

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20054

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

**PROMOTING FUTURE INVESTMENTS FOR THE UNDERSERVED**

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## PROMOTING FUTURE INVESTMENTS FOR THE UNDERSERVED

Net neutrality is a concept that on its surface, much like free speech or lack of censorship or full transparency, has wide support. However, no one has ever raised the question to consumers, particularly, low income, minority and other underserved consumers, as to the price of securing net neutrality. That is, could this be an experiment with unintended consequences that could jeopardize the broadband revolution and the potential for America to be Number One, including Number One for its minorities, such as Native Americans, Asian Americans, Blacks and Latinos.

Our organization is prepared, with the assistance of the proponents and opponents of net neutrality, to conduct such as survey with appropriately nuanced questions for our nation's growing Asian American population, including its most underserved. We would also encourage FCC input. (Please see our prior filings referring to such a comprehensive survey.<sup>1</sup>)

Allegedly hundreds of billions of dollars have been invested in the broadband network. It is alleged by those investors that their investments must be protected. On its face, this is consistent with U.S. constitutional law interpretation of property rights. However, the questions are much deeper. We should, of course, protect key investments in the public interest, particularly in terms of broadband. Secondly, we should encourage future investments by maximizing opportunities for profit if the public interest is served.

The March 30<sup>th</sup> joint op-ed by the CEOs of Google and Verizon in the Wall Street Journal entitled, "Unleashing American Broadband," demonstrates this quandary. Both CEOs state that the "Internet thrived in an environment of minimal regulation" and "we do agree generally as a matter of policy that the framework of minimal government involvement should continue." To their credit, both CEOs state the importance of the FCC "creating the right climate for private investment and market-driven innovation to advance broadband."

In this context, what is unknown are what types of and the volume of investments that would be made in the future if those who have invested multibillions of dollars are deprived of some of the value of their investments or fear "future takings" in possible violation of the Fifth Amendment.

These types of property right issues have been argued by responsible parties over the course of our 220 year constitutional history. They have often caused deep divisions within the U.S. Supreme Court. The seminal case relating to regulatory takings discusses in part the quandary faced by the FCC and the parties. In Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), the Supreme Court in a 6 to 3 decision created a three part test for when a government regulation represented a taking and could be subject to compensation. The factors were: economic impact of the regulation on the claimant; the extent to which the regulation has interfered with investment-backed expectations; and the character of the governmental regulatory action. In a similarly divided case, the Supreme Court decided that the appropriate remedy for a regulatory taking was the award of compensatory damages (First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 1987). Two recent 21<sup>st</sup> century Supreme Court cases also demonstrate the difficulty of determining whether FCC net neutrality actions could effectively be challenged and the

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<sup>1</sup> "Comments of Mabuhay Alliance (NBP Public Notice #16) on Behalf of 15 Million Asian Americans Regarding Broadband Adoption: Pockets of Asian Americans at Third World Levels of Broadband Access, Adoption and Usage," December 1, 2009.

"Comments of Mabuhay Alliance (NBP Public Notice #18) FCC Should Help Underserved Communities Gather Requested Data on Broadband," December 3, 2009.

nature of the compensatory damages,<sup>2</sup> although no cases indicate whether the public itself would ultimately bare the cost of compensatory damages through consumer fee increases.

**Volcker/Buffett Blue Ribbon Commission?**

Before this Commission puts at risk these investments and therefore the future of America overtaking or equaling Japan or South Korea in broadband access, we would urge an independent study by a well-respected commission, similar to the Blue Ribbon Commission that Ronald Reagan instituted to examine the future of social security in the early 1980s. We would urge, for example, that this Commission seek the assistance of former Federal Reserve Chairman Paul Volcker and other retired financial experts or financial experts without an interest in the proceedings, such as Warren Buffett and William Seidman, the former head of the FDIC.

It could also be possible that rival corporate leaders in discussing net neutrality could devise a financial investment formula, including future commitments that could minimize the risks. (The Google/Verizon Wall Street Journal op-ed is an example of this type of cooperation among rivals.) For example, the three largest technology companies, including Microsoft, Google and Apple, are capitalized at 640 billion dollars or two and a half times the market value of AT&T and Verizon.<sup>3</sup> An annual investment at a magnitude of 10 percent of the market value of these technology companies over a five to ten year period might be an appropriate commitment. (300 billion dollars over the next five years based on 60 billion dollars per year.) This is particularly feasible since the top five technology companies have cash assets as of the end of 2009 of over 146 billion dollars. These five companies are Microsoft, Google, Oracle, Apple and Cisco (Wall Street Journal, March 3, 2010, "Gap Widens Between Tech Richest and the Rest").<sup>4</sup>

Respectfully submitted,

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<sup>2</sup> U.S. Supreme Court 5 to 4 decision in Kelo v. City of New London, 545 U.S. 469 (2005). See also, the 6 to 3 Supreme Court decision in Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

<sup>3</sup> New York Times, March 24, 2010, "Making a Stand, Google Faces Fallout."

<sup>4</sup> Cisco \$39.6 billion, Microsoft \$36.1 billion, Apple \$24.8 billion, Google \$24.5 billion, and Oracle \$20.8 billion.