Multicultural Media, Telecom and Internet Council

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February 18, 2015

Hon. Tom Wheeler
Chairman
Hon. Mignon Clyburn
Commissioner
Hon. Ajit Pai
Commissioner
Hon. Jessica Rosenworcel
Commissioner
Hon. Michael O'Rielly
Commissioner
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

RE: Protecting and Promoting the Open Internet, GN Docket No. 14-28

Dear Chairman Wheeler and Commissioners:

The Multicultural Media, Telecom and Internet Council ("MMTC") shares in the Commission's goals to protect and promote an open Internet. MMTC submits this *ex parte* to: (1) reinforce our position that Section 706 of the Telecommunications Act, supplemented by a consumer-friendly, probable cause enforcement mechanism like Title VII of the 1964 Civil Rights Act, is the most viable regulatory approach to enforce open Internet provisions while protecting consumers;[1] and (2) raise questions regarding the proposed use of Title II and the potential unintended consequences on broadband adoption for people of color, the disabled, the economically disadvantaged, rural residents, and seniors. As stated in previous filings, MMTC believes that we can achieve the goal of *smart net neutrality* rules while fostering broadband adoption and informed use without the use of Title II regulation.[2]

[1] *See generally* Comments of the National Minority Organizations, FCC GN Docket No. 14-28 (July 18, 2014).

[2] The D.C. Circuit made clear in *Verizon v. FCC, 740 F.3d 623* (D.C. Cir. 2014), that "[S]ection 706 of the Telecommunications Act…furnishes the Commission with the requisite affirmative authority to adopt [open Internet] regulations." *Id*. at *628-636.* The D.C. Circuit upheld the transparency rule as a valid exercise of the FCC's authority under Section 706. *See id*. *generally, see also id.* at Silberman dissenting opinion at 663, n. 8. The Court also made clear that Section 706 would support the adoption of appropriately tailored rules prohibiting blocking of online content and requiring "commercial reasonableness" in business relationships between ISPs and edge providers. *Id.* at 958. The "commercial reasonableness" standard can be likened to

Given the Chairman's proposal to reclassify broadband as a public utility,[3] MMTC raises three considerations for the Commission as it reviews the draft proposal.

First, although the proposal clearly states that the FCC will not engage in rate regulation generally, it is not clear whether forbearance from rate regulation under Sections 201 and 202 would be effective in and of itself, or whether "for the first time, the FCC would exercise the power to declare broadband Internet rates and charges unreasonable after the fact."[4]

To gain some certainty around the practical operation of Sections 201 and 202 and ensure that these provisions are used only for the purposes the Chairman's draft intends, MMTC urges the Commission to consider following the FCC's *2000 EEO R&O* procedural precedent.[5] The forthcoming Open Internet R&O could simply state that if an adjudicative complaint is filed seeking to apply *de facto* rate regulation *ex ante*, the agency (in the words of the *2000 EEO R&O*) "will dismiss any such complaint summarily."[6] MMTC respectfully proffers that this procedural precedent would clarify the parameters in the Open Internet R&O. The relevant facts regarding the *2000 EEO R&O* are set forth below.

In 1998, the D.C. Circuit struck down the Commission's broadcast EEO rules,[7] and the Commission sought to reform them. Since 1969, petitions to deny license renewals, filed by respected civil rights organizations such as the NAACP, the League of United Latin American Citizens (LULAC), and the Rainbow PUSH Coalition, had been the primary vehicle for broadcast EEO enforcement. Typically, these petitions presented evidence that a station's workforce was homogeneous and, through primary reliance on "word-of-mouth" recruitment, tended to replicate itself over time – a practice the Commission has long recognized as inherently discriminatory.[8] Unfortunately, some

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core Title II standards requiring just and reasonable terms and conditions, and prohibiting unreasonable discrimination without the substantial burdens and uncertainty created by common carrier regulations. We should be following the D.C. Circuit's roadmap for new open Internet rules under Section 706, whereby the FCC can preserve the flexibility needed for regulating Internet access without needlessly creating legal risk and uncertainty.

[3] Chairman Wheeler Proposes New Rules for Protecting the Open Internet 1, 4 (2015), http://www.fcc.gov/document/chairman-wheeler-proposes-new-rules-protecting-open-internet (last visited Feb. 17, 2015).

[4] Hon. Ajit Pai, Press Statement, February 10, 2015, available at http://www.fcc.gov/document/comm-pai-press-stmt-president-obamas-plan-regulate-internet (last visited February 12, 2015). *See also* Michael Powell, Empty Promises: Rate Regulation is not Dead Yet, available at https://www.ncta.com/platform/public-policy/empty-promises-rate-regulation-is-not-dead-yet/ (last visited February 12, 2015).

