Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:	)	
	)	GN Docket No. 10-127
Framework for Broadband Internet Services	)	

REPLY OF TELECOM MANUFACTURERS

As makers of equipment, software, and components for broadband networks, we are worried that adoption of the regulatory structure embodied in the Third Way proposal would have a negative effect on broadband network investment. We are concerned about this since reduced investment in broadband means less business for our industry. That is why our opening comments dealt entirely with this issue, and it is why this Reply will be limited to that matter as well.

The Commission is prohibited by law from implementing a regulatory proposal which is likely to have a clear and substantial negative impact on network investment,[1] and it is required to make the determination about the proposal's impact on network investment based on record

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[1] *See, e.g.,* Sec. 706 (a) of Telecom Act of 1996, reproduced under the notes to 47 U.S.C. § 157 (requiring FCC to "remove barriers to infrastructure investment"). *See also U.S. Telecom Ass'n v. FCC*, 359 F. 3d 554, 580 (D.C. Cir. 2004) (holding that because adopting the proposed LEC regulation at issue there "would impose excessive impediments to LEC infrastructure investment", the Commission properly decided not to implement the proposal even though the result would be economic injury to LEC competitors); *Puerto Rico Telephone Authority/GTE Merger*, 14 FCC Rcd. 3122 at ¶ 58 (1999) (finding that the merger at issue in that case was in the public interest in part because it was likely to result in additional infrastructure investment). *See also* American Recovery and Reinvestment Act of 2009 at § 6001(k) (2) (D), 123 Stat. 115 (2009) (directing FCC to adopt a plan that increases private sector investment in broadband infrastructure).

evidence rather than speculation, ideology, or conclusory allegations.[2] Chairman Genachowski has made clear that he intends to comply with these requirements by stating that he would vote against adopting the Third Way regulatory system if it does not "encourage and unlock massive private investment"[3], just as the Commission has refrained from adopting numerous *other* regulatory proposals that would harm investment.[4]

Against this backdrop, we wish to make clear that of the 28 parties submitting Comments in the present proceeding in support of the Third Way regulatory plan, just two –Open Internet Coalition and Free Press -- sought to offer evidence that adoption of the Third Way regime would have no negative impact on investment. Twenty of the remaining 26 supporters of the Third Way plan expressed no opinion whatsoever about whether adoption of the plan would

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[2] Motor Vehicle Mfgr's Ass'n v. State Farm Mutual Auto. Ins.Co. 463 US. 29, 42-43 (1983); Nat'l Cable & Telecoms Ass'n. v. FCC, 567 F. 3d 659 (2009).

[3] Statement of Chairman Julius Genachowski at 2, FCC 10-114 (June 17, 2010).

[4] *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14853 at ¶ 44 (deciding not to require a broadband wireline ISP to sell transmission to other service providers after finding that doing so would "diminish . . . [its] incentive and ability to invest in and deploy broadband infrastructure"); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling*, 17 FCC Rcd 4798 at ¶ 5 (2002) (deciding not to require a cable TV ISP to sell cable transmission to other ISPs after concluding that doing so would harm investment and innovation); *Computer III Phase I Order*, 104 FCC 2d 958, 964 (1986) (deciding not to require local telephone companies to provide enhanced services through a subsidiary after finding that doing so would reduce network and service innovation); *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand*, 18 FCC Rcd. 16978 at ¶¶ 176-78, 272-95 (2003) (deciding not to require local phone companies to provide fiber loops to competitors as an unbundled network element after concluding that doing so would slow infrastructure investment and network innovation); *Qwest Pet. for Forbearance Under 47 U.S.C.§ 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, 23 FCC Rcd. 12260 at ¶ 58 (2008) (eliminating Computer Inquiry requirements on existing packet-switched broadband services and optical transmission services after concluding that doing so would increase incentives to invest in advanced network technologies).

harm investment.[5] And although the final six Third Way supporters asserted that the plan would not reduce investment, they offered no evidence of any type intended to help substantiate that claim.[6]

Moreover, the evidence of no harm put forward by the only two Third Way supporters that offered evidence on the subject pales when compared to the evidence of harm introduced by opponents of the Third Way Plan. For example, Telecom Manufacturers alone cited in their Comments 21 recent academic studies totaling several thousand pages in length which had analyzed the question of whether regulating broadband access service in the manner authorized by the Third Way plan would reduce investment and concluded that it would.[7] By contrast, the two commenters attempting to support their claim that Third Way regulation would have a benign effect on investment cited no academic studies to support that assertion.

