April 29, 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:

In recent weeks, certain advocates for government regulation of the Internet have relied on alarmist rhetoric in arguing that the D.C. Circuit's ruling in the *Comcast* case rendered the Commission "unable to implement the National Broadband Plan" and unable to preserve the Internet's "openness," thus leaving the agency in "an existential crisis."[1] They claim that the cure for this supposed crisis is to remove broadband Internet access service from its long-standing status as a Title I information service and "reclassify" it as a Title II telecommunications service, where they allege it resided before the "previous two Commissions" took the "misguided" step of moving it into Title I.[2] This, in their view, would further the public interest by enabling the Commission to invoke common carrier "policies that date from the Taft administration" in order to regulate today's broadband Internet "just like the railroads" and "telegraphs" in the early part of the last century.[3] As discussed below, this proposal to encumber the modern Internet with hundred-year-old rules designed for franchised monopoly public utilities would mark a radical and unlawful departure from the "light touch" Internet policies embraced by both Democratic and Republican Administrations for the past fifteen years.

We have already explained why Title II "reclassification" is both deeply flawed and entirely unnecessary to preserve the openness of the Internet.[4] Several members of our group

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[1] *See* Free Press, *Court Decision Endangers FCC's Ability to Protect Net Neutrality and Implement National Broadband Plan* (April 6, 2010) ("*Free Press Statement*"). *See also* Public Knowledge, *Public Knowledge Urges FCC Action to Protect Broadband Consumers, Further National Economy* (April 6, 2010); Susan Crawford, *An Internet for Everybody*, NY Times, Op-Ed (April 11, 2010) ("*Crawford Op-Ed*"); Tim Wu, *Is Net Neutrality Dead*, Slate.com (April 13, 2010) ("*Wu Article*").

[2] *Free Press Statement*. *See also* Letter from Aparina Sridhar, Free Press, to Marlene Dortch, FCC, GN Docket No. 09-191 (April 9, 2010) (the Commission should "reclassify the transmission component of broadband Internet access service as an [sic] telecommunications service."); *Crawford Op-Ed*; *Wu Article*.

[3] *Wu Article* at 2.

[4] Letter from NCTA, CTIA, US Telecom, TIA, ITTA, Verizon, AT&T Inc., Time Warner Cable, and Qwest to Julius Genachowski, FCC, GN Docket No. 09-191 (Feb. 22, 2010) ("*Industry Letter*"). *See Statement of NCTA President and CEO Kyle McSlarrow Regarding the D.C. Circuit Court Decision in Comcast v. FCC*, NCTA Press Release (April 6, 2010) ("We cannot state strongly enough that this decision will change nothing about the cable industry's longstanding commitment to provide consumers the best possible broadband experience. Nor does the ruling alter the government's current ability to protect consumers. We continue to embrace a free and open Internet as the right policy and will continue

have also explained why reclassification is not needed to implement the centerpiece of the National Broadband Plan – universal access to the broadband Internet for all Americans.[5] Because the proponents of Internet regulation continue to mislead the Commission, Congress and the public about "reclassification," however, we take this opportunity to set the record straight: *The Commission has <u>never</u> classified any kind of Internet access service (wireline, cable, wireless, powerline, dial-up or otherwise) as a Title II telecommunications service, nor has it ever regulated the rates, terms and conditions of that service -- Internet access service has <u>always</u> been treated as a Title I information service*.

The Commission is not free to change that classification simply because some parties might now prefer a different outcome.[6] Any assertions to the contrary misstate regulatory history, misread the law and ignore many of the necessary byproducts of any such reclassification. Indeed, the United States Supreme Court has observed that the logic of such a decision would almost surely subject large portions of the Internet ecosystem – including *non-facilities based* information service providers "that own no transmission facilities" – to "mandatory common carrier regulation."[7] It should come as no surprise, then, that leading financial analysts and technology commentators have questioned this path.[8] Thus, it is hard to

