Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
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
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
International Comparison and Survey Requirements in the Broadband Data Improvement Act	)	GN Docket No. 09-47
	)	

REPLY COMMENTS OF FREE PRESS - NBP PUBLIC NOTICE #30

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SUMMARY OF REPLY COMMENTS

We strongly believe that the ultimate success of the National Broadband Plan, and the success of Commission's ongoing telecommunications policymaking activities in general, hinge on the agency viewing broadband as essential infrastructure -- a regulatory framework required by both the Recovery Act and the Communications Act. The keys to success lie in the Commission promoting meaningful competition, radically overhauling universal service policy, and ensuring the Internet remains an open platform for innovation, education and democratic discourse.

With these final reply comments, we focus the Commission's attention on the policies that are most critical to the overall success of the National Broadband Plan. This list is by no means exhaustive, and we refer the Commission to our extensive initial comments, filed in June for a full treatment of these issues.

- The Plan must set aspirational goals: Mere availability of first-generation level high-speed Internet access services is not a stopping point; it's a starting point. The plan should be designed to ensure that all Americans have access to a world-class network offering affordable services within a 5 to 10 year period.
- The Plan must radically overhaul the High-Cost Universal Service Fund: The current Fund was designed to support basic telephone infrastructure, which were high-cost low-revenue generating networks. Broadband networks enable triple-play services and give rural carriers a path to self-sufficiency. The Commission should use the High Cost Fund to support the construction of broadband networks, and only provide ongoing subsidies where they are truly needed. We outline a plan that will result in universal deployment and will enable the Commission to reduce the size of the Fund dramatically over time.
- The Commission Should Establish a Broadband Lifeline Fund: For millions of Americans broadband and broadband access devices will remain prohibitively expensive absent subsidy support. The Commission should explore a Lifeline/Linkup USF program for broadband Internet access services and devices, but ratepayer funds should not be used to pad exorbitant ISP profit margins. The program should require ISP participation, reimbursing participating providers at a reasonable rate of return.
- Further Public Investment in Middle Mile Access is Critical: The NTIA has begun to allocate billions for the purpose of constructing middle-mile access networks -- a subsidy policy designed to facilitate the further private construction of high-capacity broadband Internet access networks. The Commission, in conjunction with the NTIA, should assess the impacts of these subsidies in order to develop best practices and make recommendations on future needs for public investment.
- Effective competition and universal service policies as well as user training programs are needed to close the adoption gap: Lower prices as well as service and device subsidies will go al long way towards closing the adoption gap. But for millions of Americans, price is not the barrier to adoption; they simply don't view broadband as a high value service. Reaching these non-adopters will require on-the-ground training, education and experimentation. Ensuring that the applications markets are able to continue to innovate will also facilitate the availability of diverse content that will help raise the value proposition.
- The Plan must recognize that broadband is an input to public service: The Plan should account for the information needs of communities that are not met by the marketplace at the level required to ensure the optimal health of our democracy. Community anchor institutions such as schools, libraries, public housing, community centers, etc… must have access to low-cost robust broadband services.

- The Commission should adopt triggers for implementing policies that facilitate competition and investment: Broadband markets are local, and the level of competition and quality varies widely based on geographic area. To reach the goals of the Communications and Recovery Acts, the Commission should conduct ongoing analysis of local broadband markets to determine where market power exists. The Commission should establish triggers for competition policies depending on the specifics of the market. These policies can be time-limited, and designed to reward carrier investment in next generation technologies. Whatever course the Commission takes, it cannot sit idle once it has identified areas where consumers are suffering as a result of ISP abuse of market power.
- Properly functioning special access and enterprise broadband markets are critical to facilitating intermodal competition. The existing special access and enterprise regulatory regimes fail to adequate account for the existence and abuse of ILEC monopoly power and the Commission must act swiftly to adopt pricing regulations that adequately reflect costs. Solving the wholesale market problem is essential if the Commission is serious about facilitating intermodal competition.
- The Commission must adopt "use it or lose it" spectrum rules: The National Broadband Plan should recommend maximizing the public utility of spectrum by tightening buildout restrictions on spectrum licenses. Spectrum that sits unused for years, or that takes far too long to clear out, represents purely wasted resources in a marketplace where scarcity is a potentially serious concern.
- Expanding unlicensed spectrum must be a major component of the Plan: Opening substantial new portions of spectrum for unlicensed use will lower barriers to entry, unleash innovation and ultimately improve the markets for commercial wireless and broadband services.
- The Plan must recognize the need for reasonable and nondiscriminatory data roaming rules: All mobile wireless carriers should be able to roam on compatible competitor data networks on reasonable rates, terms, and conditions, without any discrimination in network management by the host. Ensuring that data roaming pricing is reasonable will greatly facilitate competition in the mobile broadband market.
- Reform of the Commission's set-top-box (STB) rules is critical to promoting broadband adoption: The ability of consumers to subscribe to video and broadband services, along with the potential of integrating services delivered over both pay-TV and broadband systems into a single device, could be a significant future driver of broadband adoption. This future will be held at bay for as long as cable providers are allowed to control the electronic interface between their services and the consumer.
- The Commission should act on pending rules to preserve the open Internet: Openness is critical to the value of Internet connectivity and overall market growth. The plan for universal availability and adoption of world-class broadband networks will not succeed if the Internet becomes a fractured platform.
- The Commission should implement pending revisions to FCC Form 477 broadband data and act on tentative conclusions to expand the ARMIS reporting system: The ultimate success of all Commission broadband policy -- from USF to competition -- hinges on its ability to have a universal reliable understanding of the market. The Commission has already reached the right tentative conclusions on the issue of broadband data; it just needs to act on these conclusions.
- To correct information asymmetries and empower consumers, the Commission should require enhanced ISPs disclosure: The forces of competition will only work properly if consumers have meaningful and standardized information on actual service speeds, fees, network management, and network performance.

If the Commission adopts a National Broadband Plan that is bold, comprehensive and ambitious, it will signal an end to the era of regulatory indifference. We welcome any such action that finally turns the promise of the Communications Act into a reality for all Americans.

