes to the information consumers need to fully utilize the Internet, including the offerings of content, service, and applications providers.

However, while the National Organizations support the laudable goals of the Commission’s NPRM, it is troubled by the fact that some of the Commission’s proposed rules have not been shown to be likely to close the digital divide. The National Organizations set out, below, their principal concerns.

III. IF DRAFTED OR APPLIED INCORRECTLY, NET NEUTRALITY RULES COULD NEGATIVELY AFFECT MINORITIES

The National Organizations are concerned that net neutrality rules could harm the interests of minorities if those rules are drafted or applied incorrectly. As discussed below, net neutrality rules could, among other things, increase the price of broadband for minorities, reduce the quality or availability of broadband offerings, impede the infrastructure investments necessary to fully bridge the digital divide, and limit job growth.

A. Net Neutrality Rules Could Increase The Price Of Broadband For Minorities

Owing to the deep and persistent racial wealth gap and to deep racial disparities in income and unemployment status, *see* discussion *supra*, affordability remains a key impediment to minorities’ full participation in the digital universe. Indeed, as discussed above, the affordability of certain broadband offerings accounts in part for minorities’ high rates of wireless adoption and use. It is vital, then, that the Commission avoid taking any steps that could jeopardize this one success story for minorities in the digital universe.

Thus, one of the National Organizations' foremost concerns about the Commission's net neutrality rules is the potential for those rules to harm minorities by increasing the price of broadband offerings. The National Organizations are particularly concerned about the effects of the Commission's proposed nondiscrimination rule on affordability. Under the terms of this proposed rule, broadband Internet access service providers would be prohibited from entering into voluntary arrangements by which content, application, or service providers agree to pay for enhanced or prioritized services.⁵⁸ While phrased as a "nondiscrimination" rule, this proposal could have the effect of requiring broadband providers to recover the costs of their next generation networks entirely from end-user consumers because broadband providers would be denied the flexibility to charge Internet companies for enhanced or prioritized services.

Indeed, analysts have concluded that by preventing broadband providers from charging for enhanced or prioritized offerings, the Commission's proposed rule "would keep consumers from getting lower broadband prices and make consumers pay for all of the investment and upgrade costs for the next generation network."⁵⁹ Similarly, analysts have concluded that "[n]et neutrality, especially the non-discrimination principle, will force service providers to shift those costs onto the public in the form of higher broadband fees,"⁶⁰ "would keep consumers from

⁵⁸ See NPRM at ¶106. Although the NPRM discusses the purported harms of allowing broadband providers "to impose access or prioritization fees," *id.* at ¶69, the proposed nondiscrimination rule would have the effect of prohibiting completely voluntary arrangements for enhanced or prioritization services.

⁵⁹ The American Consumer Institute, "Does Net Neutrality Help Or Hurt Consumers" at 3 (<http://www.theamericanconsumer.org/wp-content/uploads/2009/12/nn-and-consumer-welfare1.pdf>).

⁶⁰ Steven Titch, "The Packets Must Get Through," in The American Consumer Institute Center for Citizen Research, THE CONSEQUENCES OF NET NEUTRALITY REGULATION 27 (Nov. 19, 2009) (available at <http://www.theamericanconsumer.org/wp-content/uploads/2009/11/final-consequences-of-net-neutrality.pdf> (last visited Jan. 14, 2010)) ("Titch, *Packets*").

getting lower broadband prices and make consumers pay for all of the investment and upgrade costs for next generation networks.”⁶¹

Forcing end users to bear the entire costs of broadband networks and thus pay higher prices for broadband offerings would negatively impact broadband adoption and either cement or widen the digital divide. In either case, minorities would be negatively impacted. As Greg Moore, Executive Director of the NAACP National Voter Fund, has observed:

“The effects could be disastrous for low-income and minority consumers, pricing them out of the broadband market by guaranteeing a free ride to companies such as Google and eBay while shifting costs for broadband expansion back to consumers. Although net neutrality activists claim to be protecting free speech, net neutrality regulations would effectively silence many minority voices, as low-income communities drop off the online landscape because they can’t afford the price of admission.”⁶²

According to several economists, allowing broadband providers to recover their network costs by offering enhanced or prioritized services to Internet companies would not only be equitable,⁶³ it would inure to the benefit of end-user consumers. Several studies, some of which the Commission cited in the NPRM,⁶⁴ have concluded that consumers would pay significantly lower prices for broadband and broadband adoption figures would increase in the absence of net neutrality rules.⁶⁵

⁶¹ Stephen B. Pociask, “Does Net Neutrality Help or Hurt Consumers?” in THE CONSEQUENCES OF NET NEUTRALITY REGULATION 38.

