

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

In the Matter of)	GN Docket No. 09-137
)	
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. 09-51
A National Broadband Plan for Our Future)	
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)	
International Comparison and Survey)	
Requirements in the Broadband Data Improvement)	GN Docket No. 09-47
Act)	
)	

REPLY COMMENTS OF MARVIN AMMORI - NBP PUBLIC NOTICE #30

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Summary of Reply Comments

As the Broadband Task Force completes its work on drafting a national broadband plan, the Task Force and the Commission should consider the United States's international trade obligations requiring our nation to open our telecommunications markets to competition. These trade obligations would likely require the FCC to provide reasonable, cost-oriented access to telecommunications networks to ensure market access. Notably, the obligations could require the Task Force to address the politically sensitive issues of special access regulation and open access policies.

These Reply Comments are filed now in light of the Task Force's December Update, to help the Task Force consider possible international trade ramifications. A plan failing to ensure certain competitive safeguards could run afoul of our international treaty obligations. By failing to live up to those obligations, the FCC could provoke diplomatic tensions and international trade disputes.

Carriers in other nations seek to compete in our markets, and some have filed in this docket. Such international competitors—and their home nations with the ability to file international claims—will likely turn to diplomatic and international fora if the FCC fails to ensure the market access to which the US has committed. For example, these nations will invoke the multilateral General Agreement on Trade in Services (GATS), which includes US commitments on “enhanced telecommunications services” negotiated in the Uruguay Round, commitments in the Basic Telecommunications Agreement (BTA) appended as the Fourth Protocol to the GATS, and commitments in the GATS Annex on Telecommunications.

In the interest of international comity and respect for our international obligations, the Task Force and Commission should analyze whether a national broadband plan without certain

competitive policies—notably special access and open access rules—violates our international treaty obligations.

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I respectfully submit 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.

I. Background: Framework Update’s Competition Policy

On December 16, the FCC’s National Broadband Plan Task Force provided an update called a “Framework for Final Phase in Development of Plan.”

The Update was subject to criticism by some groups for lacking certain competition policies.¹ Some pointed to the Harvard Berkman Center Report, which supported certain open access policies.² In light of this criticism, the Broadband Task Force's head coordinator, Blair Levin, defended the pro-competitive parts of the Update, and rejected open-access policies for lacking political support.³

I sympathize with the concern for political feasibility and have the greatest respect for Mr. Levin. I commend his government service in agreeing to coordinate this plan.

I write, however, to offer a word of caution. The Task Force should not overlook political constraints in the other direction. The Task Force should not overlook the larger political framework involving international trade and binding dispute resolution at the international level. We have made international commitments to open our telecommunications sector to competition, and other nations will likely apply political and diplomatic pressure to ensure we keep those commitments.

II. International Commitments Require the US to Promote Competition in Telecommunications

Simply put, trade obligations limit the FCC's ability to adopt a plan without adequate competitive safeguards. The US and other nations will debate which safeguards are sufficient.

¹ Karl Bode, "Our New National Broadband Plan Doesn't Address Competition?," *DSL Reports*, Dec. 16 2009; Roy Mark, "FCC Broadband Plan Outline Disappoints Competition Advocates," *eWeek*, Dec. 16, 2009; Press Release, "Free Press: Solutions to the 'Competition Crisis' Missing from the National Broadband Plan," Dec. 16, 2009, <http://www.freepress.net/node/75428> (hereinafter, Free Press, "Solutions Missing") ("The FCC press release announced: 'Encouragement of competition will be a guiding principle of the plan, since competition drives innovation and provides consumer choice.' However, the overview of the plan failed to present policy ideas for spurring competition.").

² Press Release, "Public Knowledge Disappointed with FCC Broadband Plan," Dec. 16, 2009; Harvard Berkman Center, "Next Generation Connectivity," Oct., 2009 (draft).