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5 *See* Comments of Greenlining Institute; Comments of Public Knowledge; Comments of CPUC; Comments of Data Foundry; Comments of colorofchange.org; Comments of Center for Media Justice et al.; Comments of Center for Democracy & Technology; Comments of Alliance Law Group; Comments of Montgomery County, MD; Comments of NATOA; Comments of American Library Ass'n; Comments of Ass'n of Research Libraries et al; Comments of Penn. Pub. Util. Comm.; Comments of Writers Guild of America, West; Comments of NASUCA; Comments of Covad; Comments of Media Action Grassroots Network; Comments of Broadband Dev. And Deployment Council; Comments of CCIA; and Comments of COMPTEL.

6 *See* Comments of Google at 3; Comments of Dish Network at 4, 14; Comments of Earthlink at 14-16; Comments of Cbeyond et al at 3; Comments of U.S. Telepacific Corp. et al. at 9-10; and Comments of MIC et al. at 3. Our conclusion that 28 parties expressed support for the Third Way plan is based on the fact that 28 parties submitted Comments that were more than two pages in length. Numerous others submitted one and two page -long comments expressing support for the Third Way regulatory plan, but we did not count those short comments for this purpose since none of them contained any analysis of any issue and nearly all of them were based on a form letter.

7 *See* Telecom Manufacturer Comments at 3-4 and nn. 6 and 7.

Rather than cite academic studies, the two Third Way supporters attempting to substantiate their claim that Third Way regulation would not harm investment instead cited a variety of other things in their Comments. For its part, Open Internet Coalition cited two factors. First, it claimed that one executive from each of five broadband network owners – Time Warner Cable, Sprint, Comcast, Verizon Wireless, and Windstream -- had admitted that Third Way regulation would not harm investment.[8] In fact, the two sentence quotations it presented from the Sprint and Windstream executives are ambiguous on the question of what impact those executives believe Third Way regulation would have on investment, and the remaining three companies (Comcast, Verizon Wireless, and Time Warner Cable) filed Comments in this proceeding arguing strongly that, notwithstanding the personal opinion of any single executive, the companies themselves believe that adopting the Third Way plan would in fact reduce investment.[9] Sprint's Comments likewise imply that Sprint also believes that Third Way regulatory structure could reduce the incentive to invest,[10] and Windstream did not submit Comments.

The second factor cited by Open Internet Coalition in an effort to show that adoption of the Third Way plan would not harm investment is that the stock prices of ISPs owning

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[8] Comments of Open Internet Coalition at 33-34.

[9] Comments of Comcast at 35-38; Comments of Verizon and Verizon Wireless at 12-20; Comments of Time Warner Cable at 8, 39, 51-52, 58, and 89.

[10] Comments of Sprint Nextel at 4 (stating that investment is promoted by marketplace forces rather than government regulation). See also *id*. at 16, 18.

broadband networks performed roughly on par with the S&P 500 index, rather than underperforming that index, during the two month period following announcement of the Third Way proposal.[11] But since many factors influence stock prices, it is sheer speculation that performance of a given broadband network owner's stock over a two-month period relative to a broad price index is a reasonable proxy for whether the Third Way regulatory plan would likely harm network investment, and Open Internet Coalition offered no contrary evidence.

Free Press, the only other party attempting to present evidence that the Third Way regulatory structure would have no negative impact on investment, proffered evidence that likewise failed to support its view. Free Press first claimed that historical LEC investment trends show that heavy regulation of broadband service authorized by the Third Way plan would have no negative effect on investment given that LEC broadband investment grew rapidly during the five year period of heavy broadband regulation (1996-2001) and either declined or grew slowly during the subsequent six years when regulations were removed (2001-2007).[12] The conclusion Free Press drew from its superficial recounting of history is unwarranted for several reasons. First, Free Press offered no reason to believe that the investment data it presented is a fair proxy for LEC broadband investment during the relevant period of 1996 through 2007 since its data purported to represent LEC investment in broadband and narrowband technologies combined rather than broadband alone, and since it is almost certain that a tiny fraction of LEC capital

