Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act	)	GN Docket No. 09-47
	)	
A National Broadband Plan for our Future	)	GN Docket No. 09-51
	)	
Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act	)	GN Docket No. 09-137

COMMENTS OF PAETEC HOLDING CORP.
IN RESPONSE TO
NBP PUBLIC NOTICE #13

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PAETEC Holding Corp. ("PAETEC") respectfully submit its Comments in response to the Commission's Public Notice,[1] seeking comment on the draft study issued by the Berkman Center. In particular, these comments address issue number four in the Commission's public notice regarding "[h]ow much weight should the Commission give to this study as it develops a National Broadband Plan?"[2]

I. INTRODUCTION

In recognition of the importance of broadband to the nation's economy, Congress, in the 2009 Recovery Act,[3] tasked the Commission with the responsibility for developing a national broadband plan "to ensure that all people of the United States have access to broadband capability."[4] As the Commission has acknowledged, the statutory command to create a national broadband plan recognized that the United States has "not yet met the challenge of bringing broadband to everyone."[5] It also recognizes that even where some broadband capability is available, the United States has failed "to keep up with the growing demand for faster and more reliable connections."[6]

In charging the Commission with the obligation to create a national broadband plan, Congress required the Commission to address several individual components.[7] One of these

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[1] *Comments Sought on Broadband Study Conducted by the Berkman Center for Internet and Society*, NBP Public Notice No. 13, GN Docket Nos. 09-47, 09-51, 09-137, DA 09-2217 (Oct. 14, 2009).

[2] *Id.*

[3] American Recovery and Reinvestment Act of 2009, Pub L. 111-5, 123 Stat. 115 ("Recovery Act").

[4] Recovery Act § 6001(k)(2).

[5] *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 ¶ 5 (rel. April 8, 2009) ("*NOI*").

[6] *NOI* ¶ 5.

[7] *See Id.* ¶ *9.*

components is to address "the most effective and efficient mechanisms for ensuring broadband access by all people in the United States"[8] and another directs the Commission to provide a "detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure."[9]

One of the first steps the Commission took in implementing the Recovery Act's broadband plan directive was to issue a Notice of Inquiry ("NOI") seeking comment on the development of the National Broadband Plan.[10] In the NOI, the Commission rightly acknowledged the importance of open networks, seeking comment on "the value of open networks as an effective and efficient mechanism for ensuring broadband access for all Americans,"[11] and seeking input on the impact of an open network policy on investment, innovation… competition and affordability of broadband."[12]

A. The Berkman Study

As part of the Commission's inquiry into the "value of open networks," the Berkman Center conducted an independent review of broadband deployment and usage data from around the world.[13] These international comparisons are valuable because "in broadly similar democratic, market societies, intelligent, well-intentioned people face similar problems and have different approaches" to solving such problems.[14] Different countries experiment with different policies. There is certainly substantial value in gleaning from these disparate experiences lessons

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[8] Recovery Act § 6001(k)(2)(a).

[9] Recovery Act § 6001(k)(2)(b).

[10] *See generally NOI*.

[11] *NOI*, ¶ 47.

[12] *Id.* ¶ 48.

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

that can be applied in making future policy determinations for the United States. As the report explains "it would be a grave mistake on the part of the United States to simply ignore and fail to use"[15] the data that exists from other countries' experiences with broadband deployment policies — including open access policies.

The report found that "open access policies" including unbundling, bitstream access and collocation, among others, "are almost universally understood as having played a core role in the first generation transition to broadband in most of the high performing countries."[16] In addition, the Berkman Study found that open access policies "now play a core role in planning for the next generation transition,"[17] that is the transition to advanced broadband with the capability of delivering download speeds of 100 Mbps. Even some countries that initially rejected open access requirements have incorporated unbundling into their policymaking to facilitate the transition from first generation broadband to more advanced broadband networks.[18] Equally significant to the report's findings on open access policies is the significance of the vigor with which regulators enforce the open access policies. As the report explains, "where an engaged regulator enforced open access obligations, competitors that entered using open access facilities provided an important catalyst for the development of robust competition."[19] Thus, the report's principal finding on open access is that such policies, "where undertaken with serious regulatory engage-

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[14] Berkman Study p. 26.