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REPLY COMMENTS OF FREE PRESS - NBP PUBLIC NOTICE #30

Free Press respectfully submits these further reply comments in response to the Public Notice, DA 10-61, GN Docket Nos. 09-47, 09-51, 09-137, released January 13, 2010 by the Federal Communications Commission ("FCC" or Commission").

I. INTRODUCTION

As the Omnibus Broadband Initiative Team completes its work, it should always remember why Congress asked the Commission to formulate a National Broadband Plan in the first place -- the universal acknowledgement that our nation's broadband market is not living up to its potential. This failure to live up to our potential is chiefly a policy failure. For nearly a

decade our nations' broadband policy was no policy at all -- the Commission stood by, and in some cases accelerated our decline into mediocrity. This all-hands-off-deck policy of blind indifference stood in stark contrast to the Congressional intent embodied in the 1996 Telecommunications Act. Congress tasked the Commission to use the policy levers of the Act to create real and meaningful competition in basic and advanced communications service markets. Instead the Commission looked out at the market, saw some limited competition, and then decided the job was finished. It wasn't; it hadn't yet even begun.

So Congress, through the Recovery Act, has signaled its dissatisfaction with the status quo, and has told the Commission to go come up with a plan to ensure all Americans have access to affordable broadband infrastructure, and a plan to ensure that the public maximally utilizes such infrastructure. The key word in the legislation is "infrastructure." This indicates that Congress views broadband Internet access services as much more than a conduit for mere entertainment services; with the Recovery Act, Congress is telling the Commission that broadband networks are critical infrastructure like roads and other utility networks. This is a bold statement by the Congress, and the Commission must meet this with an equally bold plan that tosses aside legacy thinking, and looks past the self-interested propaganda of the ISP lobby.

Congresses' request for a broadband infrastructure policy is in essence merely a restatement of the Commission's responsibilities under Section 1 of Title I of the Communications Act. This task really boils down to the Commission using policy to make sure that "adequate facilities at reasonable charges" are made available to all Americans. The policies Congress outlined in the Act largely deal with promoting efficient competition and interconnection. Thus, we strongly encourage the Commission to view each and every aspect of the National Broadband Plan through the lens of competition.

In our initial Comments in this proceeding we exhaustively detailed the historical development of Commission policy over advanced networks, cataloging failures and successes.[1] We provided extensive detailed recommendations on reforming universal service, closing the digital divide, and promoting effective competition. In the seven months that have passed since, all subsequent evidence gathered by the Commission through the numerous hearings and specialized public comment periods has only served to strengthen the justification for our recommendations. In these final reply comments, we offer a succinct summary of the most important policy recommendations that must be incorporated into the National Broadband Plan framework in order to ensure it fulfills each and every purpose outlined by Congress in the Recovery Act.

II. RECOMMENDATIONS FOR A PUBLIC INTEREST-FOCUSED NATIONAL BROADBAND PLAN

A. The Commission Must Establish Aspirational Service Quality and Adoption Goals, as Well as Benchmarks to Measure Progress Towards Meeting these Goals.

If the National Broadband Plan is to succeed, the FCC start by recognizing -- as Congress did in the Recovery Act -- that broadband access as essential economic and social infrastructure, not a mere entertainment service. To embody this paradigm shift, the National Broadband Plan should have aspirational network quality[2] and adoption goals, and should define benchmarks for

[1] *See* Comments of Free Press, *In the Matter of A National Broadband Plan for Our Future*, GN Docket No. 09-51, June 8 (2009) (*Free Press Initial Broadband Plan Comments*).

[2] In our Comments in response to NBP Public Notice #1, we proposed in order to ensure adherence to previous Congressional intent on the issue of defining "broadband," that "at a minimum, broadband should be defined as a symmetrical telecommunications service that can reasonably deliver (at all times, including peak-use times) to each end-user of a connection, 5 megabits per second (Mbps) of bandwidth (in both the down and upstream directions), at latencies low enough to enable high-quality real time voice and video two-way communications. Such connections must be offered in a manner consistent with the *2005 Internet Policy*

measuring progress made towards achieving these goals. These benchmarks should be pegged to meet the ultimate objective of ensuring all Americans have access to an affordable world-class broadband network within 5 to 10 years.[3] We would not accept polluted water or rolling brownouts in middle America -- nor should we tolerate substandard broadband service. Moreover, we cannot repeat the mistakes of the past and attach our goals merely to a standard of universal availability.[4] Availability is not enough. Major increases in adoption levels should be the goal, and broadband infrastructure utilization ought to mirror as telephone service adoption over time.

B. A Bold Transformation in Universal Service Policy is Needed to Ensure Ubiquitous Availability of Affordable and Self-Sustaining Broadband Networks.

When the current universal service regime was created in 1996, the Internet was an application that rode on top of the telephone infrastructure. Today, telephony is one of many

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Statement, and must be affordable, as measured by actual market uptake. This bare-minimum threshold standard should apply irrespective of technology, and should serve as a baseline for both mobile and fixed services." We also noted that "this standard is the bare-minimum per user, who is engaging in nothing other than video communications. In reality, today's (and certainly tomorrow's) typical household is a multi-user/multi-tasking environment that requires multiples of the per-user bandwidth thresholds described above […] Thus, while the threshold we suggest above is appropriate for the purposes of fulfilling the Section 706 mandate, we believe that for the purposes of the National Broadband Plan the Commission should place less emphasis on the minimum thresholds, and more emphasis on an aspirational definition of broadband -- one that embodies the ARRA's frame of broadband as critical infrastructure. Such an aspirational definition would require symmetrical bandwidths on the order of 100Mbps, with longer term uses (i.e. beyond the next 5-10 years) easily requiring each line to deliver symmetrical bandwidth on the order of 1 gigabit per second (Gbps)."

[3] In order to meet this goal, a reasonably comparable level of service and pricing should be available to all Americans. The key phrase here is "reasonably comparable," and it may be necessary for the Commission to make exceptions for the last one to two percent of premises that cannot be served with fiber-optic-level quality service in a fiscally responsible way (note that this level of service can be provided over existing coaxial plant). In these cases, the best available wireless technology should be utilized.