11 Comments of Open Internet Coalition at 34-35.

12 Free Press Comments at 92-95.

spending in the first several years of that period represented broadband investment given that LECs did not start providing consumer terrestrial broadband service until about 1999 and did not begin providing wireless broadband service until 2002.[13] Free Press's claim that stringent broadband regulation did nothing to depress broadband investment during the latter part of the 1996-2001 period of heavy regulation when LECs actually began to invest in broadband also carries no weight since Free Press confused mere correlation with actual causation and since its conclusion that LEC broadband investment was not hurt by heavy regulation suffers from the what economists often refer to as the "bias of omitted variables."[14] Also wrong is Free Press's assertion that stringent broadband regulations were removed in early 2002 when it claimed broadband investment started its nosedive. In fact, the most significant broadband regulation – requiring LECs to facilitate the provision by competitors of broadband Internet service by requiring LECs to lease the upper frequencies of broadband-capable loops to competitors - was not repealed until late summer 2003, two years after the start of the investment skid that Free Press attributed to the elimination of broadband regulation[15], and the FCC did not rule that LEC-provided terrestrial and wireless broadband internet access service could be provided without

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[13] In 2000, just 1.6 million households subscribed to the LEC-provided terrestrial broadband service, and carriers did not begin deploying broadband technology in cell phone networks until 2002. B. Swanson, "Bandwidth Boom: Measuring U.S. Communications Capacity from 2000 to 2008" at 2 (Entropy Economics, June 24, 2009).

[14] *See* L. Darby, "The Informed Policy Maker's Guide to Regulatory Impacts on Broadband Network Investment" at 7 (Am. Consumer Institute, Dec. 2009), avail. at http://www.theamericanconsumer.org/wp-content/uploads/2009/11/fp-report1.pdf.

[15] *Triennial Review Order*, 18 FCC Rcd. 16978 at ¶¶ 288-89 (rel. Aug. 21, 2003).

common carrier regulation until 2005 and 2007, respectively,[16] which was long after the investment slide Free Press attributed to repeal of heavy broadband regulation began.[17]

Although it cited no academic studies to support its claim that heavy regulation of broadband would not reduce (and might increase) broadband investment and simply ignored several dozen studies that have reached the opposite conclusion, Free Press did take pot shots at two of those studies. But none of these shots undermines the essential conclusion of those two studies – that heavy broadband regulation of the sort authorized by the Third Way plan would likely slow broadband investment. First, Free Press asked the Commission to ignore the conclusion of the June 2010 Phoenix Center study that the Third Way plan could reduce broadband investment on grounds that study had reached that conclusion based entirely on the fact that the stock price of publicly traded broadband service providers declined on the day Chairman Genachowski announced his intention to seek a Commission vote on whether to

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16 *Terrestrial Broadband Order*, 20 FCC Rcd. 14853 (2005) (holding that LEC-provided terrestrial Internet access service would not be regulated as common carrier service); Wireless Broadband Order, 22 FCC Rcd. 5901 (2007) holding that Internet access service provided by wireless carriers would not be regulated as common carrier service).

17 Free Press also claimed in its Comments that a business's investment incentive is affected by consumer demand and operating costs as well as the level of competition, taxes and interest rates, but not the amount and nature of government regulation, (Free Press Comments at 90-92). However, Free Press made no attempt to support that claim which, on its face, is absurd and is contradicted by established economic theory. *See* L. Darby, "The Informed Policy Maker's Guide to Regulatory Impacts on Broadband Network Investment" at 3-6 (Am. Consumer Institute, Dec. 2009). Free Press also cited the same quotation snippets from five opponents of Third Way regulation as did the Open Internet Coalition as evidence that network investment would not suffer. Free Press Comments at 97-99. We already have shown that those quotations do not constitute evidentiary support for the proposition that investment would not suffer under the Third Way regulatory regime. *See* pages 3-4 above.

request comment on the Third Way plan.[18] In fact, Free Press misrepresented the 46-page Phoenix Center study. Rather than conclude that the stock market's negative reaction to the Third Way plan shows that adoption of the plan would lower investment incentives, the study instead (i) used game theory analysis and economic modeling to show that, under the logic of the Third Way plan, investment would likely decline if the plan were adopted;[19] and (ii) used the FCC's own actions to show that the agency would be unable to resist the temptation to adopt a host of regulations authorized by the Third Way plan notwithstanding recent claims to the contrary by the agency's leadership.[20] Although Phoenix Center noted that cable TV stock prices had declined precipitously shortly after Chairman Genachowski announced his intention to seek comment on the Third Way plan, it did so only to show that the stock market appeared to agree with its conclusion that the FCC would end up adopting a host of regulations authorized by the Third Way plan even though its leadership had denied an intent to do so.[21] In other words, the study discussed the decline in cable TV stock prices as one of several checks on the validity of its modeling and the logic of the Commission's proposal that the Third Way plan would likely

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18 Free Press Comments at 100-02, discussing G.S. Ford and L.J. Spiwak, "The Broadband Credibility Gap", Phoenix Center for Advanced Legal & Econ. Pub. Policy Studies at 11-22 (June 2010), avail.at http://www.phoenix-center.org/pcpp/PCPP40Final.pdf. ("Phoenix Center Study").