[15] Berkman Study p. 26.

[16] Berkman Study p. 11.

[17] *Id*.

[18] *Id.* (discussing Switzerland and New Zealand).

[19] *Id.* at p. 12.

ment, contributed to broadband penetration, capacity, and affordability in the first generation of broadband."[20]

Contrary to the policy of the Commission over the last nine years, the experience of the rest of the world's democratic, market economies is that unbundling plays an important role in facilitating competitive entry.[21] The international experience further suggests that unbundling played an important role even where facilities based alternatives were available by serving "an important catalytic role in the competitive market."[22] In some cases "competition introduced through open access drove investment and improvement in speeds, technological progression, reduced prices, or service innovations."[23]

The international experience and the lessons from countries that have had success in encouraging the deployment and adoption of better, faster and cheaper broadband internet service are consistent with the U.S. experience in the period where a robust unbundling policy was in effect and enforced. This success is best exemplified with the initial deployment of xDSL based services. Initially these services were not widely deployed by the ILECs for fear of cannibalizing other more lucrative services such as T-1 service. Competitors, however, backed by the Telecommunications Act of 1996[24] and critical decisions by an engaged Commission interested in promoting robust competition,[25] were able to obtain copper loops, conditioned to remove ac-

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[20] *Id.* at p. 75.

[21] *Id.* at p. 76.

[22] *Id.*

[23] *Id.*

[24] Pub.L. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 et seq. ("1996 Act").

[25] *See e.g. Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 FCC Rcd 15435 (2001) *aff'd sub num Verizon Tel. Cos. v. FCC*, 292 F.3d 903 (D.C. Cir. 2002); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761 4773-74 ¶¶ 23-24 (1999) *aff'd in part and*

creted devices such as load coils, and collocate DSLAMs in ILEC central offices, all at cost-based rates, so they could provide xDSL-based broadband service to consumers, while adequately compensating the ILEC. CLECs were providing these services even where the ILECs had not deployed their own DSLAMs and were not providing DSL service at all. But the Commission, unwilling to defend its well reasoned unbundling regime by appealing an unfavorable Court of Appeals ruling to the US Supreme Court, prematurely abandoned its commitment to a robust unbundling policy and instead adopted a regime favoring intermodal competition between ILECs and incumbent cable operators and significantly reducing opportunities for new entrants using unbundled loops.

It is thus no surprise that the Berkman Study found that the "highest prices for lowest speeds" of broadband service "are overwhelmingly offered by firms in the United States and Canada, all of which inhabit markets structured around 'inter-modal' competition."[26] In contrast, 'the lowest prices and the highest speeds are also all offered by firms in markets where, in addition to an incumbent telephone company and a cable company, there are also competitors who entered the market, and built their presence, through the use of open access facilities."[27] Indeed, the Berkman Study findings provide a strong indictment of the FCC 's abandonment of the 1996 Act's unbundling policies as a key component of robust competition that drives innovation and better value to end users.

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vacated and remanded in part sub nom. GTE v. FCC, 205. F.3d 416 (D.C. Cir. 2000), *on recon Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 17806 (2000).

[26] Berkman Study p. 12.

[27] *Id.*

II. HOW MUCH WEIGHT SHOULD THE COMMISSION GIVE TO THIS STUDY AS IT DEVELOPS A NATIONAL BROADBAND PLAN?

The FCC should give significant weight to the Berkman Study as it provides powerful lessons based the experience of other democratic, market based industrialized countries that have sought to spur the transition from narrowband to broadband internet access. These countries, like the United States, all sought to make broadband available to all of their citizens. In order to make broadband available, policymakers in theses nations considered the best methods for promoting investment in broadband facilities; whether broadband service would be physically available to most if not all of the countries' inhabitants and whether the services would be affordable so that consumers would purchase broadband services and use them. These are the same questions U.S. policymakers grappled with in the U.S. transition to broadband at the end of the 1990s and into the beginning of the new millennium, and they are same questions that Congress has asked the Commission to revisit in light of the unacceptable status of broadband deployment resulting from the Commission's recent policy decisions. In grappling with these questions before, U.S. policymakers made a conscious choice to move from the open access model of unbundling set forth in the 1996 Act and instead to limit unbundling in hopes of encouraging incumbents to increase investment in fiber-based broadband services to residential consumers. At this juncture it is clear that this policy has failed. While the largest phone companies have begun to offer next generation broadband services, the deployment of such services has not happened on a rapid scale. The U.S. standing has declined significantly since the Commission scaled back its commitment to the unbundling mandates set forth in the 1996 Act. As a result, the U.S. remains a middling economy when it comes to the deployment of broadband. It would make little sense for the Commission to ignore the data available from other countries that chose a different, and markedly more successful, path. Considering that Congress has charged the Commission with the responsibility of

