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February 26, 2010

Julius Genachowski, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket 07-52; *A National Broadband Plan for Our Future*, GN Docket No. 09-51

Dear Chairman Genachowski:

We are writing in response to the effort by major carriers, in their February 22 letter in the above-referenced proceedings, to discourage the Commission from even *asking* important and indeed central questions about the nation's communications regulatory structure.

As explained in our comments in the Open Internet proceeding, CDT has serious concerns about the unbounded nature of the theory of Commission jurisdiction contained in the Open Internet NPRM. We recommended that the Commission go back to square one and craft a narrow theory of jurisdiction based on the agency's role in regulating transmissions by wire and radio under Title I. We also noted that, as an alternative basis of authority, the Commission could consider reclassifying broadband Internet access services as Title II services.

To be clear, CDT has not endorsed Title II reclassification as the optimal course of action and does not suggest that the Commission jump to any conclusions about the merits of this policy option.

The carriers' letter, however, characterizes Title II reclassification for broadband Internet access service as a "Pandora's Box." The implication is that the mere act of looking at the question will unleash a torrent of horrible consequences.

Such a suggestion is silly. The Commission's national broadband plan is an opportunity to step back and consider national broadband policy from soup to nuts, with all options on the table. If the arguments against reclassification are half as strong as the carriers say, then further inquiry will make that clear and the Commission will not proceed with such an approach. But one way or another, a comprehensive broadband strategy needs to include a path towards a stable and reasonably clear conception of the scope of the Commission's regulatory authority. Currently, the scope of the Commission's authority over broadband

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Internet access is controversial and unsettled. To fail to examine the regulatory classification questions that are at the heart of the current jurisdictional dispute would be to ignore an elephant in the room.

The carrier's letter also says that the Commission should ignore reclassification as a potential option because any move to reclassify would be legally untenable. But the lawfulness of any Commission move to reverse previous classification decisions would depend almost entirely on the Commission's *reasons*. Agencies plainly may change course, so long as they have (and articulate) legitimate reasons for doing so. The lawfulness of any reclassification decision, therefore, would turn on whether the Commission had engaged in rational analysis that demonstrated sound reasons for its decision. Yet careful analysis of the issue is exactly what the carriers' letter seeks to preempt. Their legal argument puts the cart way before the horse by simply assuming that no valid reasons for reclassification exist, and then insisting that the Commission should not look into the matter.

In sum, there is nothing "extremist" or "radical" about the idea that the Commission, as part of its far-reaching assessment of broadband regulatory policy in the national broadband plan, should examine legacy regulatory classifications and assess whether they are optimal today. What is truly radical is the suggestion that the Commission should put on blinders and ignore the question entirely.

Sincerely,

/s/

Leslie Harris, President & CEO
John Morris, General Counsel
David Sohn, Senior Policy Counsel
Center for Democracy & Technology