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

REPLY COMMENTS OF THE NATIONAL ORGANIZATIONS

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EXECUTIVE SUMMARY

As discussed in our opening comments, the National Organizations fully embrace and share the Commission's goal of preserving a free and open Internet. Moreover, the National Organizations have long supported the Commission's four existing open Internet principles, and in our opening comments we endorsed the adoption of the Commission's first proposed rule governing content neutrality and its sixth proposed rule promoting transparency. Ensuring 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. Indeed, achieving the important goals set out in this proceeding will allow all Americans to stand as first-class citizens in today's digital world.

As stated in our comments, however, the National Organizations evaluated the available evidence and reached the conclusion that certain net neutrality rules could unintentionally harm the interests of minorities if they are drafted or applied incorrectly. For this reason, we have urged the Commission to proceed cautiously, abide by a "first, do no harm" approach, and refrain from adopting any rules unless the record evidence shows that the interests of minorities will not be harmed.

The National Organizations are not alone in taking this position. Numerous national, state, and local civil rights groups responded to the Commission's NPRM and expressed concern that certain net neutrality rules could unintentionally harm the interests of minorities and detract from the Commission's important goal of closing the digital divide and ensuring universal broadband availability.

In light of the record developed thus far in this proceeding, the National Organizations have concluded that, as currently drafted, the Commission's fifth proposed rule would prohibit

the offering of enhanced or prioritized services. Such an outcome carries a significant risk of doing far more harm than good. The record shows that this rule could harm the interests of minorities by preventing broadband providers from offering enhanced or prioritized services that could generate revenues to offset the costs of network deployment and maintenance, shifting costs from large Internet-based companies to consumers in the form of higher prices for broadband. This would in turn impede the generation of revenues that could be used for the investment and deployment necessary to close the digital divide, negatively affecting job growth and economic opportunities and preventing small or start-up businesses (categories that include most minority and women owned businesses ("MWBEs")) from competing effectively with established Internet-based companies through the use of such enhanced services.

Accordingly, the National Organizations urge the Commission to adopt a more pro-consumer version of its fifth proposed rule that would prohibit unreasonable or anti-competitive discriminatory conduct that would adversely affect an Internet consumer's experience or choice. The Commission should also clarify that Internet access providers may offer enhanced or prioritized services, provided such services are offered in a non-discriminatory manner. This approach would keep the focus of net neutrality where it should be – on protecting the interests of consumers, encouraging innovation and investment by network providers, and ensuring that entrepreneurs have a fair shot at competing against established competitors.

In addition, the Commission should revisit the four principles that were the core of the existing policy framework for openness and amend each to reflect its original consumer focus. One of the keys to the success of the Commission's four principles is that they are all framed as consumer protection provisions. For example, the proposed new first principle says that "a provider of wireline broadband Internet access service may not prevent any of its users from

sending or receiving the lawful content of the user's choice over the Internet." The original principle stated that "*consumers* (emphasis added) are entitled to access the lawful Internet content of their choice." Rather than focus on consumers and continue to describe what consumers are entitled to do over the Internet, the NPRM now shifts the focus to apply only to broadband Internet access providers. Such a shift in focus gravitates away from the successful approach of the 2005 *Internet Policy Statement* and limits the application of net neutrality rules only to broadband network providers.

Consequently, the National Organizations would only support the proposed package of six rules if the Commission corrects its fifth proposed rule, and codifies the first four Internet principles as they were originally crafted *i.e.* as consumer protection provisions. If that is impossible, the Commission should go back to the drawing board rather than adopt a flawed package of regulations. On an issue this important, the Commission should not leave it to a future commission to correct any serious errors, because changing rules after they take effect is usually disruptive to business plans and expectations that were premised on Commission rules. It is vital that the Commission "do it right or not do it at all." Net neutrality rules should not be adopted if they contain elements of proposed rule five that would harm the interests of minorities.

However, if the Commission is unable to reach a consensus on a modified, pro-consumer version of the fifth proposed rule there is an alternative to shelving the rules altogether: the Commission can refer the fifth rule to an Administrative Law Judge ("ALJ") in order to undertake a formal rulemaking, including fact finding and the preparation of an authoritative report.

Finally, to further enhance opportunities for minority and women owned businesses online, we are proposing, in concept form, a New Entrant Digital Entrepreneur Incentive Program. This new Program would incentivize partnerships between Internet access providers and new entrants and thereby enable them to sustain a competitive presence online and overcome longstanding barriers of access to capital and opportunity. This program would help ensure that in the new digital economy – unlike the previous agricultural and industrial economies – all Americans will have an opportunity to express their talents, creativity and entrepreneurial mettle.

