Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

A National Broadband Plan	)	GN Docket No. 09-51
For Our Future	)	

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION ON NBP PUBLIC NOTICE #13

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The National Cable & Telecommunications Association (NCTA) hereby submits its comments in response to the Public Notice issued by the Commission in the above-captioned proceedings.[1]

INTRODUCTION AND SUMMARY

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of high-speed Internet service ("broadband") after investing over $145 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to over 20 million customers.

In the *Notice*, the Commission seeks comment on a report prepared by the Berkman Center for Internet and Society at Harvard University (the "Berkman Report" or "Report"). According to a Commission news release issued on July 14, 2009, the Commission asked the Berkman Center to prepare an "independent expert review of existing literature and studies about

[1] Public Notice, *Comments Sought On Broadband Study Conducted By The Berkman Center For Internet and Society, NBP Public Notice # 13*, GN Docket Nos. 09-47, 09-51, 09-137, DA 09-2217 (rel. Oct. 14, 2009) (*Notice*).

broadband deployment and usage throughout the world."[2] The work for the Report was supervised by Yochai Benkler, the Berkman Professor of Entrepreneurial Legal Studies at Harvard, and faculty co-director of the Berkman Center.[3]

The *Notice* asks a series of six questions directed at whether the Berkman Report accomplished its intended purpose and how it should be treated within the context of the instant proceeding:

1. Does the study accomplish its intended purposes?
2. Does the study provide a complete and objective survey of the subject matter?
3. How accurately and comprehensively does the study summarize the broadband experiences of other countries?
4. How much weight should the Commission give to this study as it develops a National Broadband Plan?
5. Are additional studies needed along the lines of the Berkman study?
6. Please provide any other comments on the Berkman study that you deem relevant.[4]

As explained in these comments, the Berkman Report fails to accomplish its intended purpose. It is not an "independent expert review of existing literature and studies about broadband deployment and usage throughout the world." Rather, it represents new studies and new data sources that serve the specific policy and ideological goals of Professor Benkler.[5] The Report should be accorded no special treatment simply because it was prepared at the Commission's request. Professor Benkler is an advocate with strongly-held beliefs and the Report is redolent with those biases. In particular, the research and analysis in the Report was

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[2] News Release, *Harvard's Berkman Center to Conduct Independent Review of Broadband Studies to Assist FCC* (rel. July 14, 2009) ("News Release").

[3] *Id.*

[4] *Notice* at 1.

[5] *See* Commenting on the Berkman Center's Broadband Study for the FCC (Nov. 4, 2009), *available at* http://cyber.law.harvard.edu/node/5751 (Benkler Blog).

structured in a manner that would lend support to Professor Benkler's established and strongly-held views favoring governmental access mandates over policies to promote investment in competitive broadband facilities. The Report simply ignores much of the academic literature that contradicts his policy preferences, giving it no value as an "independent expert review" of the literature. And when contrary evidence cannot be avoided, it is given short shrift or casually dismissed as anomalous.

The Berkman Report, in short, is an advocacy piece, not the work of dispassionate scholarship that the Commission requested. NCTA commends the Commission, and in particular its Broadband Task Force, for the intellectual rigor with it appears to be approaching the many inquiries it has initiated to develop the National Broadband Plan. This Report is not consistent with that approach, it is not what the Commission ordered, and it should not be granted special significance exceeding that of any comment submitted to the Commission in this proceeding.

I. THE BERKMAN REPORT DOES NOT ACCOMPLISH ITS INTENDED PURPOSES

The Commission tasked the Berkman Center with conducting an "independent expert review of existing literature and studies about broadband deployment and usage throughout the world."[6] Based on this description, the Berkman Report wholly fails to accomplish its intended purpose.

The phrase "review of existing literature" suggests that the Commission intended for the Berkman Center to thoroughly and objectively review materials previously prepared by others. While portions of the Report arguably fit this description, the bulk consists of entirely new research and analysis driven by Professor Benkler's personal agenda. For example, Professor

[6] News Release at 1.

