MASSACHUSETTS
40 main st, suite 301
florence, ma 01062
tel 413.585.1533
fax 413.585.8904

WASHINGTON
501 third street nw, suite 875
washington, dc 20001
tel 202.265.1490
fax 202.265.1489

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February 24, 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 No. 07-52; *A National Broadband Plan for Our Future*, GN Docket No. 09-51

Dear Chairman Genachowski:

We write to respond to an unprompted letter sent to the Commission Monday by a handful of lobbyists from the nation's largest cable, telephone, and wireless companies ("ISP letter").[1] Since they critique a position that they mistakenly ascribe to Free Press, we felt it would be useful for you to hear from us on the matter.

The ISP letter makes broad predictions about the calamities that will befall the agency, the industry, and the country if the Commission were to place the entire Internet under the full panoply of rules and regulations that apply to telephone networks. There is no evidence that the Commission is contemplating such a course, nor any reason to suspect it would. And while the ISPs present non-profit consumer groups as the scary bugaboo that might open this Pandora's box, the evidence cited is thin. The entire case for authoring this screed is based on one filing from Public Knowledge and a cryptic quotation from a Free Press board member that appears intended as an exercise in red-baiting. Everything else presented as evidence of an immediate crisis is either mischaracterized, inaccurate, or even dishonest.

The ISP letter attacks a straw-man position. Consumer advocates and numerous industry parties (including the companies that authored this letter) have raised questions about jurisdictional issues surrounding broadband facilities-based services and have cited the need for a serious discussion of these issues at the Commission.[2] But no one has made the "extremist" case that these lobbyists fear.

These assertions are scare tactics, designed to discourage you from engaging with the difficult law and policy questions that must be answered to promote a world-class, affordable broadband network for the American people. Issues of authority and jurisdiction under the law to implement your ambitious broadband agenda are an important part of today's policy debate. No one would dispute that. If anything, this hyperbolic epistle from these lobbyists simply underscores the need to have a robust and reasoned debate about the best path forward to reach the broadband goals of the country.

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[1] *See* Letter from NCTA, CTIA, USTA, TIA, ITTA, Verizon, AT&T, Time Warner Cable, and Qwest to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket No. 09-191, WC Docket No. 07-52, GN Docket No. 09-51, February 22, 2010 (*ISP Letter*).

[2] *See e.g.* Notice of Ex Parte Presentation of Media Access Project, Consumers Union, Consumer Federation of America, Free Press, New America Foundation, and Public Knowledge, GN Docket No. 09-191, WC Docket No. 07-52, GN Docket No. 09-51, February 19, 2010. *See also* Comments of National Telecommunications Cooperative Association, GN Docket No. 09-51 (2009), at 15-16 (requesting that broadband services be regulated under Title II to enable them to be covered under the Commission's universal service rules, along with other measures as needed to "improve affordability and availability for consumers" and "to promote public safety and homeland security"); Comments of Verizon and Verizon Wireless, WC Docket No. 05-337, CC Docket No. 96-45 (2008), at 31; Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act, filed Nov. 16, 2009; Reply Comments of the National Association of Telecommunications Officers and Advisors et al., GN Docket Nos. 09-47, 09-51, 09-137 (2010), at 7-16.

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florence, ma 01062
tel 413.585.1533
fax 413.585.8904

WASHINGTON
501 third street nw, suite 875
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fax 202.265.1489

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THE ISPS PRESENT THE COMMISSION WITH A FALSE CHOICE OF TWO EXTREMES, BASED ON MISCHARACTERIZATIONS OF LEGAL AND REGULATORY HISTORY

With their letter, the ISPs have resorted to revisionist history, designed to box the Commission into a false choice of two extremes — complete reliance on the fragile legal ground of Title I ancillary authority, or full scale heavy handed regulation of the entire Internet ecosystem. We regret that they would choose to start this important debate in this manner because it is inconsistent with over 40 years of established legal and regulatory history.