[4] *See* "Networked Nation: Broadband in America 2007," National Telecommunications And Information Administration, United States Department of Commerce, January 2008.

applications that ride on top of broadband Internet infrastructure. This phenomenon of convergence has radically transformed the underpinnings of all telecommunications regulation. Whereas the carriers of last century were only able to earn $20 per customer each month selling local telephone service, today's carrier using a single converged network can earn well over $100 per customer every month by offering telephone, TV and Internet service. With convergence comes tremendous opportunity: the opportunity to ensure universal affordable broadband access and the opportunity to significantly reduce the future burden on the Universal Service Fund. The former is of course a goal of the Fund's staunchest defenders, and the latter is a goal of its most ardent critics. But critics and defenders of the existing High-Cost Fund all agree that broadband is the essential communications infrastructure of the 21st century. In this 21st century digital world it makes no sense to subsidize 19th century technology.

The time for Commission action is now. It need not and cannot wait for Congressional action. Under existing law the Commission has the obligation and authority to implement sweeping changes to the Fund. As detailed in our initial Comments, we recommend that the FCC begin the process of transitioning to support a system that embraces convergence.[5]

First, the Commission should modernize the current regulatory support structure to reflect the lower cost and increased revenue opportunities brought by broadband infrastructure. The need for ongoing high-cost support should be based on forward-looking infrastructure costs and total revenue earning potential. This modernized regulatory structure will reduce the need for ongoing support, as many current Fund-recipients will be able to recoup network costs from the higher per-customer revenues earned from "triple-play" phone, Internet and TV services. This regulatory approach will not require rate-regulation of traditionally unregulated services, but will

[5] See *Free Press Broadband Plan Initial Comments*, at pp. 208-234.

account for the elephant in the room: that many rural carriers use USF funds to construct converged networks, but whose support is only based on the smallest part of the revenue generated from that ratepayer investment.

With an appropriate support structure in place, the Commission can then implement a 10-year transition of the High-Cost Fund to a system that subsidizes the upfront deployment costs of broadband networks. Further ongoing support should only be provided on a limited disaggregated basis to extremely high-cost areas. This transition should begin with a freeze of total High-Cost funding at 2010 levels; we strongly believe that the existing pool of funds can be more efficiently and equitably allocated, and that there is no justification for asking ratepayers to contribute more than they already are to the Fund. This transition can be achieved via a gradual 5-year phasing down of support for those study areas where carriers are self-sufficient under the new support structure, and/or those areas where a) competing services are provided by one or more unregulated provider; b) rates are fully deregulated by state authorities; and/or c) HCF-supported lines receive "marginal" per-line support. As identified in our initial Comments, nearly 60 percent of the total High-Cost Fund is used to subsidize lines that require less than $20 per month in support, accounting for 97 percent of all lines receiving High-Cost Fund support. Those areas that are self-sufficient under the new regulatory support structure are likely to be those areas that receive marginal per-line support, and also likely to be areas where competition exists and rates are deregulated. We estimate that after the 10-year transition, the total size of the High-Cost Fund could be reduced to less than $1.5 billion annually.

The concerns about the "donut hole" are valid; however, we suggest that a disaggregated approach to targeting support for network construction and ongoing support will result in the very-high cost areas that currently lack advanced facilities receiving future support (the edges of

the “donut”), while the areas subject to competition will be those where advanced networks exists, and where carriers are able to operate in a self-sufficient manner (the “hole” of the donut).

If the Commission makes changes to the current USF contributions assessment system, it should not immediately subject residential broadband services to these assessments even if broadband networks are supported by USF. As discussed in our initial Comments, because of consumer’s own-price demand elasticity for Internet access services, assessments on broadband could lead to a net decline in subscribership, undermining the goals of universal service.

Finally, the Commission chooses should implement some changes to the existing support structure regardless of the transition path it chooses. The Identical Support Rules should be eliminated. The Commission should base all High-Cost Loop support on forward-looking costs, not historical costs. And the Interstate Access Support Fund should be phased down and eliminated.

C. The Commission Should Explore Extending the Low-Income Support Program to Include Broadband Internet Access, But Ratepayer Funds Should be Tied to a Reasonable ISP Profit Margin.

Broadband is no longer a luxury -- it is a technology that is vital for any individual to effectively participate in today’s world. Yet less than one-quarter of low-income households have broadband, while broadband is in the homes of two-thirds of the rest of the population. The reasons that some low-income homes have yet to adopt broadband are just as complex as the reasons for non-adoption in the rest of the population. Obviously, price matters, but the lack of exposure to this technology means that low-income consumers don’t yet place a high value on broadband -- unlike the high value they do place on services like cable TV and cell phones. Therefore, policies should be focused not only on lowering the cost of broadband services for

low-income consumers (including equipment costs), but also on programs that provide practical training to novice users.

Extending the Lifeline/Linkup program to broadband can play a role in bridging the digital divide by lowering equipment and monthly subscription costs for low-income households. And we strongly recommend that the Commission establish a pilot program to explore and discover best practices for increasing adoption of these critical services by low-income households. But we should not expect such a subsidy alone to be enough to close the digital divide. And we should also learn the lessons from the shortcomings on the current low-income telephone program.

In establishing a program to support the monthly cost of broadband Internet access services for low-income households, the Commission must take account of a critical difference between the current Lifeline program and a broadband Lifeline program: the supported service in the current (POTS) is a rate-regulated service, while broadband Internet access services are not. The contribution margins ISPs earn on broadband Internet access services are in most cases north of 80 percent.[6] Under no circumstance should the Commission be subsidizing profits this high. We suggest that the Commission require ISPs participate in the program, and that they offer a basic stand alone broadband Internet Access Service to qualifying low-income households at a price of $10 per month. The program would cover the entire monthly price, enabling ISPs to earn a more reasonable margin of 20 percent or higher.