19 Phoenix Center Study at 8-11; 25-29.

20 *Id* at 11-24, 30-35.

21 *Id*. at 30-33.

reduce investment rather than as the basis for its conclusion that the Third Way plan will reduce investment.[22]

Free Press also attacked the conclusion of a 59-page study by the Advanced Communications Law & Policy Institute that the Third Way plan would reduce broadband investment. It attacked that conclusion by claiming that the study's authors provided no evidence to support the conclusion, but instead "simply assert[ed] that . . . [such regulation] would harm investment and assume[d] the harm will be massive. . . ."[23] In fact, the study examined one of the myriad regulations that the Third Way plan would make possible – net neutrality regulation - and explained in great detail how that single regulation could reduce investment by complicating the ability of companies owning broadband access networks to both develop new business models and provide new types of service in order to help recover costs.[24]

Finally, Free Press claimed that AT&T's 2008 investment helps show that the Third Way plan would not cause broadband investment to decline since AT&T's investment that year exceeded its 2006 investment even though it had been required by an FCC merger order to comply in 2007 and 2008 with one type of regulation authorized by the Third Way plan, net

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22 *Id*. at 29-35.

23 Free Press Comments at 100 discussing C.M. Davidson and B.T. Swanson, "Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC's Proposed Net Neutrality Rules on the Broadband Ecosystem", Advanced Communications Law & Policy Institute (June 2010), avail. for viewing at http://www.nyls.edu/user_files/1/3/4/30/83/Davidson%20&%20Swanson%20-%20NN%20Economic%20Impact%20Paper%20-%20FINAL.pdf

24 Advanced Communications Law & Policy Institute study, *supra*, at 27-33, 39-44.

neutrality.[25] But the mere fact that AT&T's investment may have increased during the second year of the two year period when the merger order was in effect does not help show that the Third Way plan would cause broadband investment to decline since requiring network owners to provide net neutrality would *suppress* investment that otherwise would occur rather than shutting down investment entirely.[26] Moreover, AT&T most likely did not consider a two-year requirement to provide net neutrality to be an especially burdensome constraint on its investment decisions during that short period since two years almost certainly was much shorter than the expected useful economic life of the assets in which AT&T invested during the period. Equally important is the fact that AT&T had been required to follow a weaker version of net neutrality during the two-year period the merger order was in effect than the version of net neutrality the Commission has suggested it may require all network owners to follow on a permanent basis if the Third Way plan is adopted.

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25 Free Press Comments at 95 n. 266.

26 For what it is worth, we note that Free Press's own numbers show that two network owners that are smaller than AT&T-- Comcast and Time Warner – increased network investment during 2007 and 2008 in absolute terms far more rapidly than AT&T. We also note that Free Press's own data shows that Verizon's capital spending growth as a percentage of revenue was larger than AT&T's during this two year period (17.6% vs.16.4%).

CONCLUSION

For reasons discussed above, the record evidence before the Commission plainly requires the agency to find that adoption of the proposed Third Way regulatory structure would result in substantially diminished investment in broadband network infrastructure.

Respectfully submitted,

AC Photonics, Inc.
ADC Telecommunications, Inc.
Berry Test Sets Inc.
BTECH Inc.
CBM of America, Inc.
Condux International, Inc.
Enhanced Telecommunications, Inc.
FiberControl
General Machine Products Co., Inc.
Go!Foton Corp.
Independent Technologies Inc.
MetroTel, Inc.
Occam Networks, Inc.
Optical Zonu Inc.
Preformed Line Products, Inc.
Prysmian Communications Cables and Systems USA, LLC
Quanta Services, Inc.
Sheyenne Dakota, Inc.
SNC Manufacturing Co. Inc.
Sunrise Telecom, Inc.
Suttle Apparatus Corp.
Telesync, Inc.
Vermeer Corp.

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