⁶² *Id.* at 39 (quoting Greg Moore, *Extend Internet’s Full Reach to Black Communities*, Asbury Park Press, May 11, 2007).

⁶³ *See, e.g.*, Titch, *Packets*, in THE CONSEQUENCES OF NET NEUTRALITY REGULATION 27 (“The cost of the management required to support sophisticated applications should be borne by the companies that produce, market and profit from these applications.”).

⁶⁴ *See* NPRM at ¶65 (recognizing studies that conclude that net neutrality rules would “increase end-user prices, limit the number of users, and reduce revenue, discouraging network improvements”).

⁶⁵ *See, e.g.*, Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23 J. of Econ. Perspectives 23, 61, 67 (2009) (“Of course, for a

For example, studies show that allowing broadband providers to charge for enhanced or prioritized services would result in significant discounts in the price of broadband for consumers, with some estimates showing that end-users would save \$5 to \$10 per month.⁶⁶ The total savings from this discount would range from \$3.012 billion to \$6.024 billion per year.⁶⁷ Because broadband would be more affordable if the Commission did not adopt an unduly restrictive nondiscrimination rule, broadband adoption figures would increase. It is estimated that 14.3 million additional homes would subscribe to broadband in response to a \$5 per month subsidy, and 28.6 million additional homes would subscribe to broadband in response to a \$10 per month subsidy.

Therefore, the National Organizations ask the Commission to refrain from adopting any net neutrality rules – either its proposed non-discrimination rule or any of the other rules – that would deprive consumers of these significant savings. It would be unacceptable if the Commission adopted rules that effectively increased the price of broadband for consumers or potentially limited the adoption of broadband by millions of consumers – particularly those burdened by the racial wealth gap – for whom broadband affordability may be a high barrier to adoption and use.

B. Restrictions On Network Management Practices Could Have A Disproportionately Negative Impact On Minorities

The National Organizations are also concerned that net neutrality rules could negatively affect minority consumers if those rules unduly limit broadband providers' network management

given price level subsidizing content comes at the expense of *not* subsidizing users, and subsidizing users could also lead to greater consumer adoption of broadband.”).

⁶⁶ Haney, *Consumer Welfare Losses*, in THE CONSEQUENCES OF NET NEUTRALITY REGULATION 49 (collecting data).

⁶⁷ *Id.*

practices. In the NPRM, the Commission proposed that broadband providers may take reasonable steps to manage their networks in several types of situations.⁶⁸

The National Organizations agree with the Commission that broadband providers must have the flexibility necessary to maintain the proper functioning of their broadband networks. As noted above, minorities suffer from a lack of access to broadband services in larger numbers than other groups. Thus, any FCC rule that prevents broadband providers from maintaining the proper functioning of their networks could have a disproportionate impact on minorities by effectively denying them reliable access to broadband offerings. It takes just a few heavy users to disrupt the online experience of other consumers who may be attempting to use the Internet for basic yet essential purposes, such as schoolwork or community organizing.

Allowing broadband providers the flexibility necessary to maintain the proper functioning of their networks matters for all broadband platforms, and particularly in the wireless context. As discussed above, wireless broadband offerings have played a unique role in helping to narrow the digital divide. Minority consumers rely much more heavily on wireless broadband offerings than other groups, and minority households are currently more likely to have only a single, wireless onramp to the Internet. At the same time, wireless broadband networks are especially sensitive to a disruption or impairment in service resulting from heavy users or bandwidth intensive applications. Thus, minorities are more likely than other groups to be affected if the Commission adopts rules that impede a wireless broadband provider's ability to manage network congestion or address other issues that negatively affect a consumer's Internet experience.

⁶⁸ See NPRM at ¶¶135-41.

C. **Net Neutrality Rules Could Impede The Investment And Deployment Necessary To Bridge The Digital Divide**

The National Organizations are also concerned that the Commission's net neutrality rules could negatively affect the investments necessary to fully bridge the digital divide. To close the gap between the digital haves and have-nots, the Commission should create incentives for the deployment of additional broadband infrastructure and the upgrading of existing broadband networks – all of which will require a substantial increase in investment.⁶⁹ Indeed, the Commission's preliminary estimates show that the total investment required to ensure the universal availability of broadband could be as much as \$350 billion.⁷⁰

It is unclear from the NPRM how net neutrality rules would create incentives for broadband providers to make the massive investments necessary to achieve the goal of providing universal access to broadband.⁷¹ On the contrary, several analysts have concluded that net neutrality rules would deter such investments.⁷² Indeed, “analysts are concerned about the

⁶⁹ See, e.g. Broadband Task Force Delivers Status Report On Feb. 17 National Broadband Plan, FCC News Release (rel. Sept. 29, 2009) (describing universal broadband as “the infrastructure challenge of our time”).