[6] Contribution margins reflect the profits earned above the costs of adding additional customers. Cable ISPs incur about $7 to $8 in cost per month offering services to new customers; if they earn $40 for that service, their margins are above 80 percent. *See* Vivesh Kumar, "When is the Cable Buy Set To Come?", *Wall Street Journal*, April 3, 2008.

D. The Commission Should Conduct a Review of Recovery Act Investments in Order to Monitor and Establish Best Practices for Public Investment in Broadband Networks. Further Public Investment Should Be A Component of the Plan, But These Investments Must Be Properly Targeted.

We believe that if market forces (maximally supported by competition policy, as discussed below) cannot attract private capital to improve legacy network infrastructure, then there exists a strong case for public investment. All major infrastructure projects in our history have followed this pattern. Making these investments wisely and using public dollars to leverage private dollars should be the goal of the National Broadband Plan.

In addition to the long-term reforms to the Universal Service Fund (which will largely be focused on funding last mile infrastructure in completely *unserved* areas), the Commission must confront the infrastructure challenges in *underserved* areas. These are those areas where first-generation, minimal high-speed Internet services are available, but where limitations in middle mile and last mile infrastructure that will in the future result in a "quality" digital divide (i.e. these networks will be unable to offer reasonably comparable services in terms of price and capabilities to those that are already or will become available in major urban areas). To confront these challenges, we recommend that the National Broadband Plan set in motion a "first-pass" collaborative review of all federal and state public network infrastructure investments. This review will enable the Commission and other federal and state agencies to measure the progress and success of the NTIA/RUS grant and loan programs in delivering targeted public network investments in unserved and underserved areas. This first-pass review should examine how and to what extent targeted public investment in middle-mile facilities improves service for all downstream end-user networks. Ample case studies will exist from the NTIA/RUS grants/loans, and these experiences can aid in establishing best practices for future investment in underserved areas.

Finally, similar to the conditions established by the NTIA and RUS for the receipt of Recovery Act funds, the Commission should delineate clear public service conditions for ISPs who construct networks with public funding. We recommend that at a minimum, middle-mile facilities constructed with public funds should be operated on a wholesale open access basis, offering service at reasonable and nondiscriminatory rates, terms and conditions at all endpoints and interconnection points.

E. A Combination of Competition, Universal Service, and User Aid and Training Programs Are Needed to Close the Adoption Gap

There is universal agreement that the National broadband strategy must move beyond addressing mere availability and tackle the vexing problem of adoption. The economic growth that comes from broadband is only realized in its fullest form if the take rate is high. But substantial portions of the population choose not to subscribe to broadband Internet access services even when they are available from multiple providers. The National Broadband Plan team has devoted much effort trying to understand why this is the case even though cable television and mobile telephone subscribership numbers dramatically outpace broadband subscription in low adoption communities. All indications point to multiple reasons, broadly grouped into cost, valuation and utility. Some consumers simply can't afford broadband, while others perceive low utility from these services, or believe the value they offer is not worth their cost. However, historical data also indicate that once services are adopted, the previous non-users are highly likely to maintain service. Thus to increase adoption to rates comparable to telephony or television, policies are needed to lower prices, increase value, and increase awareness of utility.

Many of these issues could be substantially addressed by competition policy. The National Broadband Plan should recognize that the lack of competition in our duopoly markets is directly responsible for high prices and incremental deployment, which in turn contributes to the adoption problem. The oligopoly market has enabled ISPs to reduce output and avoid targeting low-income consumers. Even a modest amount of additional competition, encouraged by policies discussed in further detail below, could result in pricing innovation, such as pre-paid fixed broadband access services, which could substantially address the adoption gap.

But price competition is only one facet of the adoption problem (one very important both now, and even more so in the future as the digital generation comes of age). Even with lower prices, millions of Americans will remain on the wrong side of the digital divide due to basic income constraints. Universal Service policy can help play a role in bridging this gap, by subsidizing the high cost of equipment and monthly access fees. However, many of the programs that will provide the most impact on the digital divide lie outside of the Commission's jurisdiction and expertise. Therefore, the National Broadband Plan should make recommendations to Congress and stakeholders on the need to explore a wide mix of polices aimed at solving this problem, including programs that provide practical technology training, enhance digital literacy, and develop community-based content and applications.

F. The National Broadband Plan Must Recognize that Broadband is An Input to Public Service. Community Anchor Institutions Must Have Access to Low-Cost Robust Broadband Services.

The Plan should account for the information needs of communities that are not met by the marketplace at the level required to ensure the optimal health of our democracy. This is a tried and true practice of communications law for a century. Radio and television broadcasters have public interest obligations, while Cable providers pay franchise fees, support public access

channels, and agree to serve all households in a community. ILECs too have Carrier of Last Resort (COLR) obligations and minimum quality requirements.

The public interest commitments of our 21st century infrastructure should be rooted not only in universal service policies (i.e. ensuring the availability of services at reasonable comparable quality and rates), but also in offering high-capacity services to public, community anchor institutions, such as schools, libraries, public housing, military bases, public media outlets, universities, and other potential and worthy endpoints. The existing Schools and Libraries program as established in Section 254(h) of the Communications Act embodies this social aim, but the needs go beyond these particular institutions, and the e-Rate program itself is in need of overhaul.[7] The National Broadband Plan should initiate an Inquiry to determine to what extent carriers should be obliged to offer reduced cost service to these community institutions; how policy changes can facilitate these institutions' ability to offer these services to local end users via local-area-networks; to what extent these institutions should be subsidized; and whether or not a dedicated program, similar to the Schools and Libraries Fund, should be created to ensure the public service goals of the National Broadband Plan are accomplished.

[7] In our initial Comments, we recommended the that Commission explore an "e-Rate@home" program, where USF-supported schools and libraries would be permitted under the rules of the fund to use their existing high-capacity connections to offer free WiFi services to students in the surrounding neighborhoods, and that this program be combined with aid programs that provide laptops to qualifying students in participating schools. Though details are at this time yet unknown, it does appear the Commission is already pursuing such policies. *See* "FCC Announces Tentative Agenda for February 11th Open Meeting," Federal Communications News Release, January 21, 2010 (noting an item summarized as "[a]n Order and Notice of Proposed Rulemaking to enable schools that receive funding from the E-Rate program to allow members of the general public to use the schools' Internet access during non-operating hours at no additional cost to the Universal Service Fund").