³ Blair Levin, "FCC Gives Status on Nat'l Broadband Plan," *C-Span (The Communicators)*, Dec. 21, 2009 (hereinafter "Levin on C-Span"); Amy Schatz, "FCC Eyes Average Internet Speeds for Rural Areas," *Wall St. J.*, December 21, 2009.

A. Necessary Competitive Safeguards Include Special Access and Open Access

Our trading partners will likely make arguments around our policies for open access and special access, which they would argue fail to ensure the market access to which our treaties commit.

First, special access rules—requiring reasonable rates for those purchasing special access interconnection—would ensure entrants could compete in providing telecommunications services to business customers and in providing wireless service. Many commenters have argued that regulation to ensure such access is necessary for competition, including commenters owned by foreign corporations, like British Telecom, T-Mobile, members of the Ad Hoc Telecom Manufacturer Coalition,⁴ and the Ad Hoc Telecommunications Users Committee.⁵

Second, open access rules are needed to ensure competition, according to the Berkman Center, and according to British Telecom, the Japanese Government, and Free Press (as well as Congress, in the 1996 Act, and the FCC, until the Bush Administration).⁶

B. The Role of International Trade Law in Counteracting Domestic Capture

International trade obligations often serve to counterbalance the tendency of nations to adopt laws favoring their “national champions” over competitors, domestic and foreign. National champions are incumbent domestic companies with considerable local political influence. Such favoritism harms consumers as well as competitors.

⁴ See, e.g., Ad Hoc Telecom Manufacturer Coalition Ex Parte, Special Access Rates for Price Cap Local Exchange Carriers,

WC Docket No. 05-25, Apr. 3, 2009.

⁵ Comments of the Ad Hoc Telecommunications Users Committee, Analytical Framework Necessary to Resolve Issues in the Special Access NPRM, WC Docket No. 05-25, Jan. 19, 2010.

⁶ See, e.g., Comments of Japanese Government, June 5, 2009; Comments of Free Press, June 8, at 22, 77, 81; Comments of BT Americas, Inc., A National Broadband Plan for Our Future, GN Docket No. 09-51, June 8, 2009.

Favoring national champions is common. Because of public choice problems, many governments and agencies are “captured” by dominant domestic businesses.⁷ A foreign nation would certainly argue that the FCC (like other governments’ agencies) is captured.⁸

Where a government, including the US’s, protects national champions like telecommunications and cable carriers based on domestic public choice problems, “supranational” structures can help force that government to support competition, to the benefit of its own national consumers.⁹ Here, with the FCC’s national broadband plan, international pressure from other nations could countervail the domestic US political opposition to certain access rules—especially as that international pressure would derive from US treaty commitments.

C. Our Trade Commitments Require a Competitive National Broadband Plan

In the 1990s, the US undertook obligations to open up its telecommunications markets to competition. In addition to bilateral and regional agreements, which impose additional constraints I do not address here, the US joined the World Trade Organization and made commitments to open up its own telecommunications markets. It did so in a bargain to encourage other nations to open up their markets.¹⁰

The nations’ commitments were aggressive, partly in light of the well-known economic factors potentially impeding competition in network industries (such as large economies of scale

⁷ See, e.g., Daniel Farber & Philip Frickey, “The Jurisprudence of Public Choice,” 65 *Tex. L. Rev.* 873 (1987).

⁸ A former FCC Chairman once joked that FCC stood for “Firmly Captured by Corporations.” Speech by Reed Hundt, Chairman, Federal Communications Commission, Center for National Policy, Washington, D.C., May 6, 1996.

⁹ This effect is well-known to legal scholars studying the European Community, where the European-level structures force governments to open markets to competition, despite the political clout of national champions. See, e.g., Georget Bermann et al., *Cases and Materials on European Union Law* (2nd Ed., West, 2002), at 1018.