⁷⁰ See *id.*

⁷¹ The conclusion reflexively reached by some ardent net neutrality advocates – namely, that net neutrality regulation will naturally lead to an increase in investments by broadband providers – has recently been shown to rest on faulty analysis and dismissed as “nothing more than net neutrality propaganda.” See George S. Ford, Ph.D, Phoenix Center for Advanced Legal & Economic Public Policy Studies, *Finding the Bottom: A Review of Free Press's Analysis of Network Neutrality and Investment*, at 1 (Oct. 29, 2009) (“Ford, *Net Neutrality and Investment*”) (available at <http://www.phoenix-center.org/perspectives/Perspective09-04Final.pdf> (last visited Jan. 14, 2010)). Also, the Commission has stated that imposing “heightened regulatory obligations could lead [broadband providers] . . . to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas . . . [and] could also discourage investment in facilities.” Brief of the Federal Petitioners at 31, *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005).

⁷² See, e.g. Testimony of Craig Moffet before the Senate Committee Hearing on Net Neutrality, “Wall Street's Perspective on Telecommunications” (March 14, 2006); see also Larry

impact of net neutrality regulations on investment returns,”⁷³ and have concluded that “neutrality regulations can have a significant impact on market value and retard investment incentives.”⁷⁴

But there is more than just economic theory leading to the conclusion that net neutrality rules could deter the investment in and deployment of broadband infrastructure necessary to bridge the digital divide. When Chairman Genachowski announced his intention to pursue net neutrality rules, the financial markets reacted negatively.⁷⁵ And the Commission’s auction of 700 MHz C Block licenses – licenses which included net neutrality-like open access conditions – clearly shows the negative impact of net neutrality rules on investment decisions. It is reported that the open access conditions imposed on C Block spectrum led to a two-thirds reduction in the market value of that spectrum.⁷⁶

F. Darby and Joseph P. Fuhr, Jr., “Consumer Welfare, Capital Formation and Net Neutrality: Paying for the Next Generation Broadband Networks,” *Media Law and Policy*, Summer 2007, at 128.

⁷³ Larry F. Darby, *Banning Internet Access Price Discrimination Is Bad For Consumers*, in THE CONSEQUENCES OF NET NEUTRALITY REGULATION 20.

⁷⁴ Ford, *Net Neutrality and Investment*, at 5.

⁷⁵ See, e.g. Peter A. McKay, “AT&T Holds Back Blue Chips,” *WALL STREET JOURNAL* (Oct. 8, 2009) (stating that the telecommunications sector “was hurt by comments from the Federal Communications Commission chairman saying he intends to proceed with Internet openness rules for cellular carriers”) (available at http://online.wsj.com/article/SB125491293800270553.html?mod=rss_markets_main (last visited Jan. 14, 2010)).

⁷⁶ See Ellen P. Goodman, *Spectrum Auctions and the Public Interest*, 7 J. Telecom. & High Tech. L. 101, 109 (2009) (available at <http://ssrn.com/abstract=1411660> (last visited Jan. 14, 2010)) (“Members [of Congress] criticized the FCC for having sold the C Block spectrum at a bargain price -- a discount they attributed to the open platform conditions.”); see also *Oversight of the Federal Communications Commission -- The 700 MHz Auction*: Hearing Before the House Subcomm. on Telecomm. & the Internet (April 15, 2008) (written testimony of Harold Feld, Senior Vice-President, Media Access Project on Behalf of the Public Interest Spectrum Coalition) (available at http://energycommerce.house.gov/index.php?option=com_content&task=view&id=237&Itemid=106 (last visited Jan. 14, 2010)) (“In particular, AT&T argues that it paid \$2.68 MHz/Pop for B Block licenses rather than \$0.76 Verizon paid for C Block licenses to avoid the open device condition.”).