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I. INTRODUCTION

The National Organizations respectfully submit these reply comments in response to the Commission's Net Neutrality NPRM.[1] The National Organizations comprise fourteen civil rights, professional and service and elected officials' organizations representing the interests of minorities.[2]

As discussed in our opening comments, the National Organizations support the Commission's efforts to codify the first and sixth proposed rules, which relate to the accessing of lawful online content and transparency, respectively. In order to protect the interests of minority consumers and MWBEs, however, we urge the Commission to adopt a modified, pro-consumer version of the fifth proposed rule that would prohibit unreasonable or anti-competitive discriminatory conduct that would adversely affect an Internet consumer's experience or choice, and to codify the Commission's first four existing Internet principles in their original, consumer-focused form. Should there not be full Commission support for this approach, we urge the Commission to delegate authority to an ALJ to consider the fifth proposed rule in the course of a formal, on the record rulemaking proceeding. Finally, to advance diversity and competition in the digital economy, we propose the creation of a New Entrant Digital Entrepreneur Incentive Program.

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1 *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").

2 *See* Attachment for a list of 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.

II. THE NATIONAL ORGANIZATIONS WOULD SUPPORT A DECISION TO CODIFY THE EXISTING NET NEUTRALITY PRINCIPLES IN THEIR CURRENT, CONSUMER PROTECTION FORM PROVIDED THE FCC REVISES ITS FIFTH PROPOSED RULE

In 2005, the Commission sought to safeguard and promote the open Internet, and it did so by establishing four Internet principles.[3] As noted in our opening comments, the National Organizations have long supported the Commission's four principles.[4] These principles, as the Commission recognized in the NPRM, have "performed effectively" and have successfully balanced the interests of consumers, broadband Internet access providers, and providers of content, applications, and services.[5]

One of the keys to the success of the Commission's four principles is that they are all framed as consumer protection provisions. The principles state: (1) "*consumers* are entitled to access the lawful Internet content of their choice"; (2) "*consumers* are entitled to run applications and use services of their choice, subject to the needs of law enforcement"; (3) "*consumers* are entitled to connect their choice of legal devices that do not harm the network"; and (4) "*consumers* are entitled to competition among network providers, application and service providers, and content providers."[6]

Unfortunately, the Commission's Net Neutrality NPRM has departed from the successful pro-consumer approach adopted in the 2005 *Internet Policy Statement*. Rather than keeping the focus on consumers and continuing to describe what consumers are entitled to do over the Internet, the NPRM changes course and proposes to codify rules that only apply to broadband

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

4 *See* National Organizations' Comments at ii, 12-13.

5 *See* NPRM at ¶88.

6 *Internet Policy Statement*, 20 FCC Rcd at 14988 (¶4) (emphasis added).

Internet access service providers.[7] The proposed rules state: (1) "a provider of broadband Internet access service may not prevent any of its users from sending or receiving the lawful content of the user's choice over the Internet"; (2) "a provider of broadband Internet access service may not prevent any of its users from running the lawful applications or using the lawful services of the user's choice"; (3) "a provider of broadband Internet access service may not prevent any of its users from connecting to and using on its network the user's choice of lawful devices that do not harm the network"; (4) "a provider of broadband Internet access service may not deprive any of its users of the user's entitlement to competition among network providers, application providers, service providers, and content providers"; (5) "a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner"; and (6) "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."[8]

By taking the focus off of consumers and their rights, the Commission's proposed rules would lessen the protections consumers enjoy under the existing principles and, in this way, harm the interests of minorities and all Internet users.[9] As discussed in our opening comments, there is ample evidence that certain content, applications, and service providers have both the

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7 *See* NPRM at ¶89 ("We also propose 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[.]").

8 NPRM at ¶¶ 92, 104, 119.

9 *See, e.g.*, Comments of the Communications Workers of America, at 11-14 (Jan. 14, 2010) (urging the Commission to codify its four existing Internet principles because the Commission's newly proposed rules "narrow those principles in a way that would be detrimental to consumers").

ability and a demonstrated willingness to shape the Internet experience of all consumers, including minorities, in some decidedly un-neutral ways.[10] We noted that a dominant search engine provider may be using its position to influence the online experience of consumers in ways that inure to the detriment of minorities.[11] The Commission's proposed net neutrality rules would do nothing to protect consumers from these practices because they exempt content, applications, and service providers from the scope of the rules. In fact, as discussed below, the fifth proposed rule in particular would actually favor large content, applications and service providers over new entrants or small businesses (categories that include most MWBEs) by preventing these new entrants and small businesses from competing on a level playing field with their established competition. Affording protections to the largest online companies so that they can grow larger and more dominant is not what net neutrality should be about. Rather, if the Commission adopts net neutrality rules, they should serve to protect consumers with respect to their entire online experience.