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to work with the Commission and other policymakers and stakeholders to find a sound way of preserving that goal."); *USTelecom Statement on Comcast Court Ruling*, USTelecom Press Release (April 6, 2010) ("Today's narrow court ruling will have no impact on our industry's commitment to provide the optimum Internet experience to consumers. Our companies will continue to ensure that consumers can access any lawful content they wish, run any application, and attach any device of their choice, consistent with the FCC's longstanding policy principles that we pledged to support several years ago."); *AT&T Statement on the Comcast v. FCC Decision*, AT&T Press Release (April 6, 2010) ("AT&T made a commitment to abide by the FCC's Open Internet Principles when they were first formulated in 2005, and we will continue to do so."); *Appeals Court Decision on Comcast v. FCC Will Have No Impact on Consumers, Verizon General Counsel Says*, Verizon Press Release (April 6, 2010) ("Today's decision in *Comcast vs. FCC* will have no impact on the experience of Internet users. Consumers are in the driver's seat in today's market-driven Internet ecosystem, and their interests remain fully protected. . . . The FCC's authority supplements the various other consumer protection and competition laws that apply to all members of the Internet ecosystem."). *See also* Letter from Brendan Kasper, Vonage, to Marlene Dortch, FCC, GN Docket No. 09-191, at 1 ("there is no need for such a reclassification").

[5] Letter from Kyle McSlarrow, NCTA, to Julius Genachowski, FCC, GN Docket No. 09-51 (March 1, 2010); Reply Comments of USTelecom, WC Docket No. 09-191 (April 26, 2010); Letter from Gary Phillips, AT&T, to Marlene Dortch, FCC, GN Docket No. 09-51 (April 12, 2010); Verizon Reply Comments, GN Docket No. 09-191, WC Docket No. 07-52 (April 26, 2010) (noting potential FCC authority under both Section 254 and 706(b) to address universal service funding for broadband).

[6] *See* Letter from Seth Waxman, WilmerHale, to Julius Genachowski, FCC, GN Docket No. 09-191 (April 28, 2010) ("*Waxman Letter*") (discussing significant legal impediments to Title II "reclassification").

[7] *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 994 (2005).

[8] John Dvorak, *Net Neutrality becomes a dangerous issue*, MarketWatch (April 16, 2010) (Reclassification "is not the way to fight the net neutrality battle. . . . It's a total scam invented to censor the Internet once and for all. I'm surprised people, no matter how idealistic, cannot see through it."); Josh Wein, *Major ISPs Already Said to Follow Network Neutrality Rules*, Commc'ns Daily, Feb. 23, 2010, at 4 (quoting Rebecca Arbogast, Stifel Nicolas: reclassification would "totally freak people out"); Larry Downes, *What's in a title? For broadband, it's Oz vs. Kansas*, CNET News (Mar. 11, 2010), http://news.cnet.com/8301-1035_3-20000267-94.html (quoting Craig Moffett, Bernstein Research: reclassification would drive investors to "run for the hills"); Craig Moffett, *et al.*, Bernstein Research, *Weekend Media Blast: Internet En-title-ment.… The Nuclear Option*, at 2 (Apr. 16, 2010) (raising concerns about the negative impact of reclassification on broadband investment).

imagine a regulatory policy more at odds with this Commission's goal of encouraging "private investment and market-driven innovation."[9] Consistent with the Commission's commitment to be "candid" about "government policies [that] hinder innovation and investment in broadband,"[10] the Commission should categorically reject any proposal to "reclassify" broadband Internet access as a Title II service.[11]

Internet Access Service Has <u>Never</u> Been Subject to Title II Regulation. Some advocates of Internet regulation contend that during the previous Administration the Commission:

> declared that high-speed Internet access would *no longer* be considered a 'telecommunications service' but rather an 'information service.' This *removed* all high-speed Internet access services – phone as well as cable – from regulation under the common-carrier section of the Communications Act.[12]

These assertions are simply wrong. The Commission, under then-Chairman William Kennard, first addressed the regulatory status of Internet access service in its seminal *Report to Congress* in 1998.[13] The Commission began by examining the relevant statutory terms "telecommunications service" and "information service" and concluded that the two terms are "mutually exclusive," in that an integrated information service cannot simultaneously be said to contain a "telecommunications service," even though it has "telecommunications" components. Then, after conducting a thorough examination of the features and functionalities that are part and parcel of Internet access service, the Commission concluded that it is an integrated "information service" and is not (nor does it contain) a "telecommunications service." Subsequent Commissions reached these same fundamental conclusions when examining specific forms of broadband Internet access service in 2002 (cable), 2005 (wireline), 2006 (powerline) and 2007 (wireless).[14] And when the Commission's approach to broadband Internet access classification was challenged in court, the Commission defended its conclusions all the way to the Supreme Court and won.[15]

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[9] FCC, *Connecting America: The National Broadband Plan* at 3 (2010) ("*National Broadband Plan*").