Resolution of the problems of authority and classification must not begin with misinformation. Foremost among the problems with the ISP letter is the assertion of "far-reaching and destructive policy consequences that would inexorably flow from any decision to… encompass broadband Internet access within the scope of Title II 'telecommunications services.'"[3] The ISPs contend that such action would result in "providers of Internet search advertising services, like Google, Microsoft and Yahoo, that use Internet connections" being subjected to common carrier regulation. To support this bold claim, the ISPs rely on the Supreme Court's majority opinion in the *Brand X* case, claiming:

> As the *Brand X* Court explained, because "the relevant definitions do not distinguish facilities-based and non-facilities-based carriers," reinterpreting the statutory scheme to place broadband Internet access services within the "telecommunications service" category would "subject to common-carrier regulation non-facilities-based ISPs that own no transmission facilities."[4]

This characterization of the *Brand X* opinion represents careless drafting at best and intentional misrepresentation at worst. The Supreme Court did not in fact "explain" that classifying the transmission component of broadband Internet access services as a telecommunications service would "subject to common-carrier regulation non-facilities-based ISPs that own no transmission facilities." The quote the ISPs offer here is actually a restatement of one of the arguments offered by *a respondent* in the *Brand X* case, and the Supreme Court *explicitly rejected* the argument because it "conflict[ed] with [] regulatory history."[5]

The ISP letter also proposes an inaccurate extension of the so-called "contamination theory." The contamination theory holds that if a non-facilities-based information service provider sells a service that is a combination of computing and basic transmission, then that the entire service is considered an information service, and the provider is not obligated to abide by Title II regulations.[6] Contrary to this decades-old established Commission practice, the ISPs would have the Commission believe that the contamination theory would now act in the opposite direction, "contaminating" computing services that use telecommunications transmission as services subject to Title II treatment. Such an assertion represents a substantial misreading of Commission precedent.

The examples offered by the ISPs in their letter demonstrate the flaws in their theory. The ISPs state that "Internet transport companies like Level 3, Akamai, and Limelight, which offer backbone and

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[3] *ISP Letter*, at 10.

[4] *ISP Letter*, at 11 (citing *Nat'l Cable & Telecomm. Ass'n v. Brand-X Internet Servs.*, 545 U.S. 967, 997 (2005) (*Brand-X*)).

[5] *Brand-X*, 545 U.S. at 993.

[6] Prior to the *Cable Modem Declaratory Ruling*, the Commission had never applied the contamination theory to *any* facilities-based provider, for doing so would have allowed such providers to complete circumvent the *Computer Inquiry* rules. *See Independent Data Communications Manufacturers Association Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service, American Telephone and Telegraph Company Petition for Declaratory Ruling that all Interexchange Carriers be Subject to the Commission's Decision in the ID-CMA Petition*, Memorandum Opinion and Order, 10 FCC Rcd. 13717 (1995) (*Frame Relay Order*).

MASSACHUSETTS
40 main st, suite 301
florence, ma 01062
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content-delivery services to thousands of large and small business customers by means of facilities they either own or lease, could find themselves subject to regulation"[7] as a result of Commission reclassification. But, companies like Akamai already purchase and use Title II regulated enterprise broadband connections to offer their services, and do not currently "find themselves subject to regulation."[8] There is similarly no uncertainty as to the outcome of reclassification on a company like Netflix for leasing a Title II classified telecommunication service to "offer video content on the Internet," because Netflix already leases such Title II classified services. Consistent with decades of application of the contamination theory, Netflix and similarly situated businesses are not now subject to regulation as telecommunications carriers.

The Commission must reject arguments based on misinformation and misrepresentations and should recognize that classification of the transmission component of broadband Internet access services as a telecommunications service does not inherently require regulation of content and applications providers. Furthermore, consistent with the Commission's discretion and authority to forbear from the application of Title II requirements, reclassification of the transmission component of broadband Internet access services does not necessarily lead to any substantial new obligations on broadband ISPs. Of course, the Commission may take action to implement policies to protect consumers and promote universal service. But Commission action to achieve broadly supported and essential public goals does not inherently lead to a slippery slope to massive regulation of the Internet, as presented by the ISPs' doomsday letter.

THE ISPS COMPLETELY IGNORE THE REALITY THAT THE COMMISSION'S AUTHORITY TO CARRY OUT NUMEROUS PUBLIC INTEREST POLICES IN THE FUTURE ALL-IP MARKET IS UNCERTAIN UNDER THE CURRENT REGULATORY CLASSIFICATION

By characterizing the classification debate as revolving around a single issue, network neutrality, the ISP letter ignores the fact that, absent a new engagement with classification issues, the Commission will have to use its Title I authority to enact many pro-consumer policies, authority that is under challenge by the very signatories of the ISP letter. These policies are incredibly important and have broad support in the Administration, Congress, and among the general public. Yet, challenges to Title I authority (past and present) put the Commission on fragile jurisdictional footing. As a consequence, the Commission should address these questions thoroughly and completely. The Commission should, at a minimum, consider jurisdictional issues in connection with the development of the National Broadband Plan.