Experience also shows the positive investment impacts resulting from the Commission's decision not to adopt net neutrality rules. For example, when Chairman Kennard made it clear in 1999 that net neutrality-like unbundling obligations would not apply to cable operators, investments by cable companies accelerated significantly and the bulk of the investment went into network upgrades that have yielded a faster, more robust broadband infrastructure.⁷⁷ Indeed, “[c]able companies in the U.S. would not have deployed advanced broadband infrastructures, or deployed them as rapidly and wisely as they did, if the Commission had yielded to pressure to impose ‘open access’ requirements.”⁷⁸

The Commission should also remain mindful that deterring broadband investment and deployment would have a negative impact on job creation and economic growth. As noted above, unemployment rates for minorities are much higher than for other groups. Thus, minorities have a particularly strong interest in ensuring that the Commission does not unintentionally limit job 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.⁷⁹ Indeed, 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, in turn, lead to better

⁷⁷ See Jeffrey A. Eisenach, “Broadband Policy: Does the U.S. Have It Right After All?” Progress & Freedom Foundation, 3-4, 9 (Sept. 2008) (available at <http://www.pff.org/issues-pubs/pops/2008/pop15.14USbroadbandpolicy.pdf> (last visited Jan. 14, 2010)); see also Hance Haney, *Network Neutrality Regulation Would Imposer Consumer Welfare Losses*, in THE CONSEQUENCES OF NET NEUTRALITY REGULATION 51 (“Haney, *Consumer Welfare Losses*”).

⁷⁸ Haney, *Consumer Welfare Losses*, in THE CONSEQUENCES OF NET NEUTRALITY REGULATION 51.

⁷⁹ See Comment Sought on Relationship Between Broadband and Economic Opportunity, NBP Public Notice #18, GN Docket Nos. 09-47, 09-51, 09-137, DA 09-2518 (rel. Nov. 12, 2009). Comments submitted in response to Public Notice #18 included data on the relationship between broadband deployment and job growth.

paying jobs.⁸⁰ And a study released this month 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.⁸¹ In addition, the availability of advanced telecommunications networks is essential to attract and retain businesses in local communities. Study after study has shown the positive impact broadband deployment can have economic growth.⁸² Yet, if the Commission adopts rules that deter future investment in broadband, these jobs and economic opportunities will never materialize.

We want to share one particularly compelling broadband success story. In 2001, the New Jersey Department of Labor and Workforce Development created a program that increased broadband adoption and social and economic empowerment for women. This innovative pilot program was funded by the Women's Bureau of the U.S. Department of Labor.⁸³ The program provided working single mothers, who typically earned less than \$16,000 per year, with online computer skills and job training via broadband on laptops or personal computers placed in their homes. These women could access the training program on their own time and learn skills such

⁸⁰ 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) (available at http://www.baller.com/pdfs/US_Broadband_Coalition_Report_9-24-09.pdf (last visited Jan. 14, 2010)).

⁸¹ Jed Kolko, Public Policy Institute of California, *Does Broadband Boost Local Economic Growth?* (Jan. 2010) (available at http://www.ppic.org/content/pubs/report/R_110JKR.pdf (last visited Jan. 14, 2010)).

⁸² See, e.g., *id.*; see also U.S. Broadband Coalition Report (collecting data and information from various studies and report).

⁸³ See Center for Women and Work, Rutgers University, *Increasing Access to Education and Skills Training for Low-Income Single Mothers: Online Learning as Training Policy* (available at <http://www.itwd.rutgers.edu/PDF/Brief-OnlineLearningProgram.pdf> (last visited Jan. 14, 2010)).

as word processing, data entry, and processing medical claims.⁸⁴ A study by the Center of Women and Work (CWW) at Rutgers University found that the program was highly successful. Of the 128 participants, 117 (92%) completed the program. The group had an average 14% pay increase and 15 of the participants went on to college or community college.⁸⁵ All of the women were emphatic about the fact that they would not have been able to complete a training program if it were not available in their homes.⁸⁶

In the end, if these economic studies and past experiences are any indication, adopting net neutrality rules that deter investment would uniquely harm minorities, who would remain stuck on the wrong side of the digital divide and deprived of equal access to jobs, information, and the other significant benefits that flow from universal access to broadband.

IV. IN LIGHT OF THE POSSIBILITY FOR NET NEUTRALITY RULES TO HARM MINORITIES, THE COMMISSION SHOULD PROCEED CAUTIOUSLY AND PLACE THE BURDEN ON PROPONENTS OF REGULATION TO ESTABLISH THAT MINORITIES WILL NOT BE HARMED

In light of the evidence that net neutrality rules could have a negative impact on minorities if they are drafted or applied incorrectly, the National Organizations urge the Commission to proceed cautiously in this rulemaking and remain mindful of the possible unintended consequences of its actions. The Commission should abide by a “first do no harm” approach, refrain from adopting any net neutrality rules unless the record evidence clearly establishes a need for each rule and that the interests of minorities will not be harmed.

⁸⁴ *See id.*

⁸⁵ *See* Patricia Lamiell, *Center for Women and Work Takes Online Job Training Program to Other States*, Rutgers Focus, Rutgers The State University of New Jersey (available at <http://ur.rutgers.edu/focus/article/Center%20for%20Women%20and%20Work%20takes%20online%20job%20training%20program%20to%20other%20states/1413/> (last visited Jan. 14, 2010)).