G. The National Broadband Plan Must Include Mechanisms for Assessing Local Competition and Market Power and Establish Triggers for Market Interventions that Will Facilitate Competition and Investment.

The centerpiece of our recommendations in our initial Comments was the suggestion that Commission begin the process of formulating a National Broadband Plan by "reviewing every major regulatory decision since the 1996 Act to determine whether or not its predictions for market competition and deployment have come true." We encouraged the Commission to conduct such a review because we strongly believe that the ultimate fate of the National Broadband Plan rests on the Commission's ability to promote meaningful competition in otherwise naturally uncompetitive broadband markets. Only by revisiting past assumptions can the Commission begin to have a clear understanding of its own responsibility for enabling the market failures that led to the need for Congress to require the formulation of a National Broadband Plan.

The Commission's responsibilities under the Communications Act and the Recovery Act are clear, and the successful fulfillment of these responsibilities hinges on the agency's willingness to facilitate meaningful competition. To perform its role as the corrector of market failures, the Commission must develop a set of common standards for competition analysis, one aimed at identifying those local markets where ISPs possess and/or abuse market power. Following the recommendations of the Department of Justice[8], the Commission should look not simply at a raw count of the number of potential providers, but actually define market boundaries and identify the existence or lack of market power.

[8] Ex Parte of the United States Department of Justice, *In the Matter of A National Broadband Plan for Our Future,* GN Docket No. 09-51, pp. 19-20 (Jan. 4, 2010).

We suggest that in this process the Commission develop triggers based on market concentrations (as measured by HHIs). Any market that hits a threshold HHI value of 1,800 should trigger further investigation.[9] If this further investigation identifies market power abuses or potential abuses[10], this identification should trigger proceedings that contemplate regulatory intervention.

These interventions could take many forms, and nothing should be ruled out. For example, in the event that a single ISP has achieved a market-dominant position, the Commission should implement a rule requiring the unbundling of the Internet access service component of any triple-play or quadruple play service packages, requiring such services be made available on stand-alone basis for a price that is reasonably comparable to the price offered in the bundle and/or to prices offered for a similar service in other markets by similar providers. In so doing, the FCC will make it possible for consumers to build their own bundles of services across providers. If a local cable ISP has market dominance, this rule will facilitate competition and lower prices by permitting consumers to build their own bundles with cable modem service, over-the-top VoIP, and satellite television. The resultant downward pressure on pricing in voice and video markets will return some of the consumer surplus back to the household.

In markets where classic market power abuses exist, the Commission should consider requiring dominant carriers to offer a basic level Internet access service at a regulated rate. This could be relaxed to a requirement to only qualifying low-income households as competition

[9] In prior comments in the 07-38 docket we have detailed how the Commission can use the new Form 477 subscribership information to calculate HHIs for fixed residential broadband services at the Census Tract level.

[10] As explained in our initial comments, significant and sustained price increases are but one form of abuse of market power (known as the "classic" form). But carriers can also use market power to exclude competitive entry, or delay what would otherwise be timely and efficient network investments and service innovations.

develops over time. Because the small business enterprise broadband market exists in a separate and distinct market from the residential access market, it is likely that the Commission will need to analyze these markets separately. In the event that classic market power abuses in the small business market are identified, the Commission should pursue policies requiring dominant ISPs to provision small business broadband services at reasonable rates, terms and conditions.

We recommend the Commission use all existing authority at its disposal to promote competition and investment. The decision to end line sharing requirements on ILECs was shortsighted and should be revisited. The costs of existing copper infrastructure was long ago recovered, and encouraging basic DSL competition will actually provide incentives for LECs to accelerate last mile fiber deployment. The Commission must recognize the wisdom of former Chairman Powell, who rejected "the argument that the elimination of line sharing provides an affirmative incentive for ILEC deployment of new broadband infrastructure. Line sharing rides on the old copper infrastructure, not the new fiber facilities that we seek to advance to deployment."[11] Along these lines, the National Broadband Plan must address the alarming issue of copper retirement.[12] The concerns about asymmetric regulation can be easily addressed with existing policy mechanisms. As we stated in our initial comments, the National Broadband Plan should recommend the Commission revisit the *Internet Ventures* decision, and use its authority

[11] *See* "Oral Statement of FCC Chairman Michael K. Powell, Before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, U.S. House of Representatives," Feb. 26, 2003.

[12] *See* Ex Parte of XO Communications, LLC, *In the Matter of Report on Rural Broadband Strategy, International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act, A National Broadband Plan for Our Future, Petitions for Rulemaking and Clarification Regarding the Commission's Rules Applicable to Retirement of Copper Loops and Copper Subloops*, GN Docket Nos. 09-29, 09-47, 09-51; RM-11358 (Jan. 11, 2010).

under Section 612 of the Act to require cable companies to provide channel space for third-party DOCSIS providers.[13]

The Commission can use these geographically targeted, market-specific competition policies both as a means to address market failures (a "stick" if you will) and as a means to encourage more timely investment. ISPs can be relieved of such obligations, fully or partially, if 1) further market analysis demonstrates effective competition and the lack of market power, or 2) if carriers upgrade a specified percentage of their lines to a next-generation capacity, and agree to offer these services at prices that are reasonably comparable to those in unregulated markets for a specified time period. This "carrot" to the "stick" of regulation will remedy both classic and exclusionary abuses of market power, as well as remedy the often overlooked abuse of market power that comes in the form of delayed investment, which results from a lack of effective competition.