¹⁰ Laura B. Sherman, “Wildly Enthusiastic’ About the First Multilateral Agreement on Trade in Telecommunications Services,” 51 *Fed. Comm. L.J.* 61 (1998).

and sunk costs), as well as the history of governments protecting their national carriers from competition. US carriers were “wildly enthusiastic” about these agreements, as the agreements opened up foreign markets to competition.¹¹ Based on those obligations, nations can pursue claims through the WTO’s dispute settlement procedures.

The relevant trade agreement consist of agreements adopted during the Uruguay Round of multilateral trade negotiations, from 1986-1995—the eighth round held under the auspices of the General Agreement on Tariffs and Trade, adopted in 1948. The Uruguay Round resulted in several trade agreements, annexes, and schedules running thousands of pages.

The Round’s agreements extended free trade principles to services, notably through the GATS. The GATS imposes general obligations of “market access,” “most favored nation status,” and “national treatment” for all services attached in “schedules” setting out which sectors the nations are opening up to competition. The schedules also include explicit limitations. To understand a nation’s commitments, therefore, one must review the schedules to note the sectors and sub-sectors open to competition, and any limitations included in those schedules.

Therefore, for our trade commitments, we must review US schedules attached to the GATS, schedules attached as part of the Fourth Protocol of the GATS, and the Annex on Telecommunications (applicable to GATS signatories). The US telecommunications schedules, taken together, consist of three pages plus an incorporated Reference Paper. In those documents, the US committed to opening up numerous enhanced and basic services.¹² The US also

¹¹ *Id.*

¹² Sector Specific Commitments of the USA, <http://tsdb.wto.org/simplesearch.aspx>; Reference Paper, http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

committed to enabling such competition by foreign companies operating through a commercial presence in the US—which is how a BT and T-Mobile compete in the US.¹³

The trade commitments adopted in the GATS have produced few precedents that can resolve some of their ambiguities, making international disputes more likely. Because the GATS, which governs trade in services, is much newer than the multilateral agreement governing trade in goods (the GATT, of 1948), the GATS has produced few adjudicated disputes. The first adjudicated services-dispute through the WTO's dispute settlement process, however, involved telecommunications. In that dispute, the US filed a claim against Mexico for Mexico failing to regulate its dominant (politically powerful) carrier, Telmex. The Dispute Panel noted that “the interpretation of the complex layers of GATS Articles, Annexes, Protocols and Schedules with GATS market access commitments, national treatment commitments and additional commitments poses many challenges to WTO Members and WTO dispute settlement bodies.”¹⁴ That decision provides some guidance on how the GATS telecommunications obligations will be likely interpreted, but ambiguities remain, making disputes likely and international decisions necessary to resolve those ambiguities.

Before taking each potential US violation in turn, the reader should understand the concept of market access and the importance of the Annex on Telecommunications.

1. The FCC Should Consider Market Access Obligations

The US is most likely failing to provide “market access” to scheduled services. Under Article XVI of the GATS, on market access, the US committed to “accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.” “Members” are the many

¹³ Such trade is referred to as “mode 3”. The US listed some mode 3 limitations not relevant here.

nations that are signatory to the GATS. Therefore, the US cannot limit market access beyond the access promised in its schedules to these nations' companies (or "service suppliers"), even if the US does *not* discriminate against foreign companies but merely restricts competition for all players. The commitment to market access is separate from and in addition to obligations to nondiscriminatory treatment among nations ("most favored nation commitment") or among foreign and domestic firms ("national treatment").