Benkler explains that his team "spent a tremendous amount of time and effort both learning from and refining the OECD pricing data, and *created an entirely new pricing study* based on a completely independent market data source."[7] Similarly, while the Report analyzes existing OECD data on broadband penetration, the team also "develop[ed] our own data sources and measurements, correlating and cleaning them up as we went along . . . ."[8]

The fact that the Berkman Center did not comply with the Commission's request does not, by itself, mean that the resulting Report should be accorded no weight. But the fact that Professor Benkler and his team chose to develop new data sources and create new studies only with respect to a subset of issues, while ignoring other critical data that would not be convenient for the Professor's policy preferences, undermines the credibility of the Report. For example, the Report acknowledges that government subsidies played a critical role in a number of countries thought to be broadband leaders.[9] Faced with limited data on this issue, however, the team apparently made no attempt to develop new data sources or create new studies to determine the importance of this factor – it is simply sloughed off.[10] As we discuss in greater detail in the following section, this selective enthusiasm for certain issues over others renders the Report anything but objective, and its conclusions that government access mandates are preferable to policies to promote investment in competitive broadband facilities are entitled to no deference whatsoever.

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[7] Benkler Blog (emphasis added).

[8] *Id.*

[9] Report at 165 ("[T]he United States has spent more in stimulus mode than most other nations, but less than the most publicly-funded nations, in particular Sweden, as well as South Korea and Japan. We note only that these three nations are, by a wide margin, the leaders in fiber deployment. . . . [W]e can perhaps say that substantial government investments seem to be associated with approaching [the goal of fiber closer to the home] more rapidly.").

[10] *Id*. at 162 ("getting numbers on actual public investments is difficult" and "[d]escribing levels of long-term investment is therefore a less certain exercise"); *id*. at 163 (figures from Korea "bundle public and private investment in ways that make them difficult to tease apart").

II. THE BERKMAN REPORT DOES NOT PROVIDE A COMPLETE AND OBJECTIVE SURVEY OF THE SUBJECT MATTER

The Berkman Report is not a "complete and objective survey" of the broadband experience in other countries and should not be treated as such by the Commission. With respect to objectivity, the Report exhibits a consistent bias in favor of government regulation and against those who, subject to the rigors of competition, have built and continue to build and upgrade broadband facilities. Throughout the Report, the authors use words such as "recalcitrant" to describe such entities,[11] and depict them as resisting regulatory measures through "foot-dragging" and litigation.[12] Meanwhile, regulators that enforce the sorts of regulatory measures that the Report views as beneficial are typically described in the Report with positive terms such as "engaged," "effective," and "professional."[13]

Perhaps not surprisingly, that same bias against those who invest in and build broadband networks is reflected in Professor Benkler's prior writings on this subject. For example, in his recent book *The Wealth Of Networks*, Benkler writes:

> The emergence of the networked information economy as described in this book depends on the continued existence of an open transport network connecting general-purpose computers. *It therefore also depends on the failure of the efforts to restructure the network on the model of proprietary networks connecting terminals with sufficiently controlled capabilities to be predictable and well behaved from the perspective of incumbent production models.*[14]

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[11] *See, e.g.*, *Report* at 74, 95, 103, 109, 123.

[12] *See, e.g.*, *id.* at 78, 101.

[13] *See, e.g.*, *id.* at 12, 74, 75, 76, 83, 86, 87, 95, 101.

[14] Yochai Benkler, *The Wealth Of Networks: How Social Production Transforms Markets and Freedom*, ch. 11, ¶ 24 (Yale Press 2006) ("Wealth of Networks") (emphasis added), *available at* http://yupnet.org/benkler/archives/22; *see also id.*, ch. 5, ¶ 43 ("At present, cable broadband has succeeded in achieving a status almost entirely exempt from access requirements that might mitigate its power to control how the platform is used, and broadband over legacy telephone systems is increasingly winning a parallel status of unregulated semi-monopoly."), *available at* http://yupnet.org/benkler/archives/15.