⁸⁶ *See id.*

As a matter of historical fact, facially neutral laws have had un-neutral impacts on minority groups. Indeed, studies have shown that countless well-intended laws have had negative, unintended consequences for minorities.⁸⁷ The New Deal and Fair Deal era of the 1930s and 1940s provides a particularly compelling and relevant lesson. During this period, the federal government passed numerous laws that ushered in a period of increased economic and social improvement for American workers. In the wake of these facially neutral enactments, however, the economic and social divides between White Americans and minorities actually increased by large margins. At the beginning of this era, the unemployment rate for White Americans and African Americans was roughly the same. Thirty-five years later, however, the unemployment rate for African Americans was twice as high as White Americans.⁸⁸ Also during this time period, the income of African American males relative to White Americans declined in every section of the country, and while the poverty rate for White Americans decreased by 27% it only decreased by 3% for nonwhites.⁸⁹

As indicated in the sections above, detailed studies show that the New Deal and Fair Deal era legislation produced these unequal and pernicious results because the laws favored workers who had the training and ability to find employment in the then-emerging industrial trades. Many of the federal enactments, for example, such as the Fair Labor Standards Act, the National Industrial Recovery Act, and the National Labor Relations Act, only extended their benefits to industrial workers – and offered nothing to agricultural and domestic workers.⁹⁰ At the time,

⁸⁷ See, e.g., Ira Katznelson, *WHEN AFFIRMATIVE ACTION WAS WHITE* (W.W. Norton & Co, 2005).

⁸⁸ *Id.* at 14.

⁸⁹ *Id.* at 14-15.

⁹⁰ *Id.* at 53-60.

however, African Americans were overrepresented in agricultural and domestic lines of work.⁹¹ As a result, workers who could transition to work in industrial trades (mainly White Americans) enjoyed relative prosperity under the new federal regime, while those who could not make this transition (mainly minorities) were left out and left behind. The lesson from these experiences is clear: even apparently universal and neutral federal programs can widen existing disparities. As we now continue the transition into a digital age, the Commission should ensure that its efforts to promote a free and open Internet for all do not end up leaving minorities and other groups lacking equal access to broadband behind.

In light of this history, it is not surprising that Commissioner McDowell, in discussing the importance of a “first do no harm” approach, recently emphasized that “new rules – however well intentioned – may carry unintended consequences that operate in the real world to thwart the ability of small businesses, including those owned by minorities, from entering markets or from succeeding after they’ve launched.”⁹² Echoing concerns about possible unintended consequences, Commissioner Copps also recently stated that “[i]t’s ironic but true that digital development wrongly done could actually make things worse.”⁹³ “If we fail,” Commissioner Copps stated, “the diversity gaps and rural gaps, and inner city gaps and technology gaps and regional gaps that have been such brakes on our progress can only get worse—much worse.”⁹⁴

Therefore, regardless of the idealism behind the proposed rules, the National Organizations have

⁹¹ *Id.* at 55.

⁹² Remarks of Commissioner Robert McDowell, Annual Rainbow PUSH Coalition and Citizenship Education Fund Conference on “First Class Digital Citizenship: A Civil and Human Right” (Nov. 20, 2009).

⁹³ Remarks of Commissioner Michael Copps, Rainbow PUSH Coalition Conference on “First Class Digital Citizenship: A Civil and Human Right” (Nov. 20, 2009).

⁹⁴ *Id.*

a legitimate basis for questioning whether the Commission's net neutrality rules would have unintended adverse consequences for minorities.

Going forward, the Commission should abide by a "first do no harm" approach. This means that before adopting any net neutrality rules, the Commission should undertake a detailed, granular, and objective analysis and ensure that each and every net neutrality rule is supported by documentation showing that the rule – standing alone or in conjunction with other rules – will not depress adoption, increase the price of broadband, reduce employment levels or otherwise harm minority consumers or minority-owned businesses. The burden is on the proponents of any proposed new regulations to show, at a minimum, that the rules they support will not harm minorities.

In this respect, the Commission should follow the December 3, 2009 unanimous recommendation of the FCC's Advisory Committee on Diversity for Communications in the Digital Age entitled "The FCC's Obligation to Close the Digital Divide."⁹⁵ In its recommendation, the Advisory Committee stated:

Given the Commission's statutory mandates and its established priorities, the Advisory Committee recommends that the agency closely analyze how its broadband policy or rulemaking proposals will impact the digital divide. By performing this analysis before acting, the agency will acquire the information it needs to ensure that its ultimate decision is consistent with its determination that ubiquitous access to broadband is one of the Commission's most critical policy objectives.