The key to this competition framework is geographic targeting of policies at areas that lack effective competition. This is much different than industry-wide regulations, and will have the effect of stimulating investment and deployment as well as competition. As the Commission develops and implements the framework, it will have to be vigilant about determining the boundaries between markets. All indications are that fixed and mobile services are not competitive products. Similarly, it is conceivable that though DSL and cable modem services are currently substitutable products, advances in cable modem offerings may one day soon result in DOCSIS 3.0 services being in a separate market from first-generation DSL services. Therefore it

[13] *In the Matter of INTERNET VENTURES, INC. INTERNET ON-RAMP, INC, Petition for Declaratory Ruling that Internet Service Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act*, File No. CSR-5407-L, Memorandum Opinion and Order, FCC-00-37, February (2000).

is likely that consumers in many geographic areas of the nation will only be able to participate in a DOCSIS 3.0 monopoly market, which will require careful regulatory attention in order to guard against abuses of monopoly market power.

H. Meaningful Special Access and Enterprise Broadband Market Regulations Are Critical to Promoting Facilities-Based Competition

For many years, the FCC has been wrestling with the question of how to foster competition in the special access market. While this is a policy question that has historically been focused on facilitating CMRS competition, it is now apparent that special access reform and more general enterprise market regulatory reforms are critically important to the future of broadband in America. These lines transport voice services and broadband Internet access to cell phone towers and to businesses, including small Wireless Internet Service Providers (WISPs). WISPs are the leading potential competitors to the cable-telco broadband duopoly. If this market is functioning properly, it in turn will lead to more effective competition in the broadband Internet access market and mobile voice and data market. But if the special access and enterprise markets are not characterized by reasonable pricing, customers will lose out. In most geographic markets, these lines are provisioned in a monopoly manner by the Bell companies and other ILECs, who often earn margins that are in the high double digits. To make matters worse, mobile carriers that compete directly with AT&T's and Verizon's wireless businesses must pay these inflated prices for special access and enterprise circuits.

There is near-universal recognition that in most markets, facilities-based special access competition will not spontaneously materialize. The case for regulatory intervention is clear. The Department of Justice notes that failure to reform special access pricing could prevent wireless

from becoming a more competitive market.[14] The FCC should act on its pending rulemaking to establish effective regulations to curb monopoly abuses in the special access market. And the Commission should revisit its series of enterprise market forbearance orders, which all made the fatal flaw of determining that this market is competitive *everywhere* based on limited data about this market at the national level. Creating effective intermodal competition will be impossible without special access and enterprise market regulatory reforms.

I. If there is a Spectrum Crisis, Then The Commission Should Establish Strict "Use it or Lose it" Spectrum Management Policies. The Social Costs of Warehousing of Spectrum Far Outweigh Any Perceived Private Benefits.

The National Broadband Plan should recommend maximizing the public utility of spectrum by tightening buildout restrictions on spectrum licenses. Spectrum that sits unused for years, or that takes far too long to clear out, represents purely wasted resources in a marketplace where scarcity is a potentially serious concern. The future of mobile broadband -- towards higher speeds in both upstream and downstream, capable of supporting a wider variety of services -- will only exacerbate these problems. Spectrum reallocation can allow more efficient and valuable uses of many portions of the band. To achieve this reallocation in an optimal way, the Broadband Plan should call on the Commission to attach aggressive building restrictions in all spectrum licenses. These restrictions should require detailed time-tables for build-out, and the Commission should enforce the time-tables and revoke spectrum licenses from non-complying entities.

The Broadband Plan should also call on the Commission to expand unlicensed use of spectrum that is difficult to clear, and of spectrum returned as a result of failure to comply with

[14] Ex Parte of the United States Department of Justice, *In the Matter A National Broadband Plan for Our Future,* GN Docket No. 09-51, p. 21, n. 57 (Jan. 4, 2010).

buildout obligations. Spectrum-sensing technologies could enable unlicensed devices to make use of spectrum much more quickly, as the spectrum need not be fully cleared for significant and substantial use to be made.

J. The National Broadband Plan Must Have an Aggressive Unlicensed Spectrum Component. Unlicensed Spectrum Lowers Barriers to Entry for Intermodal Competition, Promotes Adoption, and Fuels Innovation

The National Broadband Plan should recognize and acknowledge the value of unlicensed spectrum in the broadband ecosystem. Unlicensed spectrum serves as a complement to, and in some ways a substitute for, commercial reserved spectrum and other broadband technologies. Opening substantial new portions of spectrum for unlicensed use and ensuring low entry barriers to device manufacturers and service providers will improve the markets for commercial wireless and broadband services. It will lead to substantial economic and social gains.

When spectrum was first allocated for unlicensed use in the bands now used to offer Wi-Fi networks, policy makers could not possibly have anticipated the scope of benefits that have flowed from that decision. Wi-Fi networks have become an invaluable tool for home and business internal connectivity, often replacing internal wiring and granting greater (small-range) mobility to broadband users. Wi-Fi networks offload data traffic from mobile devices onto more robust fixed connections; provide connectivity in coffee shops and hotels and other commercial establishments; and even occasionally serve as primary commercial broadband Internet access technologies. Because unlicensed spectrum networks such as Wi-Fi are general purpose, multi-use, open technologies, they have, and have demonstrated, tremendous potential for innovation and economic benefit.

The Commission has begun future cultivation and promotion of unlicensed spectrum admirably by opening up the so-called “TV White Spaces” for unlicensed use. However, the

White Spaces proceeding has been substantially delayed as the Commission develops the database of reservations within the spectrum. The Broadband Plan should call on the Commission to accelerate this process and to advance other efforts for making unlicensed spectrum accessible and usable. The Commission should aggressively pursue spectrum sensing-only solutions for use of the White Spaces spectrum, to keep entry costs as low as possible to facilitate innovation and competition. The Commission should also identify and make available substantial additional spectrum for unlicensed use, to maximize the value of any commercial spectrum allocations by encouraging complements and competitors.