Professor Benkler not only has concerns as to how "proprietary networks" are operated, but he expresses opposition to the very concept of private ownership of networks. As he explained in a 2001 article:

> Building a robust communications environment that is not biased in favor of one type of speaker or one type of speech requires a core communications infrastructure *that no one owns* and that no one can control to impose a preferred model of discourse. To achieve this goal, we need a core common infrastructure equivalent to our public highway system – *nonproprietary* and equally open to all.[15]

Given Professor Benkler's long-standing positions on the purported evils of "proprietary" networks, the prospect of bias on this issue in a Report prepared by the Berkman Center – especially a Report that went beyond merely summarizing and reviewing existing literature – was perhaps always to have been expected. In any event, the Report does not disappoint such expectations. It represents a continuation of the Professor's longstanding bias against private investment.

Nor does the Report even appear to strive for, let alone achieve, completeness. As explained in the Report, "[b]ecause the near-universal adoption of open access is such a surprising result, because this kind of regulation goes to the very structure of the market in broadband, and because the policies adopted by other countries are so at odds with American policies during this decade, we dedicate the bulk of our discussion of policies in other countries to assessing the international experience on open access regulation."[16] In other words, instead of preparing a Report addressing all the factors that might affect broadband deployment and

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[15] Yochai Benkler, *Property, Commons and the First Amendment: Towards a Common Core Infrastructure*, Paper for the Brenner Center for Justice, NYU Law School (Mar. 2001) at 4 (emphasis added), *available at* http://www.benkler.org/WhitePaper.pdf.

[16] Report at 12.

adoption, the Berkman Report concentrates almost entirely on its preference for open access and practically ignores other significant issues. Three issues in particular stand out:

Government subsidies. The Berkman Report acknowledges that massive government funding played a key role in countries such as South Korea, Japan and Sweden, which it views as broadband leaders.[17] The Report states that the government of South Korea "invested $24 billion in its first transition on connecting schools and government centers in the 1990s, over $70 billion in low-cost loans to providers, and over $12 billion per year from 2004-2007 on the transition to the next generation ubiquitous network."[18] With respect to Japan, the Berkman Report notes that there is a long history of government-subsidized loans and tax incentives for broadband deployment.[19] Similarly, the government of Sweden has made significant public investments in broadband facilities for the last decade, first subsidizing the construction of a national backbone and then supporting regional and local networks.[20]

The U.S. government, by contrast, has provided far more limited support for broadband deployment or adoption. Other than the E-Rate program created after the 1996 Act, the $7.2 billion in stimulus funding that was included in the American Recovery and Reinvestment Act (ARRA) represents the first large-scale government program specifically providing support for broadband deployment and adoption.[21] None of that funding has been distributed to broadband

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[17] *Id.* at 13 ("[T]he leaders in fiber deployment – South Korea, Japan, and Sweden – are also the leading examples of large, long term capital investments through expenditures, tax breaks, and low cost loans that helped deployment in those countries. These countries have spent substantially more, in public spending on a per capita basis, than the U.S. has appropriated for stimulus funding.").

[18] *Id.* at 87.

[19] *See id.* at 85, 195; *see also id.* at 84 ("NTT had already built much of the heart of the fiber infrastructure in the 1990s, with cheap government loans during the lost decade.").

[20] *Id.* at 218.

[21] The Rural Utilities Service (RUS) administers a broadband loan program and a much smaller grant program, but these programs are on a much smaller scale than the ARRA programs. The high-cost portion of the federal

providers yet and at this point Congress has not appropriated any additional funding for broadband projects.

To the extent there are differences in performance between the United States, on the one hand, and South Korea, Japan and Sweden on the other, the starkly different approaches that these countries have taken with respect to public funding would seem to be an obvious and significant cause of those differences. The Report offers some minimal acknowledgment that in some cases government subsidies may be as important, or more important, than access requirements. With respect to Korea, for example, the Report states that the "South Korean experience speaks more to government investment than to access regulation."[22] Similarly, the "Japanese story . . . does not suggest a single cause, but rather that a combination of government-subsidized loans, open access policies on the DSL side, and facilitates-based competition" were responsible for the current state of affairs.[23]

Notwithstanding this recognition that government investment may be more important than open access, the Report "dedicate[s] the bulk of [the] discussion" to highlight the perceived benefits of open access regulation and makes no effort to quantify the effect of government investment relative to open access or other factors, or to extrapolate what kind of taxpayer investment would be required in the United States to replicate these foreign examples. While Professor Benkler and his team directed significant time and resources to producing an econometric analysis "proving" that there is a positive correlation between open access and broadband success, they made no such attempt to prove or disprove the significance of

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Universal Service Fund does not explicitly support broadband, but funds can be used to deploy fiber that is used in the provision of broadband.