Therefore, while the National Organizations wholly support the goals the Commission set forth in this proceeding, we believe the rules in the form proposed in the NPRM are not the best way to achieve these goals. Instead, the Commission should build on the successes of its 2005 *Internet Policy Statement* and codify its existing principles as they are currently written – as consumer protection provisions. If the Commission adopts this approach – and if it modifies its fifth proposed rule along the lines set forth below – the National Organizations would support the Commission's decision to adopt net neutrality rules. However, the Commission should go back to the drawing board rather than adopt a flawed package of regulations. On an issue this

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[10] National Organizations' Comments at 27-28.

[11] National Organizations' Comments at 28-32 (discussing the troubling practices employed by search engine providers).

important, the Commission should not leave it to a future commission to correct any serious errors, because changing rules after they take effect is usually disruptive to business plans and expectations that were premised on Commission rules. Therefore it is vital that the Commission "do it right or not do it at all." Net neutrality rules should not be adopted if they contain the elements of proposed rule five that would harm the interests of minorities.

III. TO HELP ENSURE THAT THE INTERESTS OF MINORITIES ARE NOT HARMED, THE COMMISSION SHOULD ADOPT A MORE PRO-CONSUMER VERSION OF ITS FIFTH PROPOSED RULE

As discussed in our opening comments, the available evidence shows that the Commission's fifth proposed rule may harm the interests of minorities in a number of ways. *First*, the rule could allow large Internet-based companies to avoid paying their fair share of network enhancements and build-out costs which, in turn, would offload these costs onto consumers who would end up paying relatively higher prices for broadband.[12] As the demand for bandwidth rises, network providers will be required to make large additional investments to expand network capabilities. While some of these additional investments could be funded by fees paid by new subscribers, demand for bandwidth is growing much faster than increases in broadband adoption rates. Therefore, a significant portion of the additional costs would have to be passed on to current broadband subscribers.[13] This would be especially harmful for our constituencies because affordability remains a key impediment to minorities' and low-income

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[12] *See* National Organizations' Comments at 14-17 (identifying numerous economic studies indicating that the Commission's proposed fifth rule would shift costs from large Internet companies to consumers and result in consumers paying relatively higher prices for broadband Internet access).

[13] *See* Robert J. Shapiro and Kevin A. Hassett, *The Role of Pricing Flexibility in Achieving Universal Broadband*, *in* THE CONSEQUENCE OF NET NEUTRALITY REGULATION 5 (Nov. 19, 2009), available at http://www.iwf.org/files/6d7e04de1e127b5d84a24d16a23a2ff3.pdf (last visited April 1, 2010).

Americans' full participation in the digital universe.[14] However, if broadband providers are able to recoup the cost of network infrastructure from heavy bandwidth application providers by offering commercial services that enhance the delivery and/or quality of services to consumers, analysts estimate that consumer savings would be between $3 billion to $6 billion a year.[15] The addition of new revenue sources would allow broadband providers to lower access charges to existing broadband subscribers by approximately $5 to $10 per month.[16] Studies show that broadband subscriptions would increase by an estimated 14.3 million additional homes if the price of broadband dropped by just $5; and an additional 28.6 million homes would subscribe to broadband in response to a $10 per month price reduction.[17] The Commission must consider how the pricing frameworks used to fund necessary infrastructure upgrades will affect broadband adoption and access cost. From the National Organizations' perspective, adopting a rule that would increase the price of broadband and lead to lower broadband adoption levels, especially among minorities, is unacceptable.

Second, as currently drafted, the Commission's fifth proposed rule could impede the investment and deployment necessary to bridge the digital divide.[18] As the record in this proceeding shows, both economic analysis and experience with similar regulations in the past

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14 *See, e.g.*, FCC, *Connecting America: The National Broadband Plan* (rel. March 17, 2010) ("National Broadband Plan") at Chapter 9 (discussing the connection between income and broadband adoption).

15 *See* Hance Haney, *Network Neutrality Regulation Would Impose Consumer Welfare Losses*, *in* THE CONSEQUENCES OF NET NEUTRALITY REGULATION 49 (Nov. 19, 2009) (collecting data). *See also* Gregory Sidak, "A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet," *Journal of Competition Law and Economics,* Vol. 2, No. 3, September 2006, available at http://jcle.oxfordjournals.org/cgi/content/abstract/2/3/349 (last visited April 20, 2010) at 464-66.

16 *See* n. 15 *supra*.

17 *Id.* (collecting data).

18 *See* National Organizations' Comments at 19-23.

show that the uncertainty inherent in this type of a rule could deter the massive investments necessary to achieve the goal of providing all Americans with equal and ubiquitous access to broadband.[19] Indeed, the Commission's auction of Upper 700 MHz C Block spectrum – spectrum that 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 this C Block spectrum led to a two-thirds reduction in the market value of that spectrum.[20] We cannot afford to adopt rules that would deter the investments needed to provide all Americans with an equal opportunity to the benefits of the digital society.