2. The FCC Should Consider the Key Role of the GATS Annex on Telecommunications

A key conclusion of the US-Mexico Telecommunications decision concerns the GATS Annex on Telecommunications. That Annex recognizes that telecommunications services are both a distinct sector of economic activity and also the "underlying transport means for other economic activities."¹⁵ That is, other economic activities—like online banking—rely on telecommunications. Indeed, aspects essential to many economic offline business activities rely on telecommunications—like providing customer support or processing financial transactions for sales. In short, telecommunications are an infrastructure for other economic activities. As a result, in order to ensure that a foreign company has meaningful market access to compete, signatories to the GATS committed to "ensure that any service supplier of any other Member is accorded access to and use of public telecommunications and transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of *a service included in its schedule*."¹⁶

The dispute resolution panel in the US-Mexico decision held that this obligation applies to all scheduled services—including to scheduled telecommunications services. That is, while a

¹⁴ Mexico – Measures Affecting Telecommunications Services (WT/DS204), Aug. 26, 2002, at section 7.2

¹⁵ Annex on Telecommunications, paragraph 1.

signatory must provide access to and use of incumbent telecommunications networks for competition in, say, scheduled financial services, a signatory must also provide access to and use of telecommunications networks for competition in *scheduled telecommunications services*. If the US schedules a market access commitment in “packet-switched data transmission,” and competition in packet-switched data transmission requires access to incumbent networks at reasonable and non-discriminatory rates, then the US must ensure such reasonable, non-discriminatory access is available to ensure competition market access for packet-switched data transmission.

D. Potential Trade Violations Resulting From a Broadband Policy Without Pro-Competitive Access Policies

The Task Force should anticipate arguments from foreign nations that the US would be violating its commitments by failing to ensure reasonable special access and open access.

1. Special Access Policy Violating Obligations

Special access is required for providing “packet-switched data transmission services” and “mobile data services,” both of which are scheduled services. The Reference Paper and US schedules may require reasonable special access rates.

The Reference Paper requires robust anticompetitive and interconnection measures. The Paper, included in the US schedules, was largely drafted by the United States and was incorporated in the schedules of dozens of Members. Understanding the need for well-known interventions to ensure competition in the traditionally monopolistic telecommunications sector, nations negotiated the Paper to commit collectively to some of these interventions, notably

¹⁶ Annex on Telecommunications, paragraph 5 (emphasis added).

stopping anti-competitive conduct and ensuring interconnection. Both of these provisions were litigated in the US-Mexico case.

First, nations committed to maintaining “[a]ppropriate measures” for “the purpose of preventing ... anti-competitive practices” by “major suppliers.” Major suppliers are those with the “ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of” controlling “essential facilities” or “use of its position in the market.” Anti-competitive practices include “anti-competitive cross-subsidization,” among other practices, not all of which were enumerated in the Reference Paper or the US-Mexico case.¹⁷

Second, in the Paper, nations committed to ensuring interconnection. The Paper states: “Interconnection with a major supplier will be ensured at any technically feasible point in the network,” and such interconnection shall be both under “non-discriminatory terms, conditions... and rates” and under “cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require.”¹⁸

According to filings especially by BT Americas, the US government’s failure to regulate special access both fails to prevent anti-competitive actions and fails to ensure cost-based interconnection. BT Americas argues that, in effect, AT&T and Verizon are major suppliers of special access services and that they charge companies like Sprint and T-Mobile far above-cost rates for special access. First, this is anti-competitive—indeed, it consists of anti-competitive “cross-subsidization”—because Sprint and T-Mobile compete with AT&T and Verizon in the retail wireless market, but face far higher costs for special access than the costs imposed on

¹⁷ Reference Paper, paragraph 1.2.

Sprint and T-Mobile.¹⁹ Second, special access is a form of interconnection (just as switched access is),²⁰ whereby a business network or a wireless network interconnect with (generally middle mile) networks to offer retail service. In effect, therefore, the FCC has failed to ensure “cost-oriented” rates for such interconnection, as required by our scheduled Reference Paper.