[22] Report at 84; *id*. at 83 ("The South Korean experience is more ambiguous on access, pointing more toward heavy government investment.").

[23] *Id.* at 85.

government investment. Even if the econometric analysis supporting open access were valid (and as described below, this one is not), the Report fails to show whether open access is the most important factor or whether, in fact, it might be outweighed by government investment or some other factor in achieving any particular nation's broadband goals.

Municipal ownership. The Berkman Report suggests that "municipal and regional investments may provide an appropriate and productive pathway for public investment" in broadband networks.[24] As with open access, this recommendation is not surprising given Professor Benkler's established biases on the subject.[25] Notwithstanding Professor Benkler's prior endorsement of municipal broadband as an "alternative path for the emergence of basic physical information transport infrastructure on a nonmarket model,"[26] the Berkman Report states that "the finances of local and regional projects are difficult to capture comprehensively" and consequently "making a strong analysis of the relative effectiveness of municipal initiatives is beyond the scope of our analysis."[27] Instead, the Report discusses anecdotal evidence as "inspiration for a future, more detailed study."[28]

The Report's portrayal of municipal ownership as a novel approach requiring further study glosses over the well-known and well-documented challenges and failures associated with municipal broadband in the United States. As noted elsewhere in the Report, the effect that

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[24] *Id.* at 165.

[25] "The second approach towards building a core common infrastructure is public provisioning of the most basic infrastructure. Just as municipalities provide sidewalks, roads, and sewers, so too it is important to revive an interest in designing the best possible approach towards public investment in the core infrastructure." Yochai Benkler, *Property, Commons and the First Amendment: Towards a Common Core Infrastructure*, White Paper for the Brenner Center for Justice, NYU Law School, Mar. 2001, at 9, *available at* http://www.benkler.org/WhitePaper.pdf; *see also* Wealth of Networks, ch. 11, ¶¶ 40-41, *available at* http://yupnet.org/benkler/archives/22.

[26] Benkler, *supra* note 25, at 9.

[27] Report at 165.

[28] *Id.*

government investment will have on competing private sector businesses is a matter of significant concern in developing broadband policy.[29] Introducing a municipal provider that can support a business with tax revenues and dictate the terms under which its competitors are able to access rights-of-way obviously has an effect on how the marketplace develops and the costs imposed on consumers.

Had the Berkman team focused on the assigned task of reviewing the existing literature, they would have discovered extensive studies and articles documenting the significant problems with many municipal projects in the United States.[30] Instead of reviewing this literature, however, the Report focuses exclusively on a single project in Amsterdam that it describes as "a model for potential municipal investment in next generation infrastructure even in the presence of robust facilities-based competition."[31] The decision to endorse this approach based on this one anecdote, while declining to analyze the substantial existing literature, was irresponsible at best.

Demand-side initiatives. The record in the *National Broadband Plan* proceeding makes abundantly clear that one of the biggest challenges facing the Commission is the fact that millions of Americans choose not to purchase broadband service because they do not find it relevant to their lives. Despite the obvious and well-documented significance of programs

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[29] *See, e.g.*, *id*. at 14, 168-71; *see also id.* at 74 ("On the supply side, governments spend and invest in infrastructure or tailor their regulatory action so as to improve competition in telecommunications markets while preserving investment incentives.").

[30] *See, e.g.*, Sonia Arrison, Ronald Rizzuto, & Vince Vasquez, *Wi-Fi Waste: The Disaster of Municipal Communications Networks* (2007), *available at* http://liberty.pacificresearch.org/docLib/20070227_Wifi_Waste.pdf; Barry Aarons, *We Told You So! Continue to Say 'No' to Municipal Broadband Networks* (2009), *available at* http://ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/B79B70FB8C06B7EA86257572001DE9DC/$File/MuniBroadband.pdf?OpenElement; James Valvo, *Municipal Broadband's Record of Failure: A Profile in Market Intrusion* (2009), *available at* http://www.americansforprosperity.org/files/Municipal_Broadband_Policy_Paper.pdf.