Third, the record evidence shows that the Commission's fifth proposed rule could have a negative impact on job creation and economic growth.[21] As noted in our opening comments, unemployment rates for minorities are much higher than they are 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

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19 *See* National Organizations' Comments at 19-23 (discussing relevant economic studies and past regulatory experiences); *see also* Comments of Time Warner Cable, at 8 (Jan. 14, 2008) (discussing the substantial investments in broadband infrastructure that have been made in the absence of net neutrality rules).

20 *See* Ellen P. Goodman, *Spectrum Auctions and the Public Interest*, 7 J. Telecom. & High Tech. L. 101, 109 (2009); *see also Oversight of the Federal Communications Commission -- The 700 MHz Auction: Hearing Before the House Subcomm. on Telecomm. & the Internet*, 110th Congress (April 15, 2008) (written testimony of Harold Feld, Senior Vice-President, Media Access Project on Behalf of the Public Interest Spectrum Coalition).

21 *See, e.g.*, National Organizations' Comments at 21-23; *see also* Comments of the Communications Workers of America, at 4 (Jan. 14, 2010) (urging the Commission to revise its proposed rules in a manner that will "encourag[e] job-creating investment").

and indirectly.[22] 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.[23] A recently released 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.[24] Further, the availability of advanced telecommunications networks is essential to attract and retain businesses in local communities. Indeed, study after study has shown the positive impact broadband deployment can have on economic growth.[25] In light of this evidence – and the current levels of unemployment in this country – we simply cannot support the promulgation of a regulation that would deter future investment in broadband deployment.

Moreover, as the comments submitted by a number of different parties show, the Commission's fifth proposed rule could also have a discriminatory impact on new or small Internet-based businesses by preventing them from being able to compete with large, established Internet-based companies.[26] Such an outcome could have a particularly disproportionate impact

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[22] *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); *see also* National Broadband Plan at Chapter 13.

[23] *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).

[24] Jed Kolko, *Does Broadband Boost Local Economic Growth?*, Public Policy Institute of California (Jan. 2010), available at http://www.ppic.org/content/pubs/report/R_110JKR.pdf (last visited April 20, 2010).

[25] *See, e.g.*, *id.*; *see also* U.S. Broadband Coalition Report (collecting data and information from various studies and report); *see also* Comments of the Communications Workers of America, at 6-8 (Jan. 14, 2010) (providing statistics on the positive impact broadband investment and deployment has on job creation).

[26] *See, e.g.*, Comments of NCTA, at 35-36 (Jan. 14, 2010) (stating that the Commission's fifth proposed rule would protect large online content and application providers from competition); *see also* Comments of the Communications Workers of America, at 16 (Jan. 14, 2010) ("Absent the ability to purchase content delivery network services and QoS offerings from a broadband Internet access provider, new, small-entrant content, application, or service providers could not enter and compete against large content, application, or service providers

on many MWBEs. Large Internet-based companies, such as Amazon, eBay, Yahoo, MSN, and Google, have invested substantial resources in deploying their own content delivery networks ("CDNs"), server farms, and other infrastructure to speed delivery of their content and applications to end-users. This infrastructure essentially creates a private Internet for these established companies because it allows them to bypass the traditional Internet backbone that other companies use. This private infrastructure allows the established companies to offer their customers faster and more reliable access to their services, content, and applications. At the same time, these private networks require enormous sums of capital to build and thus, in general, can only be self-provisioned by the largest incumbent Internet-based companies. To compete with these incumbents, entrepreneurs – including MWBEs – need access to CDNs and other network services that will allow them to provide their customers with the same fast and reliable offerings as their established competitors.

Currently, there are a number of third-party CDN providers, like Akamai, Limelight, Level 3, and AT&T, that start-ups can team up with to offer their content, products, or services over a CDN or otherwise provide their offerings in a manner that is comparable to their established competition (for example by providing route optimization). The Commission's fifth proposed rule would prevent businesses and entrepreneurs from entering into voluntary agreements with broadband access providers for these types of offerings. By preventing these voluntary agreements, the Commission's fifth proposed rule would effectively insulate the established Internet-based companies from competition. In this way, the Commission's proposed rule would have a very un-neutral impact on entrepreneurs and many MWBEs. The

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that have built their own geographically dispersed networks of servers that enable them to prioritize their own services to end-users.").

rule would allow the big online companies to grow larger while preventing start-ups from getting a toehold in the market.

A quick example (based on two entrepreneurs MMTC is assisting through its media brokerage) will help illustrate this point. Let's say that a new minority-owned business is attempting to launch a service that provides consumers with online access to streaming videos that are designed to appeal to a minority audience. In launching this service, the small business owner must compete with existing online video services such as YouTube, which is owned by Google and which provides consumers with access to millions of videos. Large content providers and distributors can assure consumers in the small business owner's market that they will have fast and high-quality access to online videos because these large companies have the financial resources to deploy their own hardware (including expensive servers and routers) close to consumers nationwide. As noted above, this infrastructure allows large firms to bypass the traditional Internet backbone and ensure that consumers can, for example, view videos on YouTube without experiencing disruptions that might otherwise degrade the quality of its video offerings. Unlike companies like Google, the small business owner does not have the financial resources to deploy her own infrastructure. She cannot pre-position her content on servers located close to her consumers, but, if she could, this would allow her to reduce the distance and number of routers her latency-sensitive packets of data must travel and would cut down on the likelihood that network congestion or other problems would degrade the quality of her video offering. If the small business owner cannot assure her customers that they will experience the same high-quality and fast access to videos on her website as those available on YouTube, then she stands little chance of gaining any market share.