[10] *Id.* at 4.

[11] Even apart from the profound substantive flaws associated with "reclassification" proposals, these proposals are also procedurally defective because they incorrectly assume the Commission could effectuate such a reclassification without issuing a new Notice of Proposed Rulemaking that properly raises the prospect of such a sea change and enables development of an appropriate record pursuant to the Administrative Procedure Act. *See* 5 U.S.C. § 553. In any such proceeding, the APA would prevent the Commission from changing the regulatory classification of broadband Internet access services merely to establish its jurisdiction over such services. *See Waxman Letter*.

[12] *Crawford Op-Ed* (emphasis added). *See also Wu Article*.

[13] *See Industry Letter* at 1-3 (discussing *Report to Congress*).

[14] *See id.* at 2.

[15] *Brand X*, 545 U.S. 967. While a 6-3 majority voted to uphold the Commission's decision, the Open Internet Coalition (OIC) now suggests the Commission should adopt the arguments in Justice Scalia's dissent in order to support "reclassification." *See* Alice Straight, *Coalition Urges FCC to Reclassify Broadband*, TMCnet.com (April 14, 2010) ("The Open Internet Coalition is asking the FCC to say that

Although these facts are beyond dispute, proponents of Internet regulation insist that "until August 2005, high-speed access to the Internet over telephone lines via DSL technology *was* regulated under Title II of the Telecommunications Act as a common carriage, telecommunications service."[16] As proof of this supposed regulatory regime, they cite the Commission's *GTE ADSL Order*, in which the Commission held that GTE's "DSL Solutions-ADSL Service" was an interstate telecommunications service that should be tariffed at the federal level.[17] But the *GTE ADSL Order* is entirely inapposite, and their reliance on it only underscores the flaw in their arguments. The proponents of Internet regulation have conflated the status of retail broadband Internet access service sold *by* Internet Service Providers (ISPs) -- which, as discussed above, has always been treated as an information service -- with the status of certain bare transmission services that phone companies, but not other providers, were required to make available *to* competing ISPs pursuant to *Computer Inquiry* rules dating from the 1970s. The *GTE ADSL Order* is irrelevant because it involved the latter, not the former. More specifically, it involved the status of a bare transmission service offered by GTE that, in the words of the Commission, "is designed to be used *by ISPs as part of their end-to-end Internet access service.*"[18] That transmission service did not include Internet access, which was then and is now an integrated information service under the terms of the statute. It did not offer end users the ability to surf the web, transmit email, download music, watch videos or engage in any other activities typically associated with Internet access service. In short, the *GTE ADSL Order* has no bearing on the regulatory status of broadband Internet access service.

Scalia was correct in his dissent . . . ."). Of course, to the extent that the six-Justice majority has already rejected Justice Scalia's arguments, those arguments are now unavailable to the Commission for that reason alone. Moreover, Justice Scalia's opinion could not support the proposed reclassification because, in several fundamental respects, it appears to misconstrue the technical and functional nature of broadband Internet access service. For example, in one passage, it asserts that consumers who purchase DSL-based broadband Internet access "will not be able to use the Internet unless they get both someone to provide them with a physical connection and someone to provide them with applications and functions such as e-mail and Web access." *See, e.g.*, *Brand X*, 545 U.S. at 1009 (Scalia, J., dissenting). In fact, as Justice Scalia's opinion also acknowledged, even "[i]n the DSL context, the physical connection is generally resold to the consumer by an ISP." *Id.* at 1009 n.3. Thus, even if some small number of consumers may have obtained transmission and Internet access from different providers at one point in time, the overwhelming commercial reality for over a decade is that consumers purchase only *one* broadband service from a given provider: an integrated broadband Internet access service. Justice Scalia also did not address the significant network-based security functionalities that are an increasingly integrated component of today's broadband Internet access services. *See Industry Letter* at 8-9. In all events, the existence of a separate transmission service would not provide a foundation for imposing net neutrality regulation on broadband Internet access service. *See infra* at 5.

[16] Susan Crawford, *"Broadband" blur*, Susan Crawford Blog (March 29, 2010), *available at* http://scrawford.net/blog/. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order, FCC 05-150 (adopted Aug. 5, 2005) (confirming that retail wireline broadband Internet access service is an information service).