While we have argued in general about the merits of a moderate Title II legal theory for many years, at this time, we are merely asking for the debate to be conducted on the record, and for it to reach a clear and stable conclusion. The package of critical policy proposals expected in the National Broadband Plan — and the unquestionable importance of their successful implementation — highlights the need for an open engagement on jurisdiction.

Key aspects of the Commission's agenda, such as broadband universal service, truth-in-billing, privacy, wireless data roaming, adoption by persons with disabilities, and openness all currently rely on Title I authority. The question of reclassification impacts all these policy priorities, and for the ISPs to ignore the very real jurisdictional issues that are before the Commission — issues often raised by these

[7] *ISP Letter*, at 11.

[8] Indeed, in this formulation, the ISPs lump in a transport company like Level 3, whose enterprise transmission services are *already* regulated under Title II, with companies like Akamai and Limelight, who purchase Title II regulated high-capacity telecommunications transmission services, or self-provision such capabilities, and are not regulated as telecommunications carriers. But this reality shows quite well that the ISPs' scare tactics are completely baseless, because companies who purchase telecommunications service inputs, have never been, and are currently not regulated as telecommunications carriers.

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40 main st, suite 301
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tel 413.585.1533
fax 413.585.8904

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tel 202.265.1490
fax 202.265.1489

very same ISPs[9] — is to paper over a legitimate policy debate that deserves attention. The uncertainties impact a wide variety of issues. A nonexhaustive list of examples includes:

Expanding the Universal Service Fund to support broadband Internet access services

The Universal Service Fund may be used to support "telecommunications services,"[10] so expanding the supported services to include broadband Internet access would require the Commission to exercise ancillary authority. Tapping the Universal Service Fund's revenue stream will be instrumental in increasing broadband adoption rates to 90% by 2020, as Chairman Julius Genachowski has proposed,[11] and will also be critical in bringing broadband to rural and low-income Americans. While there are many views about how this program can be transitioned from supporting voice services to supporting broadband, the jurisdictional questions are foundational.

Transparency and truth-in-billing initiatives

As a part of the National Broadband Plan, the Commission also has proposed a Broadband Transparency Initiative, designed to provide consumers with more data and allow them to make more informed choices among the competitors in their local markets.[12] Though the Commission likely has authority to collect information from broadband Internet access providers based on Congress's directive to "initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans,"[13] any consumer-facing transparency or disclosure initiatives regarding terms of service, actual service speeds, network operating procedures, and pricing must be supported under Title I.

Extending privacy protections to consumers of broadband internet access services

Any authority to extend privacy protections to consumers of broadband Internet access services would rely on the Commission's Title I ancillary authority. With the advent of deep packet inspection, which allows broadband Internet access providers to read the content of their subscribers' data as it is sent and received, the Commission must have the authority to protect consumers' privacy in using these services.

Promoting competition in the wireless data market

Any efforts to increase competition in the mobile wireless data market would also require the Commission to exercise Title I authority. As consumers increasingly use their mobile phones for data-related services, such as web-browsing and e-mail, the data component of mobile phone service will begin to dominate the voice component, and mobile data policies will become increasingly essential. For example, extending current roaming regulations[14] to wireless data service[15] would go a long way toward

[9] For example, Verizon has asserted that the Commission cannot use its Title I authority to promote universal service for broadband. *See* Comments of Verizon and Verizon Wireless, WC Docket No. 05-337, CC Docket No. 96-45 (2008), at 31 ("As the Commission has found, and the courts affirmed, broadband Internet access service is an information service, not a telecommunications service. Thus broadband does not qualify under section 254 as a supported service eligible for high cost subsidies.").

[10] 47 U.S.C. § 254(c)(1).

[11] Julius Genachowski, Chairman, Federal Communications Commission, "Broadband: Our Enduring Engine for Prosperity and Opportunity," Prepared Remarks before the National Association of Regulatory Utility Commissioners' Conference 5, 6 (Feb. 16, 2010).

[12] *See* Federal Communications Commission, National Broadband Plan Policy Framework 8, 22, 23 (report presented at Dec. 16, 2009 Open Meeting).

[13] 47 U.S.C. § 1302(b).

[14] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15817, 15826 (2007).