The small business owner may have a fair shot at competing with her established competitors, however, if she can team up with her local broadband provider and enter into a quality of service agreement for enhanced or prioritized delivery of her service offerings. This would allow her to provide her customers with the same fast and high-quality videos offered by much larger companies. Under the Commission's fifth proposed rule, the local broadband provider could not offer this service to the small business owner.

Thus, while some argue that net neutrality rules are necessary to prevent broadband providers from harming minorities, the reality is that many companies, including many minority-owned businesses, could be harmed if inflexible net neutrality rules prevent broadband providers from helping these businesses compete with established online companies. Incumbent large online companies have every incentive to limit a start-up's access to the types of services that they have the resources to self-provision, and the Commission's fifth proposed net neutrality rule could help solidify these incumbents' advantages. This is precisely the type of unintended consequence that could result if the Commission adopts its fifth proposed rule as currently drafted.

To be sure, the National Organizations do not stand alone in expressing concern about the Commission's proposed rules. The overwhelming majority of commenters in this proceeding who represent the interests of minorities share the National Organizations' concern that the Commission's proposed rules could harm the interests of minorities and detract from the Commission's important goal of ensuring universal broadband availability.[27]

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[27] *See, e.g.*, January 21, 2010, Letter from Calvin Smyre, President, National Black Caucus of State Legislators, Sharon Weston Broome, President, National Organization of Black Elected Legislative Women, Robert Steele, President, National Association of Black County Officials, and Mayor George L. Grace, President, National Conference of Black Mayors (dated Jan. 21, 2010, and filed in Docket 09-191 on Jan. 24, 2010); Comments of the National Black Chamber

Instead of imposing what amounts to an unqualified prohibition on the provision of enhanced or prioritized offerings – which, as shown, favors large incumbent Internet-based companies over minority consumers and MWBEs – the Commission should adopt an approach that is at once more reasonable and nondiscriminatory.

The Commission should adopt a rule that proscribes any unreasonable or anti-competitive discriminatory conduct that would adversely affect an Internet consumer's experience or choice. The Commission should also clarify that Internet access providers may offer enhanced or prioritized services, provided such services are offered on a non-discriminatory basis. This approach would keep the focus of this proceeding where it should be – on consumers and on ensuring that consumers can have nondiscriminatory access to all that the Internet has to offer. It would also serve the goal the Commission identified in the NPRM of "distinguishing socially beneficial discrimination from socially harmful discrimination in a workable manner."[28]

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of Commerce, Docket 09-191 (Jan. 5. 2010); Comments of the National Council of La Raza, Docket No. 09-191 (Jan. 14, 2010); Comments of the Rainbow Push Coalition, National Headquarters, Docket No. 09-191 (Jan. 8, 2010); Comments of the National Urban League, Docket No. 09-191 (Jan. 14, 2010); *see also* Letter on behalf of the National Association for the Advancement of Colored People and the Hispanic Technology and Telecommunications Partnership, to Gigi Sohn, President and Co-Founder, Public Knowledge (Oct. 23, 2009); *see also* Comments of the Hispanic Leadership Fund, Docket 09-191 (Jan. 14, 2010); Comments of the Sacramento Asian Pacific Chamber of Commerce, Docket 09-191 (Jan. 12, 2010); Comments of the Quad County Urban League, Docket 09-191 (Jan. 13, 2010); Comments of the Hmong American Friendship Association, Inc. , Docket 09-191 (Jan. 8, 2010); Comments of the Minority PUL Alliance, Docket 09-191 (Jan. 6, 2010); Comments of the Nevada Hispanic Services, Inc., Docket 09-191 (Jan. 4, 2010); Comments of the NAACP Tennessee State Conference of Branches, Docket 09-191 (Jan. 4. 2010); Comments of the Hispanic Chamber of Commerce of Silicon Valley, Docket 09-191 (Jan. 4, 2010); Comments of the Northern Nevada Black Cultural Awareness Society, Docket 09-191 (Jan. 4, 2010); Comments of the Orange County Hispanic Chamber of Commerce, Docket 09-191 (Jan. 4, 2010).

[28] *See* NPRM at ¶103.