developing a plan to increase broadband penetration, to make broadband more widely available to many more Americans, it makes even less sense to ignore the lessons that can be gleaned from the experiences of other industrialized economies that have cheaper and faster broadband connections to the Internet available to a higher percentage of their population than the United States.

Analyzing the lessons that can be learned from the experiences of other countries does not mean blindly adopting policies unsuited for the United States. Instead, the Commission should carefully consider policies adopted in other countries to promote broadband deployment, affordability, and adoption, with the goal of identifying and implementing "best practices" in the United States. This examination should cover both the polices that were successful and those that were not successful. PAETEC urges the Commission to examine the policies that have been successful in other countries and consider how the lessons of those policies can be tailored to the US market. Similarly the Commission can look to those countries that have not had success and learn from mistakes policymakers in those countries have made.

III. THE COMMISSION SHOULD CAREFULLY CONSIDER THE LESSONS FROM THE BERKMAN STUDY REGARDING THE ROLE OF OPEN ACCESS AND UNBUNDLING IN BROADBAND DEPLOYMENT AND PENETRATION

While the Berkman Study addresses a number of policies, including targeted government subsidies of broadband deployment, PAETEC suggests that the most important lessons from the Berkman Study concern the impact other countries' open access and unbundling policies have played in fostering the deployment of broadband service at prices that have resulted in higher broadband penetration rates than experienced in the United States. In particular, the Commission should carefully analyze the open access/unbundling policies discussed in Section 4 of the Berkman Study, which tend to be found in the countries having the highest broadband speeds and lowest prices. Although the report makes it clear that open access is neither the sole explana-

tion for successful regulatory policies in those countries, nor the essential factor in every country, it nonetheless seems to be a significant component of many countries' broadband policies.

Similarly, the Commission should also consider the policies in those countries that, like the United States, elected to forego unbundling and analyze whether the lack of unbundling in those countries played a role in the lack of progress in broadband deployment and/or penetration.

There are a number of lessons that can be applied to the U.S. experience that the Commission should consider its development of a national broadband plan. The Berkman Study validates Congress' unbundling requirements adopted in the 1996 Act. At the time the 1996 Act was drafted, Congress recognized that competitors could not immediately compete with the monopolies it sought to displace and could not be expected to replicate the entirety of the networks incumbents had amassed during a century of government sanctioned monopoly. Nor would it necessarily be in the best interests of the public at large to encourage duplication of last-mile facilities, with extensive digging of trenches, multiplication of cables, and (as the experience of 2000-01 confirmed) wasted investment that could otherwise be invested in improving network intelligence to offer more innovative services. Indeed, economic theory suggests that the value of the incumbent's network is adversely affected when competitors deploy duplicative last-mile facilities since the incumbent's existing facilities will not produce revenue if the competitor acquires the customer using its own last-mile facility. Instead Congress envisioned the use of unbundling as a catalyst for competition, so that competitors could obtain use of the monopolist network, which has been paid for by captive ratepayers, and connect those unbundled elements to facilities and equipment they chose.