[31] Report at 166.

designed to stimulate broadband demand as part of a national broadband strategy, the Berkman Report devotes only two pages to a discussion of demand-side initiatives and contains no "review of the existing literature" whatsoever.[32] As with other potential topics of discussion, the Report wasted an opportunity to provide useful insight on this important area – an area that may well prove to have the greatest potential for positively impacting increased broadband subscribership in the United States – because of its open access agenda.[33]

III. THE BERKMAN REPORT HAS DRAWN THE WRONG CONCLUSIONS FROM THE BROADBAND EXPERIENCES OF OTHER COUNTRIES, PARTICULARLY WITH RESPECT TO OPEN ACCESS

Putting aside the issues raised above with regard to the scope of the Berkman Report, the conclusions drawn with respect to open access are seriously flawed. In particular, in structuring the econometric analysis that is the focus of the Report, Professor Benkler appears to have taken a number of steps that were guaranteed to lead to a finding that open access is beneficial. In addition, the Report fails to acknowledge the problems with attempting to impose an open access regime in the United States.

A. The Berkman Report Was Structured To Guarantee That Open Access Would Appear To Be A Significant Factor In Broadband Success

The conclusion that countries with open access requirements consistently outperform those that rely on facilities-based competition is obviously the key "finding" of the Berkman Report.

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[32] *See id.* at 171-72.

[33] It is not as if demand-side issues were minor in comparison to the structural open access issues to which the Berkman Report gives almost exclusive attention. Nor are the demand-side issues impervious to study and analysis. To the contrary, the recent report submitted to the Commission by The Advanced Communications Law & Policy Institute (ACLP) at New York Law School on "Barriers to Adoption" systematically surveys and identifies the magnitude of the effect of demand-side problems on broadband penetration in the United States. *See* Advanced Communications Law & Policy Institute, *Barriers to Broadband Adoption: A Report to the Federal Communications Commission* (Oct. 2009), *available at* http://fjallfoss.fcc.gov/ecfs2/document/view?id=7020142497.

> Our most surprising and significant finding is that "open access" policies – unbundling, bitstream access, collocation requirements, wholesaling, and/or functional separation – are almost universally understood as having played a core role in the first generation transition to broadband in most of the high performing countries; that they now play a core role in planning for the next generation transition; and that the positive impact of such policies is strongly supported by the evidence of the first generation broadband transition.[34]

This conclusion is drawn both from the Berkman Center's qualitative analysis of experience in other countries, as well as an econometric analysis. In this section, we demonstrate that the econometric analysis was structured in a manner that was all but guaranteed to "prove" that open access was a key ingredient for broadband success.

First, by defining "success" as low retail prices[35] and high penetration,[36] regimes with low wholesale prices may appear to be more successful than regimes based on facilities-based competition because resellers will have fewer costs to recover from consumers and therefore can charge lower rates. Taking this concept to an extreme, the most "successful" regime would be one where the wholesale rate was zero, because resellers could provide service that was virtually free to end users, thereby increasing penetration. It should be obvious, however, that whatever short-term benefits resulted from such an arrangement, in the long-term it would be doomed to fail because network owners would have no incentive to maintain their networks or to invest in expanding their reach or capacity. The effect of imposing low wholesale rates is different in magnitude, but not in direction.

By focusing only on prices and penetration, the Berkman Report essentially ignores the negative consequences of open access that may take longer to materialize, particularly the effect

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[34] *Id.* at 11.

[35] *Id*. at 112-14.