*Specifically, the Advisory Committee recommends that in the agency's National Broadband Plan, Network Neutrality and Spectrum Policy proceedings, among others, the Commission should analyze in detail the anticipated effects of rule or policy changes on the digital divide, and craft any new rules and policies in a manner that ensures, to the extent possible, that these rules and policies will be instrumental in closing the digital divide.*⁹⁶

⁹⁵ See Dec. 3 Diversity Committee Recommendation.

⁹⁶ *Id.* (footnotes omitted; emphasis supplied).

The findings and recommendations of the Diversity Committee should be followed here. Unfortunately, however, the Commission has yet to seek the information necessary for it to conduct this analysis.⁹⁷

Even if the Commission concludes on the front end that net neutrality rules will not harm minorities, the agency should adopt mechanisms to monitor the real world impact of its net neutrality rules and be prepared to act if those rules end up widening the digital divide or otherwise harming minorities. To perform this monitoring function, the National Organizations urge the Commission to adopt metrics for measuring the digital divide and for determining the impact of net neutrality rules on minorities. Further, in light of the Commission's unfortunate history of abandoning scientific paradigms,⁹⁸ and its equally unfortunate habit of forgetting the impact of its policies on minorities and those without access to broadband,⁹⁹ the Commission

⁹⁷ For example, the NPRM does not solicit comment on whether minorities or low-income consumers have unique needs with respect to broadband Internet access service or using the offerings of content, service, or applications providers; whether there is evidence that minorities or low-income consumers rely more heavily on one particular broadband platform or another; whether members of minority groups use broadband differently than members of other groups; or whether net neutrality rules would stifle innovation in a manner that operates to the detriment of minorities or minority-owned businesses. Moreover, the Commission has not asked for comment on how net neutrality rules could affect minorities' access to vital online services, such as telemedicine or latency-sensitive applications that may require priority or specialized treatment.

⁹⁸ See, e.g. *Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd 5922, 5979-85 (Statement Of Commissioner Michael J. Copps) (2008) (criticizing the Commission's failure to conduct meaningful research on minority broadcast ownership).

⁹⁹ See, e.g. *Preserving the Open Internet*, GN Docket No. 09-191, League of United Latin American Citizens, Application For Review Of Decision Denying The Emergency Motion To Correct Or Amend The Commission's October 16, 2009 Revised Sunshine Notice (filed January 4, 2010) (discussing ways the Commission has unintentionally favored those proficient in broadband use over those without Internet access in the days leading up to the adoption of this NPRM); see also Letter to Blair Levin, Executive Director, FCC Broadband Initiative, from David Honig, President and Executive Director, MMTTC, The Commission's National Broadband Plan Policy Framework, GN Dockets 09-47, 09-51 and 09-137 (Jan. 4, 2010) (stating that MMTTC is "concerned, not with the overall vision of the [National Broadband Plan Policy Framework (Dec. 16, 2009)], but with the non-inclusion of critical issues raised and the proposals

should not adopt new broadband rules until it has done everything in its power to institutionalize a longitudinal, peer reviewed system of monitoring the impact of these rules on minorities.

Moreover, the Commission should include the concept of Digital Equal Opportunity in any rule or rules it decides to adopt. As discussed above, Digital Equal Opportunity is the principle that no person should experience a disparate impact from lack of high-speed access to, or productive use of, the Internet because of membership in a group identified by geography, social-economic status, race or ethnicity, tribal status, language, age, or physical or mental ability. Incorporating the concept of Digital Equal Opportunity into this rulemaking proceeding – either as a principle that applies to every rule or as a stand-alone rule – will help ensure that all Americans can enjoy the same privileges of first class digital citizenship that many of the more fortunate among us take for granted.

V. **THE COMMISSION SHOULD CAREFULLY EXAMINE WHETHER NET NEUTRALITY OBLIGATIONS SHOULD APPLY TO SEARCH ENGINES AND OTHER ENTITIES THAT DRIVE CONSUMER AND MINORITY ACCESS TO INTERNET APPLICATIONS AND SERVICES**

In the NPRM, the Commission proposed that net neutrality rules would only apply to providers of broadband Internet access service.¹⁰⁰ The Commission also sought comment on whether its rules should apply more broadly to content, applications, and service providers.¹⁰¹ The record on this subject has not yet been fully developed; thus, the National Organizations have formed no firm conclusions and hope to be in a better position to address this question in reply comments. Certainly, though, a reasonable case has been made that any argument the

advanced by civil rights organizations throughout several sets of comments, four staff workshops, and at the Charleston and Memphis field hearings” and, specifically that, *inter alia*, “The Framework contains no mention or discussion of minorities, the digital divide, minority business enterprises, disadvantaged business enterprises, or minority media.”)