Modifying the fifth proposed rule as outlined above would ensure that no participant in the Internet ecosystem can exercise market power in a manner that harms the interests of minorities while allowing broadband providers to take actions that can have a positive impact on consumers. This approach would also be consistent with the framework laid out by Senator Olympia Snowe,[29] which is an approach that has garnered widespread support in this docket.[30] Moreover, both the industry and the Commission have experience conducting business under a regime that protects consumers from unreasonable or anticompetitive discrimination.[31] Thus, when compared to the novel standard contained in the Commission's fifth proposed rule, an unreasonable and anticompetitive standard would prove more workable, pro-consumer, and nondiscriminatory.

Making this modification to the Commission's fifth proposed rule would ensure that minorities could continue to enjoy the benefits of a free and open Internet while, at the same time, lessening the likelihood that net neutrality would end up unintentionally harming the

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[29] *See* Letter from Senator Olympia J. Snowe, U.S. Senate, to FCC Chairman Julius Genachowski (Oct. 22, 2009); *accord* NARUC, *Resolution on Open Access to the Internet* (adopted by the NARUC Board of Directions, Feb. 17, 2010) (endorsing principles one through four and six, and endorsing principle five as adjusted consistent with NARUC's position).

[30] *See, e.g.*, Comments of the Communications Workers of America at 14-21 (Jan. 14, 2010) (supporting the Commission's decision to codify net neutrality rules, but urging the Commission to modify its fifth proposed rule to include an "unjust or unreasonable" discrimination standard); *see also* Comments of the National Exchange Carriers Association, Inc., at 5-9 (urging the Commission to modify its fifth proposed rule so that it prohibits "unreasonable and anticompetitive" discrimination if the Commission decides to adopt net neutrality rules); Comments of the Rural Cellular Association, at 4-11 (Jan. 14, 2010) (supporting the adoption of an "unjust or unreasonable" discrimination standard); Comments of PAETEC, at 12 (Jan. 14, 2010) (asking the Commission to modify its fifth proposed rule so that it prohibits "unjust or unreasonable" discrimination); Comments of Comcast Corporation at 42-44 (Jan. 14, 2010) (stating that if the Commission is going to adopt a nondiscrimination rule, one that prohibits "unreasonable and anticompetitive" discrimination would better serve the public interest).

[31] *See, e.g.*, NPRM ¶109 (discussing the Commission's and industry's experience with the unjust and unreasonable discrimination provisions of Section 202(a) of the Act).

interests of minorities. Thus, if the Commission were to make this change to the proposed rule and modify the remaining rules along the lines outlined above, the National Organizations would support the Commission's decision to adopt net neutrality rules.

IV. IF CONSENSUS CANNOT BE REACHED ON A PRO-CONSUMER ALTERNATIVE TO THE FIFTH PROPOSED RULE, THE COMMISSION SHOULD REFER CONSIDERATION OF THE RULE TO AN ADMINISTRATIVE LAW JUDGE

If the Commission is unable to reach a consensus at this time on a modified, pro-consumer version of the fifth proposed rule, the Commission should refer the rule to an ALJ so that a formal rulemaking on this issue can be conducted. The Commission has rules in place that govern formal rulemaking proceedings,[32] and members of the minority community have long urged the Commission to hold more trial-type hearings in the rulemaking context.[33] Moreover, numerous other agencies use these types of trial type hearings in rulemaking proceedings[34] and courts look favorably upon this procedure, which would help increase the Commission's ability to adopt sustainable rules.[35]

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32 *See* 47 C.F.R. §1.201 *et seq.*

33 *See, e.g.*, MMTC Road Map for Telecommunications Policy at 24, 29 (July 21, 2008) (available at http://mmtconline.org/lp-pdf/MMTC-Road-Map-for-TCM-Policy.pdf) (recommending that the Commission hold more trial-type formal hearings before ALJs).

34 *See, e.g.*, 15 U.S.C. §57a (requiring the Federal Trade Commission to hold hearings, conducted by a chief presiding officer who shall issue a recommended decision based on findings and conclusions as to relevant evidence, when adopting certain rules); *see also* Robert C. Atkinson, *Telecom Regulation For the 21st Century: Avoiding Gridlock, Adapting to Change*, 4 J. Telecomm. & High Tech L. 379, 396 (2006) (noting that state PUCs, unlike the FCC, use ALJs regularly and arguing that the FCC should begin using them effectively).

35 *See, e.g.*, Kenneth G. Robinson, Telecommunications Policy Review, vol. 23 no. 40 (Oct. 7, 2007) (recommending the "heavy use of fact-based, trial-type hearings, for just about everything"); *see also* Robert C. Atkinson, *supra*, 4 J. Telecomm. & High Tech L. at 396 n. 45 (noting that appellate courts look less favorably on FCC decisions because they are not adopted through formal procedures).