[36] *Id*. at 115.

on network investment.[37] This is an extraordinary oversight, particularly given the amount of literature that already exists on this topic. For example, as NCTA described in its opening comments in this proceeding, a recent analysis by Scott Wallsten demonstrates that "the more a country relies on unbundled local loops or bitstream unbundling to provide DSL service, the less incumbents and entrants invest in fiber."[38] Where there is competition between or among platforms, however, "the more investment there is in fiber. In particular . . . when faced with competition from cable[,] incumbent telcos invest more in fiber."[39]

Moreover, the Report completely fails to consider the implications for deploying broadband to unserved areas – one of the primary statutory goals of the National Broadband Plan. Even if the literature were wrong and the overall effect of open access was positive in areas where broadband facilities already have been deployed, there is no credible argument that imposing mandatory open access requirements on networks built with private capital will promote deployment of broadband facilities in areas where facilities have yet to be built. As NCTA has explained, promoting broadband deployment in unserved areas should be the primary goal of the National Broadband Plan.[40] Imposing open access obligations does nothing to facilitate achievement of this goal. To the contrary, for many providers the existence of open access obligations makes such investments less attractive, even with government subsidies.[41]

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[37] Moreover, as noted below, focusing on retail prices ignores the cost imposed on consumers by taxes that support government subsidies for broadband.

[38] Wallsten & Hausladen, *Net Neutrality, Unbundling, and their Effects on International Investment in Next-Generation Networks*, Review of Network Economics (Mar. 2009).

[39] *Id*.

[40] Comments of the National Cable & Telecommunications Association, GN Docket No. 09-51 (filed June 8, 2009) at i-ii.

[41] *See* Cecilia Kang, Major *Carriers Shun Broadband Stimulus*, Wash. Post, Aug. 14, 2009, at A12 (reporting that "privately, some companies are griping about conditions attached to the money, including a net-neutrality rule that they say would prevent them from managing traffic on their networks in the way they want").

Second, Professor Benkler increases the likelihood that his analysis will conclude that open access is correlated positively with broadband success by excluding ineffective unbundling regimes from the analysis. The Berkman Report actually provides substantial evidence that unbundling regimes often are ineffective, sometimes for years at a time.[42] But rather than view such real-world experience as a cautionary tale about the problems inherent in any sort of forced access regime, the Report simply excludes that data from the econometric analysis.[43] By considering only "effective" unbundling regimes (presumably those resulting in the lowest retail prices), as opposed to all unbundling regimes, the analysis is plainly tilted toward a finding that open access is correlated with increased penetration.

Third, to further ensure a favorable analysis of open access regimes, the Report excludes successful facilities-based regimes from the analysis. For example, the Report acknowledges that Switzerland was able to achieve high penetration and low prices by following a policy based on facilities-based competition.[44] But rather than accepting the possibility that the open access theory is incorrect, the Berkman Report uses a methodology that excludes Switzerland precisely because, with respect to the effects of unbundling, it is an outlier that unduly affects the analysis.[45]

Similarly, the Report notes that Canada, which also relies on facilities based competition rather than unbundling, "is often thought of as a very high performer, based on the most

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[42] Report at 78-79.

[43] *Id*. at 116 ("The second transformation we engaged in was to replace the variables describing the introduction of unbundling with variables that mark the time of introduction of effective unbundling as we found it in our analysis of the political economy aspects in the qualitative analysis.").

[44] *Id*. ("As we saw in the qualitative analysis, Switzerland is a significant example of successful broadband deployment without the passage of unbundling rules.").

[45] *Id*. ("Removing Switzerland from the data set substantially increases both the significance and the effect size of unbundling. In short, the ambiguity about the effect of unbundling in prior econometric studies is in some measure an oblique way of pointing at Switzerland's experience.").

commonly used benchmark of penetration per 100 inhabitants."[46] And, in the dismissive tone that it reserves for findings and viewpoints that conflict with its own, it points out that the Canadian Radio-television and Telecommunications Commission "opens its August 2009 Communications Monitoring report with a self-congratulatory reference to the fact that Canada has the highest level of penetration of all the G7 countries" – a statement that the Report acknowledges is "factually true."[47] But the Report discounts this fact because Canada scores less well on other factors, such as speed and prices.[48] By using an overall blended scoring approach, the Report seeks to gloss over the fact that, whatever the effect on speed and prices, Canada's policies resulted in a level of broadband service that an unusually high percentage of households chose to purchase.