[17] Harold Feld, *DSL Was Never Regulated, Oceania Has Always Been at War with Eastasia, and My Offer to AT&T*, Public Knowledge Blog (April 13, 2010) (*Public Knowledge Blog*), *available at* http://www.publicknowledge.org/node/2999. *See GTE Telephone Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292, 13 FCC Rcd. 22,466 (1998) ("*GTE ADSL Order*").

[18] *GTE ADSL Order* ¶ 21 (emphasis added).

More generally, neither do the *Computer Inquiry* rules, the resurrection of which would be unlawful in all events.[19] While the *Computer Inquiry* rules required phone companies to offer ISPs the transmission components of their information services, those rules had no impact on the phone companies' retail information services, which were sold as integrated offerings of transmission and information processing. Indeed, neither the *Computer Inquiry* rules nor the Communications Act ever required that retail information services be sold to consumers as separate, unbundled components.

For similar reasons, reimposition of the *Computer Inquiry* rules would not provide a foundation for imposing net neutrality regulation on broadband Internet access services, nor would any effort to extract a "telecommunications service" from broadband Internet access service through "reclassification." For example, neither the *Computer Inquiry* rules nor reclassification would have prevented the oft-cited *Madison River* incident (in which an *ISP* allegedly blocked VoIP calls) or the *Comcast* case (in which an *ISP* sent TCP reset packets to disrupt P2P traffic). In both cases, the ISP's behavior occurred at a level *above* the "Layer 2" transmission component of the Internet access service (*i.e.*, the putative "telecommunications service" envisioned by some advocates), and that behavior thus would *not* have been subject to any common carrier regulations that might have applied to the transmission component. To address the ISP's conduct, the Commission would need to do something it has never done before—apply Title II common carrier regulation *to ISPs and their Internet access services*. But, as discussed below, that would drag the Commission down a very slippery slope to broad-based Internet regulation.

"Reclassification" Would Threaten to Inflict Common Carrier Regulation on All Internet Based Information Service Providers. In February, AT&T, Verizon, Time Warner Cable, Qwest, TIA, ITTA, US Telecom, CTIA and NCTA filed a joint letter expressing serious concerns about the far-reaching and destructive consequences for the Internet that would result from any decision to reinterpret the Communications Act to classify broadband Internet access service as a Title II telecommunications service.[20] As the letter explained, if, as some have suggested, the Act were construed so that an information service provider is deemed to be simultaneously providing a "telecommunications service" to its customers whenever it offers an

[19] Even if those rules served the Commission's policy goals in the narrowband, circuit-switched "one-wire world" for which they were originally created four decades ago (primarily to address cross-subsidization concerns under rate-of-return regulation), the Commission has repeatedly found that they would be a serious impediment to broadband investment and innovation in the modern, multi-platform broadband IP environment. *See Industry Letter* at 2. Indeed, the broadband Internet access market looks nothing like the "one-wire world" of the 1970s and, in fact, it is even *more* competitive today than it was in 2002, 2005 or 2007 when the Commission rejected applying the *Computer Inquiry* rules to cable, wireline and wireless broadband services, respectively. *See High-Speed Services for Internet Access: Status as of December 31, 2008*, FCC Wireline Competition Bureau, at Table 13 (Feb. 2010) (confirming that 91.9 percent of U.S. census tracts have at least two fixed broadband providers—specifically, aDSL, cable modem, or FTTP service—and 57.2 percent have at least three); *Connecting America: The National Broadband Plan*, FCC at 22 (2010) (as of November 2009, "approximately 77% of the U.S. population lived in an area served by three or more 3G service providers"). Thus, any attempt to revive the *Computer Inquiry* rules now would be a textbook example of arbitrary and capricious decisionmaking. *See Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) (departures from established precedent without "a reasoned explanation . . . will be vacated as arbitrary and capricious").

[20] *Industry Letter* at 10-13.

information service with a telecommunications component, then the Act would subject many Internet-based information service providers who use telecommunications in their offerings to mandatory common carriage regulation. Indeed, the Supreme Court itself highlighted this unintended but inexorable outcome in its *Brand X* decision.