In countries where regulators followed through on enforcing this unbundling policy, unbundling became and important catalyst for competition, deployment, innovation and in the

broadband sector. For example in Japan, as the Berkman study explains, unbundling enabled Yahoo!BB to enter the DSL market using loops obtained from the incumbent NTT.[28] In the meantime, the incumbent NTT, which had largely invested in ISDN as its technology of choice, responded to unbundling competition by abandoning its plans for ISDN and shifting to DSL and fiber investment.[29] While YahooBB! now has approximately one third of the Japanese DSL market, it is also investing in fiber and fixed mobile.[30] Other companies that have invested in fiber are also using unbundled loops to provide DSL where they can not deploy fiber.[31] In Japan, "unbundling operated exactly as anticipated—it created low barriers for an entrant who was able to innovat[e], create a brand, and become an aggressive competitor."[32] Similar experiences were also found in Denmark, Sweden and Norway.[33]

While U.S. policy since 2001 has emphasized intermodal competition and eliminated unbundling requirements that would facilitate intramodal competition, the Berkman Study explains that "facilities-based competition usually complements, rather than substitutes"[34] for the intermodal competition offered by open access and unbundling-based competitors. This principle is aptly illustrated by the Japanese experience discussed above. In France, as another example, one of the principal competitors to the incumbent France Telecom grew its business and brand first through the use of unbundled loops and has since expanded into deploying its own fiber and providing subscribers with a bundle of 100Mbps upload/50 Mbps download broadband, HDTV,

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[28] Study p. 84.

[29] *Id.*

[30] *Id.*

[31] *Id.* at p. 85.

[32] *Id.*

[33] *Id.* at p. 90.

[34] *Id.* at p. 76

unlimited voice, and access to Wi-Fi when away from their homes for $33/month.[35] Other competitors to France Telecom provide subscribers similar bundles over a mix of both self-deployed and unbundled loops.[36]

In fact, the experience of a number of countries catalogued in the Berkman Study challenge the underlying premise of the Commission's intermodal competition policy that expects competition to develop between companies that use different platforms. The report found that instead, more robust competition, and thus greater consumer benefits, tend to result where companies "each compete across multiple platforms."[37]

The Berkman Study also presents powerful data refuting the primary policy rationale underlying the Commission's preference for intermodal competition over intramodal competition through unbundling. That rationale assumed that incumbents would not invest in facilities which they would be compelled to share with competitors.[38] As the Berkman Study illustrates, this assumption, foisted on the Commission by the RBOCs' self-serving promises,[39] is inconsistent with the data from other countries that promoted competition through unbundling. In Japan, for example, NTT is required to provide unbundled access to fiber loops.[40] Yet NTT continues to

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[35] *Id.* at p. 97.

[36] *Id.* at p. 98.

[37] *Id.* at p. 91.

[38] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*").

[39] *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21515 (statement of Chairman Powell) (2004).

[40] Fujino, National Broadband Policies: 1999-2009 Japan, Embassy of Japan, p. 19 (October 2009) at http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/presentation/pdf/091019_1.pdf.

invest in deploying more fiber and other companies are deploying their own fiber facilities.[41] As result of this competition, even in the face of unbundling requirements that encompassed copper and fiber loops, FTTH deployment in Japan has grown rapidly, from approximately 2 million subscribers in 2004 to over 15 million subscribers today.[42] Likewise, in France, the incumbent France Telecom has responded to the competition from providers using unbundled loops with increased investment in its own fiber.[43]

Even those countries that initially abstained from unbundling have moved towards unbundling.[44] New Zealand, for example, lagged other OECD countries until it adopted an unbundling policy in late 2006. Subsequent to the change in its unbundling policy, New Zealand climbed the rankings and experienced new investment by unbundling-based competitors.[45]

Similarly, the experience in Canada, which merely paid lip service to an unbundling requirement, is telling as its rankings declined steadily while other countries sparked growth and innovation in broadband through more progressive unbundling and open access policies. While Canada has an unbundling requirement, there is little if any competition from unbundling-based competitors. This is explained in no small part by the fact that Canada has the highest prices for unbundled loops of any of the OECD nations.[46] In Canada, the average rate (excluding extremes such as in dense urban centers or remote rural areas) for unbundled access was 70% higher than

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[41] Study p. 85.

[42] Fujino, National Broadband Policies: 1999-2009 Japan at p. 6.

[43] Study p. 98.

[44] *Id.* at p. 11.

[45] Study p. 109.