Finally, in case the deck was not sufficiently stacked already, the Berkman Report makes no attempt to quantify the role of factors other than open access, particularly government funding.[49] As described above, while the Report acknowledges that significant and continuing government subsidies are a key factor in the success of three of the leading countries (South Korea, Japan, and Sweden), it makes no effort to determine precisely how significant that factor is as compared to open access requirements.[50] Not only does this cast further doubt on the reliability of the conclusions regarding the significance of open access requirements, it also ignores the fact that the costs of taxpayer-funded projects ultimately are borne by consumers.

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[46] *Id.* at 10.

[47] *Id.* at 110.

[48] *Id.* at 10-11, 110-11.

[49] *Id*. at 115.

[50] *See* Section II, *supra*.

B. The Berkman Report Fails To Acknowledge The Challenges In Applying An Open Access Regime In The United States

The Berkman Report, to its credit, contains extensive discussion of the marketplace dynamics of a number of countries. Although there is a clear bias against existing facilities-based providers in this qualitative analysis, it is useful in highlighting some of the significant ways in which the U.S. differs from other countries.

The Report makes clear, for example, that no other country has the same pervasive deployment of cable facilities that exists in the United States. In most of the countries examined in the Report, broadband was first provided by incumbent telephone companies and cable broadband has a far more limited marketplace presence. For example, the Report explains that Germany and Italy have no cable-based broadband competitors of significance,[51] and that while cable operators offer broadband in Sweden, Finland, and France, they have not emerged as strong competitors.[52] With respect to the United Kingdom, the Report notes that "[f]rom the perspective of the potential role of cable as a source of market competition, the British experience is an intermediate case between the U.S. and France" with cable offering competitive broadband services in some areas of the country.[53]

In the United States, of course, cable operators not only compete vigorously with telephone companies in the provision of broadband services; they, not the telephone companies, were generally the *first* to deploy such services. Moreover, notwithstanding the extensive regulatory efforts to stimulate competition through the unbundling of incumbent telephone

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[51] *See* Report at 100, 105.

[52] *See id*. at 91-92 (noting that Sweden has a broadband alternative delivered by cable, but it covers only 18% of the market); *id.* at 93 (reporting that Finland's cable broadband alternative covers less than 7% of the market); *id.* at 98 (explaining that the primary cable operator in France has not emerged as a key broadband competitor, garnering a share of only 5.5% of broadband subscribers).

[53] *Id.* at 104.

companies, it was, in fact, cable operators who – with no reliance on such unbundling – actually provided lasting and vigorous facilities-based competition.

Even attempting to draw parallels between the experience in countries with a monopoly telecom provider and the United States, which has over a decade of extensive facilities-based competition, is a questionable exercise to undertake. The Report fails to identify any country that might serve as a useful model for imposing open access requirements in a marketplace with existing facilities-based competition. Although it identifies Switzerland as a country that initially relied on facilities-based competition, but subsequently pursued an open access approach,[54] there are significant differences between the U.S. and Switzerland. In particular, in the Swiss case, the open access obligations were imposed only on Swisscom, which was the dominant provider in the country and also happened to be owned by the government.[55]

Similarly, in virtually all of the other countries discussed in the Report, there are a relatively limited number of facilities-based broadband providers. Others have confirmed that this is commonly the case in nations that have promoted or required unbundling.[56] In contrast, the United States has dozens of large regional providers and hundreds of smaller providers. To point to the experience in countries with a single dominant national provider (*e.g.*, the functional separation of British Telecom) as a model for what is possible in the U.S. simply ignores U.S. marketplace realities.

In addition to calling attention to the numerous ways in which the United States differs from other countries, the Berkman Report also highlights the significant challenges associated with implementing an open access regime. As documented in the Report, open access invariably

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[54] *Id.* at 221.

[55] *Id.* at 224, 230.

[56] *See, e.g.*, Robert Atkinson, Daniel Correa, & Julie Hedlund, *Explaining International Broadband Leadership* 33-37 (2008), *available at* http://www.itif.org/files/ExplainingBBLeadership.pdf.

leads to years of litigation and uncertainty even when applied to a state-owned monopoly.[57] And as the Commission knows from its experience with unbundled network elements pursuant to Section 251(c), establishing wholesale prices that encourage entry without discouraging investment is incredibly difficult, if not impossible, to accomplish.[58] Attempting to impose similar requirements on hundreds of broadband providers in the U.S., particularly on cable operators and wireless providers that have never been subject to such requirements, would create massive marketplace uncertainty that could chill investment for years to come.