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promoting competition in this space. But any efforts along these lines, or other efforts to regulate the mobile data space in a pro-consumer way, could face significant legal challenges under a Title I framework.

Increasing adoption rates among Americans with disabilities

The Commission would also have to rely on Title I authority to adopt most policies to increase broadband Internet access rates among Americans with disabilities. Recent Commission data suggest that between 30 and 40 percent of Americans with disabilities subscribe to broadband Internet at home, compared to roughly two-thirds of the population overall.[16] Given the increasing importance of broadband as a means to increase educational and economic opportunity, gather information about current events, participate in civic discourse, research medical information, and make informed consumer choices,[17] broadband Internet adoption plays a key role in assuring that Americans with disabilities have the same opportunities as the population as a whole.

Preserving an open Internet

The Commission's current Open Internet proceeding also relies on ancillary authority. If this authority is curtailed, the Commission will likely be without authority to prevent even the most egregious discriminatory conduct by broadband Internet access providers. For example, providers would be free to block content purely on the basis of the message it conveyed — i.e., an ISP could decide to block any personal blog posts complaining about its service; it could block websites expressing political views with which the ISP disagrees; or it could block websites advertising the service offerings of its competitors. ISPs would also be free to engage in any these practices without even notifying consumers that such blocking was taking place. The Commission must retain some authority to protect Americans from these types of fundamentally anti-consumer practices. Jurisdictional clarity will once again be a critical component of resolving this policy question.

THE INCUMBENT BROADBAND PROVIDERS CAUSED THE VERY REGULATORY UNCERTAINTY THEY NOW LAMENT

Neither Congress nor the Commission intended these problems of uncertain regulatory authority to arise. Rather, they were brought about by years of obstructionist behavior (and, at times, deliberate double-talk) by broadband providers — a series of lobbying campaigns and lawsuits intended to strip the Commission of any ability to protect consumers or to promote competition through the mechanisms provided by Congress. These tactics have left the Commission in its current position: recognizing that action is needed to reach a broadband future of universal and affordable service, and uncertain as to the best regulatory vehicle to achieve positive reform.

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[15] *Id.* at 15845-46.

[16] John B. Horrigan, Broadband Adoption and Use in America 3 (Federal Communications Commission, OBI Working Paper Series No. 1, 2010); Federal Communications Commission, National Broadband Plan Policy Framework 142 (report presented at Sept. 29, 2009 Open Meeting) (*September 2009 National Broadband Plan Report*).

[17] *September 2009 National Broadband Plan Report* at 83.

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40 main st, suite 301
florence, ma 01062
tel 413.585.1533
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Perpetual lobbying and lawsuits

Incumbent broadband providers have spent years fighting against Commission authority at every turn, through aggressive lobbying campaigns and drawn-out lawsuits. In the words of Gerald Faulhaber, often cited as an expert by major broadband providers:[18]

> [I]n other countries, when the government tells you to do something, you do it and you do it quick. In the United States, when the government tells you to do something you don't want to do, you whine about how unfair it is, complain to your congressman about how you are being picked on, you bring suit against the FCC, and you almost never have to do what they told you.[19]

In the United States, this process began in earnest with the first iteration of classification orders. For example, between the *Wireline Broadband NPRM* in 2002 and the *Wireline Broadband Order* in 2005, Verizon alone filed a total of over 300 pages of comments and reply comments, and over 850 pages of ex parte notices in Docket 02-33. These earnest lobbying efforts included repeated promises by the industry that Title I classification would not render the Commission unable to protect consumers.[20]

Yet, following the classification orders, the industry immediately began to walk back these promises through further lobbying and litigation, creating uncertainty as to the Commission's ability to pursue its broadband agenda. Verizon has asserted that the Commission cannot use its Title I authority to promote universal service for broadband[21] — a central component of the broadband agenda, backed by widespread, bipartisan support. Additionally, despite assurances by the industry and by the Commission that Title I authority was sufficient to resolve consumer complaints,[22] many ISPs objected to the actual application of that authority. When Comcast was found by the Commission to have engaged in deceptive blocking in its broadband services, Comcast challenged the order, asserting that the Commission lacked the required authority over broadband service providers as a result of its classification decision.[23]

Hypocritical assertions and promises

This history repeats itself in the most recent letter. Industry incumbents argue that a Title II non-discrimination standard would have disastrous consequences for the Internet. This assertion is surprising because the strongest supporters for such an approach in the recent round of comments in the Commission's open Internet proceeding were these very same incumbent ISPs. Throughout their filings, the industry has broadly called for a Title II-like approach towards the proposed nondiscrimination rule.[24]

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[18] *See, e.g.*, Gerald R. Faulhaber & David J. Farber, "The Open Internet: A Customer-Centric Framework," Exhibit 1 of Comments of AT&T, GN Docket 09-191, WC Docket 07-52 (2009); Gerald R. Faulhaber & David J. Farber, "Mandated Spectrum Sharing: A Return to 'Command and Control,'" attached to Comments of AT&T, GN Docket Nos. 09-157, 09-51 (2009).