K. Reasonable and Non-Discriminatory Data Roaming Obligations Will Facilitate Competition in the Mobile Broadband Market and Should be a Centerpiece of the National Broadband Plan's Wireless Strategy

Promoting more competition in mobile data networks should be the centerpiece of the National Broadband Plan's wireless strategy. This is no easy feat, as mobile broadband networks present a unique range of challenges not seen in fixed wireless. Unlike wireline networks, mobile wireless service providers must be able to offer nationwide service to remain viable major competitors, because mobile service is expected to be available anywhere in the United States. But deploying nationwide facilities is prohibitively expensive, and from an efficiency standpoint has traits of a natural monopoly. Despite this hurdle, a host of regional carriers exist and play some role in the market for mobile voice services. Many of these regional carriers are unable to build nationwide networks, and their survival hinges on their ability to secure roaming agreements for voice traffic. The Commission recognized this, and passed rules requiring mobile wireless network operators to offer roaming for voice and text services on reasonable rates, terms, and conditions wherever a competing carrier lacked spectrum licenses. This

requirement has improved competition and led to a relatively competitive and consumer-friendly market in pre-paid voice services.

To date, the markets for post-paid services and for mobile broadband data services have not followed suit. Although other problems contribute to this stagnant climate (including exclusive handset agreements, excessive special access costs, and inequalities in suitable spectrum holdings), a substantial obstacle to the emergence of regional carriers as competitors is the Commission's failure to extend its voice and text roaming obligations to data services. Because data services carry no roaming obligations, regional carriers (who would compete with national carriers, and who have little to no negotiating power) cannot secure data roaming on reasonable rates, terms, and conditions. As a result, they cannot offer competing mobile broadband service offerings.

The National Broadband Plan should call on the Commission to close the data loophole in its roaming rules. The Broadband Plan should establish that all wireless carriers should be able to roam on compatible competitor networks on reasonable rates, terms, and conditions, without any discrimination in network management by the host. Procedures for filing complaints should be friendly to small businesses, and the Commission should actively police allegations of misbehavior by host networks.

L. Reform of the Commission's Set-Top-Box Rules is Critical to Promoting Broadband Adoption. The Existing Rules Give Too Much Power and Control to Incumbent Cable Operators, Who Profit From The Lack of Innovation in the Consumer Premise Equipment Market.

The National Broadband Plan should trigger a complete overhaul of the Commission current rules governing interoperability of set-top boxes (STBs) and other consumer premises equipment (CPE) with services offered by multi-channel video programming distributors

(MVPD). As the Commission has recognized, the ability of consumers to subscribe to video and broadband services, along with the potential of integrating services delivered over both MVPD and broadband systems into a single device, could be a significant future driver of broadband adoption. This future will be held at bay for as long as MVPDs are allowed to control the electronic interface between their services and the consumer.

Congress recognized the importance of an independent market for CPE and passed a law specifically designed to achieve that outcome. In implementing that directive, however, the Commission left far too much power in the hands of incumbent cable operators when it failed to require any form of standardization of interoperability or interconnection with other electronic equipment or with the Internet and allowed the cable-based organization CableLabs to retain certification power over devices. By allowing the cable industry to play gatekeeper, these choices funnel any benefits from innovation in the CPE market to the cable companies and discourage innovation and investment.

The Broadband Plan should recommend the adoption of rules ensuring that MVPDs supply only a standardized output suitable for use by a broad range of electronics. New rules should not permit MVPDs to retain control over the program guide or channel selection interface or any other consumer-facing mechanism involved in the use of MVPD-delivered content. These rules should allow manufacturers of CPE to connect equipment to both MVPD-delivered content and to Internet content and to innovate in the presentation and combination of various sources of content. Finally, new rules should encourage investment and innovation in the market for CPE, providing to provide additional value for users and additional incentives to adopt broadband services.

M. Openness is Critical to The Value of Internet Connectivity and Market Growth. The Commission Should Act on Pending Rules to Preserve The Open Internet.

While the Commission laudably has begun a proceeding to consider open Internet rules on a track parallel to the National Broadband Plan work, we reject any notion that these issues can be fully separated. A plan for universal availability and adoption of world-class broadband networks will not succeed if the Internet becomes a fractured platform. Realizing the Internet's full potential to foster commerce, improve economic and social mobility, and promote democratic engagement depends on open access to content and applications. Promoting openness principles means not only preserving the open Internet, but also fostering openness in the market for cable-set top boxes (as discussed above) and other consumer services and products on which the Plan has focused.

In order to preserve openness, the FCC should complete its open Internet rule-making in the spring of 2010 to provide the basic, light-touch rules guaranteeing nondiscrimination, transparency, innovation, and open markets on the Internet. It should also proceed broadly to ensure all devices are open, standardized, and portable across all end-user broadband networks to the extent technically feasible.

N. The Commission Should Implement Pending Revisions to FCC Form 477 Broadband Data and Act on Tentative Conclusions to Expand the ARMIS Reporting System.

Whatever policies the Commission implements as a part of the National Broadband Plan, the effectiveness of the new policies will be inextricably linked to the collection and analysis of meaningful broadband data. A policy regime that aims to encourage the deployment of infrastructure needs data about what infrastructure exists, and where it is deployed. A policy regime that aims to encourage the maximal utilization of infrastructure needs data on the

historical and forward looking costs of the infrastructure, and the revenues and charges earned and levied by the owners of the infrastructure. A policy regime that seeks to encourage adoption of broadband needs granular data on price, speed, customer satisfaction, and customer awareness of competitive alternatives, as well as data on other barriers to adoption such as digital literacy and computer ownership. A policy regime that aims to promote meaningful competition must be informed by data that enables the identification and measurement of market power, and the abuse of such power. In short, a national broadband plan needs benchmarks to be measured against, and those benchmarks must be based on good data.

In 2008 the Commission adopted long-overdue changes to its Form 477 broadband data collection practices.[15] However, the Commission left the job only half finished -- stopping with new rules on subscribership counts. The critically important matter of broadband *availability* data was left to a Further Notice, accompanied with a promise to reach a resolution by fall 2008. This self-imposed deadline came and went without any further attention paid to the matter. In our initial Comments, we urged the Commission to complete its Form 477 reform efforts, preferably prior to the completion of the plan, but at the very least as a part of the plan's immediate self-executing actions.