[5] *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 2329, 2418 ¶226 (2000) ("*2000 EEO R&O*").

[6] *Id.* at 2418 ¶226.

[7] *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, *pet. for reh'g denied*, 154 F.3d 487, *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998).

[8] *See, e.g. Jacor Broadcasting Corp*., 12 FCC Rcd 7934, 7940 ¶14 (1997) (holding that over-reliance on word-of-mouth recruitment may "have the effect of discriminating against qualified minority groups or females"); *Walton Broadcasting, Inc. (KIKX, Tucson, AZ) (Decision)*, 78 FCC2d 857, 875, *recon. denied*, 83

other petitioners abused the process by filing petitions to deny challenging renewal and transfer applications based only on the assertion (without any supporting evidence) that few minorities or women were employed at a station, without examining whether remedial recruitment steps had been undertaken. Some of these petitions were filed primarily to secure a financial settlement.[9]

At the time, Commissioner Powell and MMTC President Emeritus David Honig came up with a solution, which is found in the *2000 EEO Report and Order*. In paragraph 226 of the document, the Commission refers to the Annual EEO Reports (FCC Form 395) that were filed by individual broadcast stations to report on employees by race, gender, and job category:

> Thus, contrary to NAB's contention, we *have* guaranteed that we will not use the Form 395-B information against any broadcaster in enforcing our EEO rules. Moreover, having stated that we will not use the employment profile data collected on Form 395 to assess compliance with our EEO rules, we will be legally foreclosed from doing so. Therefore, no broadcaster or cable entity has reasonable cause for concern that the Form 395 employment profile data will be used against it in FCC enforcement actions. The fact that a few commenters suggest, without any factual foundation, that an agency has a concealed motive, cannot thereby deprive the agency of authority to adopt requirements that are clearly within its statutory authority. **Of course, we cannot guarantee that no third party will file a petition against a broadcaster based on the Form 395-B employment profile data -- or some other equally inadequate basis, for that matter. But we will dismiss any such petition summarily.**[10]

Such an approach was instrumental in saving the EEO rule. The approach was supported by Chairman Kennard, Commissioner Ness, Commissioner Tristani, and Commissioner Powell. Commissioner Powell also issued an eloquent and powerful statement in support.[11]

Second, MMTC continues to believe that Title II regulation, even when ostensibly administered with a lighter touch, will likely have unintended consequences on broadband adoption for people of color, the disabled, the economically disadvantaged, rural residents, and seniors. While the suggestion that the use of particular statutes within Title II, alongside Section 706 authority, will create strong protection against blocking and unreasonable discrimination, these provisions may primarily benefit those who are already online, while disregarding the digitally unserved and underserved who urgently need the benefits that robust high-speed broadband affords.[12] Moreover, Title II presupposes a heavy-handed approach to Internet regulation that is contrary to the policies that have contributed to the increased supply and demand for broadband services.[13] As MMTC has

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FCC2d 440 (1980) (holding that station used "employment practices which discriminated against minority groups in recruitment and employment" including "'word of mouth' referral from a predominately white work force, which, while unintended, effectively discriminated against minority group employment.")

[9] To address this practice, the Commission adopted an anti-greenmail rule, 47 C.F.R. §73.3588.

[10] *2000 EEO R&O*, 15 FCC Rcd. at 2418 ¶226 (*emphasis added*) (*internal citations omitted*).

[11] *Id.* at 2496 (Statement of Commissioner Michael K. Powell).

[12] *Id*. at 1-2.

[13] *See* Fred Campbell Jr., Internet Innovation Alliance, *Impact of Title II on Communications Investment* (February 15, 2015), available at http://www.internetinnovation.org/library/special-reports/impact-of-title-ii-regulation-on-communications-investment/ (last accessed February 17, 2015). "Through an analysis of

stated in previous filings, significant investment in broadband infrastructure improves access in all communities,[14] and is particularly important to economically disadvantaged and rural communities that tend to be affected by increases or decreases in investment and concomitant price changes.[15]