[19] Gerald R. Faulhaber, *Will Access Regulation Work?*, 61 FED. COMM. L.J. 37 (2008).

[20] *See, e.g.*, Comments of Verizon, CC Docket Nos. 02-33, 95-20, 98-10, at 42 (2002) ("More fundamentally, however, to the extent that the Commission finds that consumer protection provisions are needed in the public interest, it can and should impose them equally on all broadband providers under Title I.").

[21] *See* Comments of Verizon and Verizon Wireless, *supra* note 9.

[22] The Commission also relied on these assurances in approving the merger of Comcast and Adelphia in 2006. *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8298 at para. 220 (2006) ("If in the future evidence arises that any company is willfully blocking or degrading Internet content, affected parties may file a complaint with the Commission.").

[23] Opening Brief for Petitioner at 41-54, *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. filed Sept. 4, 2008).

[24] *See, e.g.*, Letter from AT&T to Chairman Genachowski, GN Docket No. 09-191 (Dec. 15, 2009) (expressing support for a proposal for a rule of "unreasonable and anticompetitive discrimination" on the grounds that it is "flexible enough to accommodate the types of voluntary business agreements … under Section 202 of the Communications Act of 1934 which

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tel 202.265.1490
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Furthermore, the incumbent broadband providers were nearly alone in calling for an extension of the proposed rules to the entire Internet ecosystem.[25] Free Press has never made such a request, contrary to the allegations in the ISP letter. For the industry to call for Title II-like regulation of the entire Internet ecosystem, and then to assert here that such an approach would be disastrous, is both hypocritical and inconsistent.

THE COMMISSION SHOULD IGNORE ATTEMPTS TO CUT OFF TRANSPARENT DISCUSSIONS BEFORE THEY HAVE EVEN BEGUN

Rather than offering reasonable legal arguments, the ISP letter is an attempt to create fear, uncertainty, and doubt. It is an attempt to forestall essential and open discussions concerning the Commission's most pressing broadband priorities. There are weighty substantive issues in play as the Commission identifies how it can help provide broadband service to 93 million disconnected Americans. The Commission needs meaningful input from all parties, through a transparent and public process, as it evaluates the open questions at stake here. What the Commission does not need is a parade of illusions and obstacles. Undoubtedly, the companies and trade associations that authored the ISP letter will be involved in the final resolution of these important jurisdictional questions. However, the Commission should ignore their efforts to avoid debate and should invite all parties to participate in a more reasonable fashion, consistent with the data-driven decision-making process embraced by this Commission. Only when the rhetoric ends can we expect constructive ideas to emerge. We look forward to playing our role in that process and working to find the solution that will best serve the American public.

Sincerely,

Ben Scott
Policy Director
Free Press

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forbade 'unjust or unreasonable discrimination'"); Comments of Time Warner Cable, GN Docket No. 09-191, WC Docket No. 07-52, at ii, 58-62 (2010) (referring specifically to "an existing body of established precedent to draw on" in support of a standard of "unreasonable discrimination"); Comments of the National Cable & Telecommunications Association, GN Docket No. 09-191, WC Docket No. 07-52, at 40-41 (2010) ("[I]f there is to be such a rule, it should only prohibit 'unreasonable' discrimination."); Comments of Qwest Communications International Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 29-31 (2010) ("The Commission should impose, at most, a reasonable discrimination standard.").

[25] *See, e.g.*, Comments of Verizon, GN Docket No. 191, WC Docket No. 07-52, at 14 (2010) (expressing concern over the potential for "regulatory silos" if the proposed rules are not applied equally to "applications," "content," and "devices" as well as "networks"); Comments of AT&T, GN Docket No. 191, WC Docket No. 07-52, at 196-207 (2010) (offering numerous concerns that the search engine industry is concentrated and presents demonstrable instances of misconduct and "gatekeeper capabilities").