2. Open Access Policy Violating Obligations

Our trade obligations likely require open access policies. Domestic court decisions, such as those negating some open access policies can be challenged as “measures” that violate market access commitments. BT Americas has filed comments with the FCC in favor of the Berkman Center conclusions that the US market would benefit from open access obligations.²¹

The US has made two commitments implicating open access policies. First, the US scheduled, and therefore committed to market access in, “enhanced telecommunications services,” specifically defining “enhanced telecommunications services” as then-defined in 47 CFR 64.702.²² At the time, this definition was an integral part of the FCC’s *Computer II* and *Computer III* rules applying an open access regime to telecommunications networks. These rules permitted non-facilities-based providers access to telecommunications networks to compete in providing enhanced services. Since the WTO commitments were adopted, the FCC has abandoned those *Computer II* and *Computer III* principles, thus closing the market to non-facilities-based providers.²³ The FCC’s decisions abandoning that regime has resulted in minimal

¹⁸ Reference Paper, paragraph 2.2.

¹⁹ Comments of BT Americas, Inc., A National Broadband Plan for Our Future, GN Docket No. 09-51, June 8, 2009, at 12.

²⁰ Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads* (2005), at 49-50.

²¹ Comments of BT Americas, Inc. on NBP Public Notice #13, A National Broadband Plan for Our Future, GN Docket No. 09-51/09-137, Nov. 16, 2009, at 12.

²² Sector Specific Commitments of the USA, <http://tsdb.wto.org/simplesearch.aspx>.

²³ Derek Turner, *Dismantling Digital Deregulation* (2009), http://www.freepress.net/files/Dismantling_Digital_Deregulation.pdf.

competition in enhanced services, as the facilities-based “national champion” incumbents completely dominate the market.²⁴ Thus, the FCC closed off market access to enhanced services, and access to telecommunications networks—under the scheduled definition or under the Annex on Telecommunications—is required to ensure competition in the scheduled service.

Second, the FCC committed to market access for basic telecommunications service of “packet-switched data transmission services.” Providing access to the Internet seems to be a packet-switched data transmission service. There is little competition in this lucrative market, which is dominated by national champions. Again, in order to ensure that foreign service-suppliers can provide this service, the Annex on Telecommunications requires the US to make available access to and use of the telecommunications infrastructure sufficient to provide such service.

Third, the interconnection requirement of the Reference Paper may extend to open access. The FCC’s 251(c)(3) unbundling rules are part of subsection 251 with the one-word title of “Interconnection,” suggesting that the US considered unbundling to be a form of interconnection in adopting this Paper. And unbundling effectively is a form of interconnecting with the last-mile plant, generally from middle mile or backbone connections. The Reference Paper’s interconnection obligations require cost-oriented interconnection rates that are “sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require.”²⁵ Indeed, even when the incumbent major supplier lacks a facility, the Reference Paper requires interconnection to be ensured “upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the

²⁴ Reply Comments of Free Press, A National Broadband Plan for Our Future, GN Docket No. 09-51, July 1, 2009, at 34-50.

²⁵ Reference Paper, paragraph 2.2(b).

cost of *construction of necessary additional facilities*.”²⁶ The FCC’s current rules fall far short of those obligations.

E. The US Trade Representative Has Criticized Other Countries for Similar Policies

If foreign nations make these arguments, they can rely on the moral weight of the US itself, which makes the same arguments abroad. The US Trade Representative (USTR) issues a report annually assessing whether U.S. trading partners are complying with international telecommunication agreements. These reports are issued pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988,²⁷ and are thus known as Section 1377 Reports. Foreign nations could likely borrow language from the reports in making their case against FCC rules.

Through these reports, the US government has repeatedly criticized *other* nations abroad for doing what the US does at home—failing to provide reasonable, cost-based access to telecommunications networks for competing telecommunications services suppliers. For example, in discussing Australia in its 2008 Report, the USTR noted that pricing of unbundled copper lines is a “key factor for competitive broadband offerings.”²⁸ The USTR also expressed concern over the Australian incumbents’ ability to use legal challenges to resist network access obligations.²⁹ The next year, the USTR welcomed the government’s plan to build an open access network, calling *open access* a “welcome feature,” and welcomed the government’s rejection of

²⁶ Reference Paper, paragraph 2.2(c).