The only party that has purported to offer a substantive response to these concerns was Free Press, but that response is easily dismissed. In a clear misreading of the Supreme Court's decision, Free Press suggests that the Court "explicitly rejected" the argument that the statutory construction described above would lead to regulation of many Internet providers,[21] including those that, in the Supreme Court's words, "own no transmission facilities."[22] That is the complete opposite of what the Court held. The Supreme Court made clear that, *if* the Commission had classified broadband Internet access services as containing a "telecommunications service"—as respondent MCI had proposed there and Free Press proposes here—it would logically follow that Title II would apply to "all" *facilities-based and non-facilities-based ISPs*.[23] The Court cited that logical consequence, and its inconsistency with longstanding federal policy to keep the Internet unregulated, as a basis for upholding the Commission's conclusion *not* to classify broadband Internet access as a Title II service, which Free Press proposes here.[24]

In an even less persuasive argument, Free Press claims that because Internet-based information service providers like Netflix and Akamai purchase some telecommunications services as inputs for their own retail information services and are not regulated as Title II carriers *today*, they would therefore not be regulated as Title II carriers *after* reclassification.[25] But the whole reason Akamai, Netflix and others are classified as information service providers today is because under the Commission's well-established, judicially affirmed precedent, retail information services are *not* deemed to include the provision of a telecommunications service. And if that determination were to be reversed so that broadband Internet access services were deemed to include the provision of a telecommunications service, as Free Press, Public Knowledge and others propose, the result would compel a reclassification of the information services that Akamai and Netflix provide as well. That is why Free Press's position should set off alarm bells in Silicon Valley, on Wall Street, and everywhere in between.

* * *

The Commission has just released an impressive and ambitious broadband agenda for our nation – one that would extend the benefits of broadband to millions of Americans to whom it is not available today, while unleashing the potential of broadband as an engine of economic growth and job creation, and other national goals, including public safety, homeland security, health care delivery, and energy independence. By the Commission's own account, successfully

[21] Letter from Ben Scott, Free Press, to Julius Genachowski, FCC, GN Docket No. 09-191, at 2 (Feb. 24, 2010) (*Free Press Feb. 24 Letter*).

[22] *Brand X*, 545 U.S. at 994.

[23] *Id.* at 993-95.

[24] *Id.* at 995.

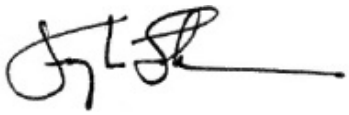
[25] *Free Press Feb. 24 Letter* at 2-3.

implementing this agenda will require billions upon billions of dollars in private investment. Thus, as the Commission begins the task of turning the *National Broadband Plan's* encouraging words into concrete actions, it should heed the sage advice that former Chairman Bill Kennard offered to policymakers at the dawn of the broadband era:

> We sometimes get so caught up in the policy debates about broadband -- the latest court case, the latest proposed legislation -- that we forget what we need to do to serve the American public. . . . We have to get these pipes built. But how do we do it? We let the marketplace do it. If we've learned anything about the Internet in government over the last 15 years, it's that it thrived quite nicely without the intervention of government. In fact, the best decision government ever made with respect to the Internet was the decision that the FCC made 15 years ago NOT to impose regulation on it. This was not a dodge; it was a decision NOT to act. It was intentional restraint born of humility. Humility that we can't predict where this market is going. . . . In a market developing at these speeds, the FCC must follow a piece of advice as old as Western Civilization itself: first, do no harm. Call it a high-tech Hippocratic Oath.[26]

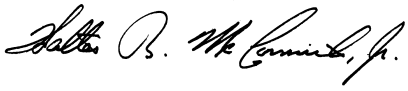
We urge the Commission to reaffirm this oath by rejecting ill-conceived proposals to "reclassify" broadband Internet access as a Title II telecommunications service, and instead continuing its unbroken tradition of classifying that service as a Title I information service.

Sincerely,

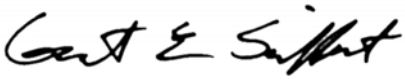


Kyle E. McSlarrow
National Cable &
Telecommunications Association

Steve Largent
CTIA –
The Wireless Association



Walter B. McCormick, Jr.
United States
Telecom Association



Grant Seiffert
Telecommunications
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Telecommunications Alliance

Thomas J. Tauke
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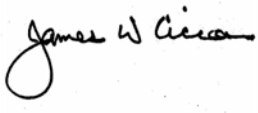

James W. Cicconi
AT&T Inc.

Gail MacKinnon
Time Warner Cable

[26] William Kennard, *The Road Not Taken: Building a Broadband Future for America*, FCC (June 15, 1999), http://www.fcc.gov/Speeches/Kennard/spwek921.html.