¹⁰⁰ NPRM at ¶90-94.

¹⁰¹ NPRM at ¶101.

Commission advances for applying net neutrality rules to broadband providers could apply with even more force to certain content, applications, and service providers – entities that have both the ability and a demonstrated willingness to shape the Internet experience of all consumers, including minorities, in some decidedly un-neutral ways.

This question is of particular interest to minorities for two reasons. First, platform neutrality – in addition to being a well-established premise of telecommunications regulation¹⁰² – is a longstanding civil rights principle. It has its origins in the definitional nature of civil rights as applicable universally, such that no person, no governmental unit, and no industry should be exempt from the shared task of creating “the beloved community.”¹⁰³ The Commission

¹⁰² See, e.g. *Bright House Networks, LLC*, 23 FCC Rcd 5857, 5867 ¶30 (2008) (stating that “[r]egulatory parity...is important to ensure a level playing field”); *Promotion of Competitive Networks in Local Telecommunications Markets*, 23 FCC Rcd 5385, 5387 ¶5 (2008) (discussing the importance of regulatory parity in the Commission’s determination to remove impediments to fair competition); *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, 23 FCC Rcd 5351, 5363 ¶24 (2008) (inquiring whether satellite carriers should have the same DTV obligations as cable providers in the interest of regulatory parity and consumer benefit); *id.* at 5380 (“We continue to strive for regulatory parity in our policymaking”) (separate Statement of Chairman Kevin J. Martin); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5921, ¶55 (2007) (ensuring regulatory parity for services regardless of delivery platform to meet Congressional mandate to promote broadband service); *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8801-02 ¶48 (1997) (recognizing the principle of competitive neutrality).

¹⁰³ The creation of a “beloved community” was a central underpinning of the philosophy of Dr. Martin Luther King, Jr., and has informed the civil rights movement ever since. The beloved community is a vision of a world driven by love and brotherhood. Dr. King described his vision as the bringing together of men. “But something must happen so to touch the hearts and souls of men that they will come together, not because the law says it, but because it is natural and right. In other words, our ultimate goal is integration which is genuine intergroup and interpersonal living. Only through nonviolence can this goal be attained, for the aftermath of nonviolence is reconciliation and the creation of the beloved community.” See Martin Luther King, TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 487 (James Washington ed., HarperCollins 1990).

recognized this principle when it applied the broadcast EEO rules to cable¹⁰⁴ and common carriers,¹⁰⁵ and in 2009 MMTC asked the Commission to use this principle to extend its broadcast advertising nondiscrimination rule to cable, satellite, and telecommunications video platforms.¹⁰⁶

Second, it appears that a specific practice by search engine providers may inure to the great detriment of small businesses that lack access to capital – an affiliation that the Commission has recognized as particularly ailing minority small businesses.¹⁰⁷ Search engine providers in particular have been described as controlling “the undisputed gateway to the Internet.”¹⁰⁸ Moreover, the dominant search engine provider, Google, recently accounted for over 71% of the entire U.S. search market,¹⁰⁹ giving Google an unprecedented ability to influence this market. Controlling the results of such a substantial share of the Internet search

¹⁰⁴ See *In re Amendment of the Commission’s Rules to Require Operators of Community Antenna Television Systems and Community Antenna Relay Station Licensees to Show Nondiscrimination in Their Employment Practices*, 34 FCC 2d 186 (1972).

¹⁰⁵ See *Rule Making to Require Communications Common Carriers to Show Nondiscrimination in their Employment Practices*, 24 FCC 2d 725 (1970).

¹⁰⁶ See *Petition for Rulemaking to Expand the Commission’s Broadcast Advertising Nondiscrimination Rule to Cable, Satellite and Telecommunications Services*, *Petition for Rulemaking*, Minority Media and Telecommunications Council, PRM09MB (filed Feb. 17, 2009) (available at <http://fjallfoss.fcc.gov/ecfs/comment/view?id=5515346085> (last visited Jan. 14, 2010)) (advocating for platform neutrality and regulatory parity).

¹⁰⁷ See, e.g. National Broadband Plan Workshop, *Capitalization Strategies For Small And Disadvantaged Businesses* (Nov. 12, 2009).