We recommend the Commission require all providers to report their service footprints by Census Block, broken down by technology type and speed tier. Lat year several telecommunications giants and trade associations agreed to report to NTIA-funded state-designated entities the availability of broadband services at the Census Block level, and agreed to

[15] See *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Order on Reconsideration, 23 FCC Rcd 9800 (2008) (*Data Order and FNPRM*).

the public disclosure of the identity of each provider within a given Block.[16] It is the exact data that we and others have repeatedly asked the Commission to gather under Form 477[17], and therefore there are now no political or practical roadblocks to this facet of FCC broadband data reform; it is only a matter of the Commission's willingness to implement the required revisions.

In the 2008 *Data Order and FNPRM* the Commission also promised to reach a conclusion on the issue of monitoring actual speeds and prices. We believe the record here is complete, and provides a clear path for how the Commission should proceed. The Commission should conduct on going field experiments to monitor actual speeds and it should require providers to report contention ratios in a granular geographic fashion. The Commission should also collect the published, stand-alone, non-promotional, non-contractual price, categorized within the Commission's improved speed tiers on a Census Tract level. In addition to stand alone prices reported by Commission speed tier, the FCC should also require the reporting of average price per megabit per second ($/Mbps), as well as Average Revenue per User (ARPU) data -- all at the Census Tract level. Finally, when collecting information on price, the Commission should attempt to account for the "real" price of long-term contracts. Contracts create switching costs that must be taken into account. If a provider does not offer broadband without a contract, the Commission must reflect this in the price.

In the fall of 2008 the Commission initiated a Further Notice on the issue of middle mile data, tentatively concluding that this type of data (similar to some of the data that used to be

[16] See Fawn Johnson, "Commerce Dept Drops Request for Sensitive Telecom Data", Dow Jones Newswires, August 7, 2009

[17] See e.g. Free Press June 30 Data Comments; See also Letter to Marlene Dortch, Secretary, Federal Communications Commission, from the People of California and the California Public Utilities Commission, WC Docket No. 07-38, August 19, 2008 (encouraging the FCC to collect broadband availability data at the Census Block or street address level).

collected in the ARMIS reporting system from price-cap carriers) should likely be collected from all broadband providers.[18] We strongly encourage the FCC to act on this conclusion and establish an "ARMIS 2.0" reporting system that provides the Commission with an ongoing and accurate picture of the nation's information infrastructure, and the barriers that may exist for expanded intermodal competition.

Finally, the Commission must end its knee-jerk response to provider's universal requests for Form 477 data confidentiality. These requests are often completely unsupported, and have resulted in the Commission taking drastic steps such as redacting the number of residential DSL subscribers in an entire state. To be sure, the Form 477 process works best when truly competitively sensitive information is kept from public view, but the actual instances of this are much lower than that stated by ISPs. For example, while the Commission may be inclined to keep each ISP's individual subscriber counts at the Census Tract level confidential, there is no reason that HHIs and 4-Firm concentration percentages calculated at the Tract should be kept under cover. Whatever level of information is ultimately disclosed, the Commission should establish a process for access to more disaggregated raw data by researchers, working under non-disclosure agreements. Outside analysis will benefit Commission policymaking in the long run and should be encouraged and facilitated.

[18] Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering, WC Docket No. 08-190, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 23 FCC Rcd 1364, 1382 para. 34, 35 (2008).

O. To Correct Information Asymmetries and Empower Consumers, The Commission Should Require ISPs Disclose Meaningful and Standardized Information on Actual Service Speeds, Fees, Network Management, and Network Performance

The National Broadband Plan should recommend a comprehensive overhaul of network information disclosure to consumers. Disclosure of meaningful information about all aspects of broadband services allows consumers to maximize their use of the broadband connection and the value they obtain from their experience. Disclosure identifies differences between services that go above and beyond a single "advertised speed" number, allowing consumers fortunate enough to have multiple options for broadband service the ability to choose the service that best fits their needs. Form 477 data and other Commission reporting mechanisms serve to paint a national and (eventually) regional picture of service deployment and adoption, but the data submitted in these processes is often restricted as confidential and unavailable to residential and business consumers. The Broadband Plan should recognize the importance of meaningful consumer disclosure in promoting broadband service adoption.

The Commission recently solicited comments on broadband consumer information disclosure. Numerous comments from industry, public interest groups, and state governments have supported this proceeding, and some have offered detailed proposals or templates to identify mechanisms for standardized disclosure of essential network performance information. Even opponents of other forms of Commission activity in the broadband market roundly support increasing consumer disclosure. These comments revealed substantial gaps in current voluntary disclosures by broadband service providers.[19] In particular, service providers disclose only

[19] Numerous government entities have recognized this. *See e.g.* Comments of the National Telecommunications and Information Administration, *In the Matter of A National Broadband Plan for Our Future*, GN Docket No. 09-51, p. 6 (Jan. 4, 2010); Ex Parte of the United States Department of Justice, *In the Matter of A National Broadband Plan for Our Future,* GN Docket

"advertised" speeds which may bear little or no relation to typical service performance, sometimes because of oversaturated shared networks with substantial contention ratios and sometimes because of misleading "PowerBoost" speeds which apply only under certain specific circumstances. Service providers also present consumers with vague and overbroad terms of service, in which they reserve for themselves overwhelming control over the use of the service including the right to disconnect a user for behavior that is "objectionable" or any communications that are "deceptive." Such broad terms of service cannot possibly indicate to consumers the real limitations and restrictions imposed on their service, including restrictions imposed by service operators through the use of deep packet inspection or other network controls.

The Broadband Plan should call on the Commission to revise and extend its truth-in-billing and disclosure rules for broadband services. The Plan should specifically recommend mandatory disclosure of meaningful and standardized information on actual service speeds, any fees or charges associated with the service, any and all network management practices in use, and precise network performance details for commercial broadband services. As voluntary mechanisms have proven woefully insufficient, rapid and thorough Commission intervention is needed.

No. 09-51, pp. 19-20 (Jan. 4, 2010); Comments of the Federal Trade Commission, *In the Matter of A National Broadband Plan for Our Future*, GN Docket No. 09-51, p. 9 (Sept. 4, 2009).

Respectfully submitted,

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