[46] *Id.* at p. 110.

in South Korea and Denmark, 50% higher than in Italy, 30% higher than in Japan, France and Norway and 25% higher than in Finland or the UK.[47]

The impact on Canada's standing in the measures of the success of its broadband policies are predictable. Between 2003 and 2008 Canada fell from second to tenth on the list of OECD countries with broadband penetration per 100.[48] Its ranking on both speed and price are worse than the United States, ranking 19th for speed.[49] As of September 2008 there were no offerings in Canada for service above 35 Mbps.[50] The Canadian example is consistent with the U.S. experience, where investment and entry has been shown to be not just dependent on the availability of loops but the availability of loops at an economically efficient price that allowed economic entry by competitors.

IV. THE COMMISSION SHOULD REVISIT ITS FLAWED DECISION TO FOCUS EXCLUSIVELY ON INTERMODAL COMPETITION AND SHOULD AGAIN PROMOTE COMPETITION THROUGH ACCESS TO UNBUNDLED LOOPS

Congress has directed the Commission to reexamine broadband policy and devise a forward looking plan to bring broadband to all Americans. After the Commission and state regulatory commissions took steps to inject competition in the local telecommunications markets, the 1996 Act was enacted to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[51] In pursuit of that goal, the 1996 Act included a requirement that incumbent telephone companies provide "unbundled"

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[47] Study p. 110.

[48] *Id.* at p. 110-111.

[49] *Id.* at p. 111.

[50] *Id.*

[51] 1996 Act, Preamble.

access to their networks to new entrants where the absence of the element would "impair" the competitor ability to compete,[52] and also required the RBOCs, even where CLECs were not impaired, to provide nondiscriminatory access to their loops, transport and other network elements at just and reasonable prices in order to obtain entry into long distance markets.[53]

The Commission began a series of proceedings to implement the unbundling requirements of the 1996 Act.[54] The Commission's first set of rules established broad unbundling obligations and required incumbents to provide unbundled access to all ILEC bottleneck facilities, including loops. The incumbents, however, relentlessly contested the Commission's rules applying the "impairment standard" both in the appellate courts[55] and in remand proceedings at the Commission,[56] and despite substantial limitations of the unbundling requirements set forth in the 1996 Act continue to press the Commission for further relief from the 1996 Act's unbundling mandates. After a series of court decisions, and further Commission rulemakings, the Commission decided to emphasize intermodal competition, especially from the incumbent cable operator, in lieu of promoting competition through unbundled access.

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[52] 47 U.S.C. § 251(c)(3).

[53] 47 U.S.C. § 271.

[54] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

[55] *See e.g. Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997); *aff'd in part rev'd in part, and remanded sub nom AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366 (1999); *Iowa Util. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part, and remanded sub nom Verizon Communications v. FCC*, 535 U.S. 467 (2002); *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002); *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[56] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"); *Unbundled Access to Network Elements*, 20 F.C.C.R. 2533 (2005).

Between 1999 and 2005, in each successive unbundling decision, the Commission further whittled away the scope of mandatory unbundling. The Commission adopted the verbiage of unbundling critics, including those sitting in appellate courts, that disparaged unbundling as "synthetic" competition. As part of its rollback of unbundling, in the 2003 Triennial Review Order, the Commission expressed a preference for intermodal competition as opposed to competition through unbundling.[57] In justifying its reliance on intermodal competition, the Commission has made assumptions that turned out to be mostly false hopes. While the Commission's "intermodal competition" mantra was mainly about telco against cable competition, the Commission touted the benefits of other technologies that always seemed to be right around the corner, from LMDS, to BPL, to fixed wireless, to municipal Wi-Fi, to Wi-Max. None of these has ever demonstrated the ability to make sufficient inroads in the broadband market. And a spate of mergers in the mobile wireless sector has dampened the threat of mobile competition as the two dominant wireless companies are also the two dominant incumbent telephone companies.

The Commission further weakened the development of broadband competition in an effort to incentivize the RBOCs to deploy fiber to the premises of residential consumers by denying competitors access to such residential fiber deployments. Competitors were also limited in their access to hybrid loops where incumbents were deploying fiber deeper into neighborhoods but still relied on legacy copper loops as part of the network architecture.[58] The Commission further narrowed the scope of unbundling required under Section 271 of the Act, even while it was granting all of the RBOCs the right to compete in long distance markets.