²⁷ 19 USC §3106.

²⁸ USTR, Results of the 2008 Section 1377 Review of Telecommunications Trade Agreements (“1337 Report 2008”), at 3.

²⁹ 1337 Report 2008, at 2-3.

incumbents' request for regulatory relief from wholesale open access rules.³⁰ As a result, foreign nations could find some “political support” for open access within the US’s trade ministry.

Turning to Germany, in 2008, the USTR criticized the German government for delays in obtaining wholesale product offerings, for long delays for bitstream access, and urged the German regulator to compete its reviews to “ensure competitive access to [incumbents’] networks through” these wholesale offerings.³¹ In 2009, the US faulted Germany for the same litigation problems we see in the US. The USTR noted that, after five years of litigation, Germany still lacked obligations for bitstream access. The USTR noted that local loop unbundling is “one of the most widespread means of competitive entry for the residential consumer market,” and urged the German regulator to ensure that any price increases for local loop unbundling must be cost-based.³²

One final example is Singapore, where the USTR faults the government for adopting the same model of “facilities-based competition” adopted by the Bush administration in eliminating open access. The Bush administration argued that denying access to incumbents’ facilities would spur greater investment by competitors and would foster facilities-based competition. Free Press, among others, has argued that this model has been a failure. The Berkman Center Report supports that conclusion. Free Press has also argued that the FCC should review the conclusions and predictions made in the Bush orders eliminating open access and—finding that the predictions failed to materialize over the last five to eight years—reverse the orders.³³ Interestingly, in commenting on Singapore’s policies, the USTR sounds like Free Press, rather

³⁰ USTR, Results of the 2009 Section 1377 Review of Telecommunications Trade Agreements (“1337 Report 2009”), at 8-9.

³¹ 1337 Report 2008, at 6.

³² 1337 Report 2009, at 10.

³³ Derek Turner, Dismantling Digital Deregulation (2009), at 10-11.

than the FCC. The USTR noted that Singapore has decided to let the incumbent “deny access to leased lines” at certain aggregation points hoping to spur facilities based competition. In the 2008 1377 Report, rather than expressing excitement over the impending facilities-based competition, the USTR expressed concern about the effect on trade from denying such access and “strongly urge[d] Singapore to reconsider its decision.”³⁴ In 2009, the USTR stated, “If insufficient alternatives have developed during the past six years, USTR asks [the regulator] to consider reviewing this policy, or indicate why it still expects that competitive alternatives will eventually develop.”³⁵ We can expect our trading partners to agree with that sentiment, for the US market and request for a review of these policies. Finally, we can also expect our trading partners to note that national champions in the US—AT&T and Verizon—are members of competitive associations (like the European Competitive Telecommunications Association³⁶) advocating for the access to interconnect with incumbent networks in other nations, though the champions have lobbied successfully to oppose such policies for their competitors at home.

III. Conclusion

While I commend the Broadband Task Force for its impressive hard work, and understand that the Task Force may feel constricted by political feasibility in designing its plan, the Task Force should consider the potential legal, diplomatic, and (therefore) political push-back from important trading partners. Many telecommunications service suppliers hope to compete in our market, and their nations have bargained for market-access commitments in exchange for opening up their own markets. If the Task Force recommends a National

³⁴ 1337 Report 2008, at 9.

³⁵ 1337 Report 2009, at 12.

³⁶ ECTA, About, <http://www.ectaportal.com/en/ABOUT/Mission/>; a Verizon executive served on ECTA’s board of directors in 2007. <http://www.ectaportal.com/en/ABOUT/Board-of-Directors/2001-2009-Directors/ECTA-Board-of-Directors-2007/>

Broadband Plan devoid of meaningful pro-competitive policies like special access reform and forms of open access, the Task Force is placing the FCC in the difficult position of recommending a Plan that may cause friction with trading partners and violate treaty obligations. I urge you to consider this issue now, rather than when our trading partners object.

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