Under this approach, the Commission could empower an ALJ to consider the merits of the fifth proposed rule based on evidence presented, including sworn testimony and the examination of witnesses, which the ALJ could evaluate for credibility.[36] The ALJ could also review sensitive materials under protective orders to ensure that all relevant information is considered while at the same time ensuring the confidentiality of sensitive business or proprietary data.[37] At the conclusion of the evidentiary phase of the proceeding, the ALJ would release a Report, which would contain findings of fact and conclusions of law along with the text of any rule the ALJ deems appropriate and fair to all parties involved in light of the record created.[38] The full Commission would then have an opportunity to review or modify the ALJ's Report and the text of any proposed rule the ALJ recommends.[39]

Proceeding by formal rulemaking could produce a number of significant benefits. From the National Organizations' perspective, a formal rulemaking could help ensure that the interests of minorities and the poor and underserved are fully considered and well protected, since a trial record – unlike lobbyists' visits to commissioners and staff – is a great equalizer. Certainly access to the administrative courts has been vital in securing civil rights advances over the past three generations. Proceeding by formal rulemaking before an ALJ would also enable the Commission to move cautiously and be mindful of the potential for its actions to have unintended consequences for minorities.

It would also serve the Commission's interests to use an ALJ. If a party challenges any rule or rules the agency adopts in this proceeding, the Commission may have an easier time

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36 *See* 47 C.F.R. §1.351 (discussing rules regarding evidence in proceedings before an ALJ).

37 *See* 47 C.F.R. §1.313 (discussing the use of protective orders).

38 *See* 47 C.F.R. §1.267 (setting forth the rules governing the ALJ's decision).

39 *See* 47 C.F.R. §1.276 (providing for full Commission review of decisions by an ALJ).

defending the rule against any challenges if it bases its decision on a formal rulemaking record. Therefore, short of reaching a consensus that is consistent with the approach described above, the Commission should refer the fifth proposed rule to an ALJ.

V. A CONCEPT FOR A NEW ENTRANT DIGITAL ENTREPRENEUR INCENTIVE PROGRAM

To further enhance opportunities for minority and women owned businesses online, we propose, in concept form, a New Entrant Digital Entrepreneur Incentive Program. This new Program would incentivize partnerships between Internet access providers and new entrant applications, content and service providers, and thereby enable them to sustain a competitive presence online and overcome longstanding barriers of access to capital and opportunity. This program would help ensure that in the new digital economy – unlike the previous agricultural and industrial economies – all Americans will have an opportunity to express their talents, creativity and entrepreneurial mettle.

In light of the pressing need to close the digital divide, the Commission must ensure that its adoption of net neutrality rules do not detract from its ability to close this gap. As noted in our opening comments, access to broadband is the key to first-class citizenship in today's digital age.[40] Thus an incentive program to promote new entrant participation is one issue that all members of the minority community can agree upon.

Current data indicates that the Internet connectivity gap between minorities and white Americans, as well as affluent and lower-income Americans is still significant.[41] If the

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40 National Organizations' Comments at 2-14.

41 John Horrigan, *Home Broadband Adoption 2009*, Pew Internet & American Life Project, June 2009, available at http://www.pewInternet.org/~/media//Files/Reports/2009/Home-Broadband-Adoption-2009.pdf (last visited March 29, 2010).

Commission is to fulfill its Congressional mandate to ensure that "every American has access to broadband capability," policymakers and the industry itself must come to grips with the reality of the economics and investment necessary to finance universal broadband.

The National Organizations believe that the industry itself has a role to play in helping to extend broadband connectivity to every American. In addition to reforms to the universal service fund ("USF") suggested in the National Broadband Plan, the Commission should consider other incentive programs to foster broadband availability and digital literacy within minority and other underserved communities.

Our proposed program would be loosely modeled on the Community Reinvestment Act (CRA), which encourages U.S. depository institutions to foster community development by meeting the credit needs of the communities in which they operate, including low and middle-income communities.[42] The CRA is based on the principle that banks and thrift institutions have a continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered; much as the Commission's own requirement that radio and TV stations serve the public within their community of license.[43] To enforce the CRA, federal regulatory agencies examine a banking institutions record of CRA compliance (i.e., what measures the bank has taken to foster community development) when approving applications for new branches, or for mergers or acquisitions.[44] CRA regulations provide the "carrot and stick" incentive necessary to ensure banking institutions maintain sufficient focus on their local communities.

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42 12 U.S.C. § 2901 *et seq*.

43 Vern McKinley, "Community Reinvestment Act, Ensuring Credit Adequacy or Enforcing Credit Allocation?" (1994), in REGULATION, Vol. 17, No. 4 at 25.

44 *Id*.

The Commission should examine what "carrot and stick measures" can be put into place to encourage broadband deployment and broadband adoption in underserved communities. For example, broadband providers could receive additional USF credit for measures aimed at increasing digital literacy within various communities, or for the development of public-private partnerships to provide technology and training to new entrants and particularly MWBEs within their franchise areas.