¹⁰⁸ SearchNeutrality.org, “Foundem’s Google Story” (available at <http://www.searchneutrality.org/foundem-google-story> (last visited Jan. 14, 2010)); see also Adam Raff, Op-Ed “Search, but you may not find,” *NEW YORK TIMES* (Dec. 28, 2009) (“Raff, *New York Times Op-Ed*”) (available at <http://www.nytimes.com/2009/12/28/opinion/28raff.html?pagewanted=print> (last visited Jan. 14, 2010)) (“Today, search engines like Google, Yahoo and Microsoft’s new Bing have become the Internet’s gatekeepers[.]”).

¹⁰⁹ See *Google Receives 71 Percent of Searches in September 2009*, Experian Hitwise Press Release (Oct. 6, 2009).

market gives Google an ability to influence what websites are accessed and thus which web-based businesses are able to generate the traffic necessary to succeed.¹¹⁰ The National Organizations are concerned about reports that Google is “heavily biased towards established brands” and erects “significant barrier[s] to new entrants and inevitably suppress[es] innovation.”¹¹¹ This trend could have a particularly harmful impact on minority-owned businesses, many of which are attempting to gain a foothold on the web while lacking access to capital. Search engine practices that assign visibility to businesses based on wealth rather than merit would impose a classic cycle of invisibility to minority enterprises: without access to capital they cannot secure visibility; but without visibility they cannot secure access to capital. Thus, the National Organizations fear repetition of the experience of minority businesses during the otherwise exciting early days of radio and television when the Commission – enthralled by these new technologies – did nothing to ensure that minorities would have a fair shot to secure an opportunity to participate in these industries.¹¹²

Thus, to the extent the Commission concludes that net neutrality rules are necessary to protect users from entities that would otherwise be free to control the Internet experience of others in un-neutral and harmful ways, the Commission should examine whether it should apply its rules to content, applications, and service providers. And irrespective of whether it adopts net

¹¹⁰ See Raff, *New York Times Op-Ed* (noting the “hundreds of billions of dollars of other companies’ revenues that Google controls indirectly through its search results and sponsored links”); see also SearchNeutrality.org, “Foundem’s Google Story.”

¹¹¹ SearchNeutrality.org, “Foundem’s Google Story”; see also Joe Nocera, “Stuck in Google’s Doghouse,” *NEW YORK TIMES* (Sept. 12, 2008) (available at http://www.nytimes.com/2008/09/13/technology/13nocera.html?pagewanted=3&_r=1 (last visited Jan. 14, 2010)) (discussing allegations that Google discriminates against nascent, competing search engine providers).

¹¹² See generally David Honig, “How the FCC Helped Exclude Minorities From Ownership Of The Airwaves,” McGannon Lecture on Communications Practices and Ethics, Fordham University (Oct. 5, 2006).

neutrality rules, the Commission should open a proceeding to consider the impact of search engine practices on small and minority businesses. These steps would help ensure that minorities have access all components of the Internet that are necessary for attaining first class digital citizenship. Applying any net neutrality rules the agency ultimately adopts to all Internet actors would also be consistent with President Obama’s vision that net neutrality rules “ensure that there’s a level playing field.”¹¹³

CONCLUSION

The National Organizations respectfully urge the Commission to remain mindful of the critical civil rights issues involved in this proceeding. The digital divide is unacceptable and closing it should be America’s #1 broadband policy priority. That means that each proposed rule in this proceeding should be evaluated – individually and in combination with other proposed rules – for its impact on broadband deployment, employment, access, affordability, adoption and use by minorities. If a proposed rule has been convincingly shown to be likely to help close the digital divide, and the rule is otherwise justified, the Commission should adopt it. On the other hand, the Commission should refrain from adopting net neutrality rules if the record evidence shows that they could lock in place a permanent digital underclass by making it impossible for current grave disparities to be closed within the rapid time frame with which all things online are evolving.

¹¹³ Remarks by the President on Innovation and Sustainable Growth, Hudson Valley Community College, Troy, New York (Sept. 21, 2009).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Honig", written in a cursive style.

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ATTACHMENT

NATIONAL ORGANIZATIONS

The ASPIRA Association
Black College Communications Association
The Hispanic Institute
Hispanic Technology and Telecommunications Partnership
Labor Council for Latin American Advancement
Latinos in Information Sciences and Technology Association
Lawyers' Committee for Civil Rights Under Law
League of United Latin American Citizens
MANA, A National Latina Organization
National Association of Black County Officials
National Black Caucus of State Legislators
National Conference of Black Mayors
The National Coalition on Black Civic Participation-Black Women's Roundtable**
National Organization of Black Elected Legislative Women
National Puerto Rican Coalition
United States Hispanic Chamber of Commerce

* The entire Coalition, as well as the Roundtable, is participating in this filing.