While the Commission finally narrowed its list of unbundled network elements to a level sufficient to satisfy the judges on the D.C. Circuit, it never challenged that court's micro-

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[57] *Triennial Review Order*, 18 FCC Rcd at 17145, ¶ 278.

management of government telecommunications policy before the Supreme Court. At the same time the Commission was stepping back its commitment to unbundling, it invited the ILECs to petition the Commission for further relief from unbundling. In certain markets, the FCC has accepted the invitation and, based almost exclusively on competition from cable companies, granted the ILECs in Omaha and Anchorage forbearance from their unbundling obligations.[59] In those markets, competitors cannot obtain unbundled loops to provide broadband at all.

At the same time the U.S. began to limit the utility of unbundling to provide broadband, it also eliminated another source of competitive entry. In a series of decision dating back to 1980, the Commission had previously required facilities based telephone companies such as the Bell companies and AT&T to provide unaffiliated internet providers, such as AOL, with transmission service used to provide Internet access.[60] This access requirement was essential to the development of Internet access service and the expansion of the Internet. But in the Commission's drive to foster intermodal competition, in a series of decisions, it eliminated the access requirement, thus crippling the ability of unaffiliated internet service providers to compete with the RBOCs in the DSL market. Thus independent ISPs such as AOL, that played a paramount role in the explosive growth of the narrowband internet market in the late 1990s, were virtually excluded from the transition from narrowband to the broadband internet.

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[58] *Id.* at 17149-50, ¶¶ 288-89.

[59] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area (Omaha Order)*, 20 F.C.C.R. 19415 (2005); *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area (Anchorage Order)*, 22 F.C.C.R. 1958 (2007).

[60] *See e.g. GTE Telephone Operating Cos.,* 13 FCC Rcd 22466 (1998); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 FCC 2d 384 (1980) *aff'd in part Computer and Communications Industry Assoc. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

One of the core tenets underlying the favoring of intermodal competition and the narrowing of unbundling in the U.S. was the Commission's view that the level of intermodal competition supports this result. The data presented in the Berkman Study, however, rejects this proposition, finding firms in the U.S. and Canada that rely primarily on intermodal competition offer the highest prices and lowest speeds while firms in countries that have robust unbundling, *offer the highest speeds and lowest prices.*[61] The only reasonable conclusion from this data is that the Commission's path to limited intermodal competition over the last decade has impeded the development of broadband in the United States.

Given these findings, now is an opportune time for the Commission to reconsider whether the abandonment of unbundling in favor of "intermodal competition" has benefited the public interest. The fact that U.S. consumers are paying higher prices for lower quality service than in other countries strongly suggests not. Moreover, while the Commission also relieved ILECs of broadband unbundling on the belief that it would create incentives for both ILECs and new entrants to invest in new facilities and deploy new technology, the Berkman Study demonstrates the fallacy in that thinking. At a time when it was falling behind other industrialized market economies, U.S. consumers were denied the benefit of competitive broadband services because it is cost prohibitive to duplicate the embedded network that incumbents possess. Consequently, the United States has essentially and unfortunately condoned a broadband marketplace served by a cable-ILEC duopoly that by its nature has left the U.S. far behind similar economies when it comes to bringing innovative, robust and affordable broadband services to all of its citizens.

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[61] Berkman Study p. 80.

Section 706 of the 1996 Act directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using regulatory measures that "promote competition in the local telecommunications market" and "remove barriers to infrastructure investment."[62] The Commission has broad authority as the expert agency charged with implementing the 1996 Act and developing a national broadband plan to re-orient unbundling policy to correct the failures of the last decade's broadband policy. To the extent it has statutory authority to reinstate unbundling and other open access duties, it should not hesitate to act. Where its ability to do is hampered by statutory constraints on unbundling, or strained interpretation of the 1996 Act by courts skeptical of the wisdom of Congressional policy, the Commission should not hesitate to recommend legislative changes "to ensure that all people of the United States have access to broadband capability."[63]

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[62] 47 U.S.C. § 157 nt.

[63] Recovery Act § 6001(k)(2).

Respectfully submitted,

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