Attendant to adopting net neutrality rules, the Commission could consider making relaxed network management obligations the default paradigm if premised on a broadband access provider's record of activity to incubate new digital entrepreneurship. For example the expansion and provision of internet connectivity to community anchor institutions, or investment in relevant content applications targeted at minority communities would qualify as efforts to induce broadband adoption and use – as would many of the CDN-related voluntary arrangements whose survival would be at risk if proposed rule five were to be adopted in the form proposed in the NPRM.

As the Commission proceeds with this rulemaking and implements the National Broadband Plan, it must use every opportunity to ensure that the goal of ubiquitous broadband becomes a reality. The Commission must remain mindful of its role in helping to facilitate an environment that will foster investment and encourage private sector efforts to speed the provision and adoption of broadband services.

VI. CONCLUSION

For the foregoing reasons, the National Organizations urge the Commission to continue to proceed cautiously in this proceeding. To lessen the likelihood that the Commission's net neutrality efforts do not unintentionally harm the interests of minorities, the National

Organizations urge the Commission to adopt a more pro-consumer version of its fifth proposed rule that would prohibit unreasonable or anti-competitive discriminatory activities that adversely affect the consumer online experience or choice. Rather than adopting a rule that might prevent small or start-up companies from competing on a level playing field with established incumbents and that might shift costs from large Internet-based companies to consumers in the form of higher prices for broadband, the Commission should simply prohibit unreasonable or anticompetitive discrimination that would adversely affect a consumer's online experience. If the fifth proposed rule is modified along these lines, and the Commission codifies its existing Internet principles as they were originally crafted (*i.e.*, as consumer protection provisions), the National Organizations would support adoption of net neutrality rules. In the alternative, the Commission should refrain from adopting net neutrality rules at this time and, instead, should consider delegating authority to an ALJ to conduct a fact-finding on the fifth proposed rule. Finally, the Commission should create a New Entrant Digital Entrepreneur Incentive Program to incentivize partnerships between Internet access providers and new entrants and thereby overcome longstanding barriers of access to capital and opportunity.

Respectfully submitted,

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April 26, 2010

ADDENDUM

IMPLICATIONS OF *COMCAST V. FCC*

On April 6th, the U.S. Court of Appeals for the District of Columbia vacated the Commission's 2008 enforcement action against Comcast Corporation ("Comcast") that sought to regulate Comcast's network management practices. In its decision, the Court found that the Commission had failed to tie its assertion of Title I ancillary authority over Comcast's network management practices to any statutorily mandated responsibility set forth within the Communications Act.[45]

The Court's decision has unsettled the foundations upon which the Commission seeks to build its regulatory framework for net neutrality, and may affect whether the Commission can adopt its proposed net neutrality rules as currently constructed, particularly the fifth proposed rule that, as currently crafted, clearly lacks jurisdictional basis given the Court's conclusion that the Commission lacks authority to regulate the network management practices of Internet access providers.

Further, the Court's ruling left unsettled whether the Commission is authorized to impose the existing network neutrality principles contained in the 2005 *Internet Policy Statement*. The

[45] *Comcast Corporation v. Federal Communications Commission*, No. 08-1291 (D.C. Cir. April 6, 2010). In its discussion, the Court drew a sharp contrast between certain provisions of the Communications Act that are to be interpreted as express delegations of authority from which Title I ancillary authority may be derived and those provisions of the Act that merely expressed Congressional goals that serve to illuminate the scope of delegated authority. In its discussion, the Court referenced the range of ancillary authority flowing from Title III of the Act, including Sections 303 and 307. The opinion touches upon the breadth of authority flowing from Title III and fortunately clarifies that the Commission would have ancillary jurisdiction under Title III to address broadcast EEO, advertising discrimination and procurement discrimination. *See id.* slip op. at 22-28.

Court stressed that "policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority…."[46]

The National Organizations believe there was merit in the policy positions outlined by the Commission in 2005, and reiterate their support for those principles as originally conceived. The National Organizations continue to believe that principles one through four, as well as principle six as set forth in the Commission's NPRM, should continue in effect, whether through rule, policy or industrywide commitments. While the Commission re-evaluates its position and the extent of its authority over net neutrality, the National Organizations urge industry participants to commit to continued observance of the existing four principles and commit to the transparency necessary to provide consumers with informed choices. Further, the Commission and the industry should take aggressive steps, such as those recommended in Section V of these Reply Comments, to incentivize new entrant and, particularly, MWBE participation online. The issues surrounding the implementation of principle five, as outlined in the NPRM, may have to be tabled until the questions surrounding the scope of the Commission's jurisdiction can be settled.

[46] *Id.* slip op. at 22.

ATTACHMENT

NATIONAL ORGANIZATIONS

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
League of United Latin American Citizens
MANA, A National Latina Organization
National Association of Black County Officials
National Black Caucus of State Legislators
National Coalition of Puerto Rican Women
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

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