Further, MMTC urges the Commission to recognize that there will be some level of uncertainty associated with the taxes and fees often incurred from utility-like regulation. While the Chairman has stated that there will be no new taxes on Internet services due to the current moratorium of the Internet Tax Freedom Act (ITFA), this presumption is premature as the legislation is not permanent. Moreover, the current ITFA does not necessarily exempt consumers from all telecom-related taxes and fees, given the ability of states to still intervene.[16] Such ambiguity around the type of tax and the length of exemption could have significant consumer impact, particularly on more vulnerable populations where price variability can affect their choice to adopt "broadband" over "bread." MMTC strongly recommends that the Commission evaluate the relationship between broadband adoption and Title II regulation to ensure that the progress made toward narrowing the "digital divide" is not reversed. This would be unacceptable and serve to maintain the current status quo for many vulnerable groups – ensuring their destiny as second class digital citizens.[17]

Finally, we concur with the Chairman that consumers need an open Internet.[18] Consumers also require a user-friendly system to effectively resolve their complaints. In prior filings, MMTC has proposed that the Commission draw from the "probable cause" model of Title VII of the Civil Rights Act of 1964, which could be imported into the FCC's Internet regulatory process under Section 706 of the Telecommunications Act of 1996. By encouraging voluntary mediation and informal settlement, the EEOC's administration of the "probable cause" paradigm reduces the strain

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comprehensive data covering 2011 and 2012, [the author] reveal[s] that the deregulatory approach has produced significantly more capital investment, competition, and broadband coverage in the US. Even the European Commission (EC) has acknowledged its Title II-style regulatory approach is the reason European broadband networks have fallen behind those in the U.S."

[14] *See* FCC, *Connecting America: The National Broadband Plan* (2010) ("National Broadband Plan"), available at http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf (last accessed Feb. 17, 2015).

[15] *See, e.g.*, Kevin A. Hassett & Robert J. Shapiro, Georgetown Center for Business and Public Policy, *Towards Universal Broadband: Flexible Broadband Pricing and the Digital Divide* 12 (Aug. 2009) ("*Towards Universal Broadband"), available at http://*www.gcbpp.org/files/Academic_Papers/AP_Hassett_Shapiro_Towards.pdf (last accessed February 17, 2015).

[16] *See,* Hal Singer and Robert Litan, The Progressive Policy Institute, *No Guarantees when it Comes to Telecom Fees* (December 16, 2014), available at http://www.progressivepolicy.org/issues/economy/no-guarantees-when-it-comes-to-telecom-fees/ (last accessed February 17, 2014).

[17] *See*, David Honig, Esq. & Nicol Turner-Lee, Ph.D., MMTC, *Refocusing Broadband Policy: The New Opportunity Agenda for People of Color* 7-8 (Nov. 21, 2013) ("MMTC White Paper"), *available at* http://mmtconline.org/wp-content/uploads/2013/11/Refocusing-Broadband-Policy-112113.pdf (last accessed February 17, 2015).

[18] Chairman Wheeler Proposes New Rules for Protecting the Open Internet 1, 4 (2015), http://www.fcc.gov/document/chairman-wheeler-proposes-new-rules-protecting-open-internet (last accessed Feb. 17, 2015).

on the judiciary while promoting swift resolution of discrimination claims.[19] In the same way, this process, if adapted to open Internet enforcement, could be the first line of defense for consumers who believe they are aggrieved by an apparent violation of Internet openness. The Title VII framework would provide the FCC with a flexible and enforceable legal framework, a clearly established set of factors and guidance, and a mechanism to allow the FCC, as an expert agency, to evaluate challenged practices case-by-case, affordably, efficiently, and expeditiously. Such a procedure should help alleviate any misimpression that Section 706 is insufficiently muscular to preserve Internet openness, while at the same time building consumer confidence in the FCC's stewardship of the open Internet.[20]

As the Commission releases its proposed Order to promote and protect an open Internet, MMTC requests that our three recommendations receive serious consideration. As broadband has become the most vital tool for leveling the playing field for those who have been disenfranchised in our nation, it is imperative that the foregoing unintended consequences be factored into the agency's decision making. We are all invested in ensuring that every American shares in the opportunity of net equality.

Sincerely,

Kim Keenan
President & Chief Executive Officer

[19] The EEOC retains the ability to investigate and pursue legal action against employers that have violated Title VII. If no action is taken, individuals can pursue their legal claims privately through civil law suits. In doing so, the EEOC complaint process acts as a first line of defense against Title VII violations, guaranteeing that individuals will have their complaints heard by the EEOC or will be free to proceed on their own. *See* Minority Media and Telecommunications Council Memorandum, RE: Application of the EEOC Complaint Process to 1996 Telecommunications Act Section 706 Complaints Regarding the Open Internet," GN Dockets 14-28 and 10-27 (filed September 18, 2014), available at http://apps.fcc.gov/ecfs/document/view?id=60000977445 (last accessed Feb. 17, 2015).

[20] *Id. at 7.*