IV. THE COMMISSION SHOULD ACCORD THE BERKMAN REPORT NO GREATER AUTHORITY THAN ANY OTHER COMMENT IN THE RECORD

In its News Release, the Commission announced that the Berkman Center would provide an "independent expert" review of the relevant data.[59] But the Commission is the "independent expert" and cannot delegate that role to an outside third party. And, as it has learned, in delegating that role to a fervent advocate like Professor Benkler, the Commission has lost the opportunity to benefit from a truly objective review of the existing literature. While Professor Benkler has every right to press his case before the Commission, his submission should not be accorded any special treatment in developing the National Broadband Plan. It should be treated

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[57] *See, e.g.*, *id.* at 96 (describing France Telecom's efforts to block action by the first independent telecommunications sector regulator in France, the ART).

[58] *See, e.g.*, *In re Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 18 FCC Rcd 18945 ¶ 3 (2003) ("To the extent that the application of our TELRIC pricing rules distorts our intended pricing signals by understating forward-looking costs, it can thwart one of the central purposes of the Act: the promotion of facilities-based competition. While our UNE pricing rules must produce rates that are just, reasonable and nondiscriminatory, consistent with the Act's goal of promoting sustainable competition, they should not create incentives for carriers to avoid investment in facilities."); *id.* ¶ 6 ("State pricing proceedings under the TELRIC regime have been extremely complicated and often last for two or three years at a time. . . . The drain on resources for the state commissions and interested parties can be tremendous. We also note that, for any given carrier, there may be significant differences in rates from state to state, and even from proceeding to proceeding within a state. We are concerned that such variable results may not reflect genuine cost differences but instead may be the product of the complexity of the issues, the very general nature of our rules, and uncertainty about how to apply those rules.").

[59] News Release at 1.

for what it is – a work of advocacy – that should stand or fall on its own merits. It cannot substitute for a thorough review of the existing literature. That responsibility, alas, must revert to the Commission.

V. ANY ADDITIONAL STUDIES SHOULD BE PERFORMED BY THE COMMISSION OR A DISINTERESTED CONTRACTOR, NOT BY AN INTERESTED PARTY

As noted in Section II above, there are numerous issues identified in the study (including the role of government subsidies, demand-side initiatives, and municipal ownership) that were not addressed in a comprehensive manner and that might warrant further analysis. Should the Commission decide that it would be helpful to conduct such analysis, it should strongly consider using its existing resources. In particular, the Office of Strategic Planning and Policy Analysis is specifically charged with acting as "expert consultants to the Commission in areas of economic, business and market analysis and other subjects that cut across traditional lines such as the Internet."[60] In conjunction with the expertise of the International Bureau, there is no obvious reason why this work should be outsourced.

If for some reason a study requires skills that are not available within the Commission, it should enter into a more traditional arrangement with a contractor, rather than repeating something like the unusual and failed Berkman Center experiment. Among other benefits, a traditional contractor arrangement would provide stronger incentives for the party performing the work to stick to the tasks assigned by the Commission and to perform them in an unbiased manner.

[60] FCC, *OSP Home, About OSP*, *at* http://www.fcc.gov/osp/ (last visited Nov. 13, 2009).

CONCLUSION

A comprehensive, objective study of the existing literature regarding broadband deployment and adoption in other countries is something that could be valuable to the Commission as it develops the National Broadband Plan requested by Congress. Unfortunately, the Report prepared by the Berkman Center is neither comprehensive nor objective. Ignoring the Commission's request to perform a thorough study of all the factors potentially affecting broadband deployment and adoption, the Berkman Report donned blinders for any issue that did not fit its agenda of promoting government mandated access regulation. And in lieu of providing an objective review of the literature as the Commission requested, Professor Benkler has presented the agency with new research and analysis plainly biased in favor of the Professor's strongly held personal views. Because of these significant flaws, the Berkman Report is of little or no value to the Commission in its efforts to develop a National Broadband Plan.

Respectfully submitted,

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