

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
A National Broadband Plan for Our Future) GN Docket No. 09-51

REPLY COMMENTS OF FREE PRESS

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Free Press respectfully submits these reply comments in response to the Notice of Inquiry, FCC 09-31, GN Docket No. 09-51 (“Broadband Plan NOI” or “NOI”), released April 8, 2009 by the Federal Communications Commission (“FCC” or Commission”).

I. INTRODUCTION

On July 20th 2009, the Coordinator of the FCC’s National Broadband Plan, Blair Levin, gave a speech where he described the initial comments in this instant proceeding as lacking “seriousness of purpose.”¹ He said the comments generally featured “sloppiness of thinking”² and were full of “get-mine-first” proposals.³ Having read the entire record in this proceeding, we tend to agree, but are not at all surprised. The incumbent phone and cable companies that dominate our broadband market absolutely do not want to see a meaningful national broadband plan implemented -- certainly not one that is developed by an FCC that is devoted to putting the public’s interest above all else. The incumbents simply want the national broadband plan to be a "do-nothing" plan. But we've already

¹ John Poirier, “FCC's Levin-Recent Public Broadband Comments Lack Detail,” *Reuters*, July 20, 2009.

² John Eggerton, “Levin: Broadband Comments Don't Move Ball Forward,” *Broadcasting and Cable*, July 20, 2009.

³ Fawn Johnson, “FCC Aide:Indus "Sloppiness" Could Harm Govt Internet Funding,” *Dow Jones Newswires*, July 20, 2009.

tried the strategy of blind deregulation, and it has proven to be an epic failure for American consumers and the American economy.

In his speech Mr. Levin stated that the FCC needed commenters to offer “clear ideas that solve a problem, deliver a return, can gain a consensus, and will be relatively easy to accomplish.”⁴ We largely agree with this sentiment -- with one important exception. The FCC role in this proceeding, and their role generally is to make tough decisions that inevitably will cause discomfort among some industry sectors, but are overall a net positive for the public. The record in this proceeding, and in all other related proceedings conducted over the past dozen years, makes it abundantly clear that *compromise is not the same thing as good public policy*. Some ideas are inherently better for the public interest than others. Watering down good policy with bad policy is unlikely to lead to desired outcomes.

Congress tasked the FCC with formulating a National Broadband Plan because it recognized that our nation’s broadband policy framework is adrift. If the “right” broadband policies are those that are built around consensus and are easy to accomplish, then we should assume that Congress would have picked such low-hanging fruit long ago. It did not, so the unenviable task of making policy recommendations that break through all the self-interested industry rhetoric is left to the expert agency -- the FCC.

This public comment period is an important part of that process, but it is not the only part. The bulk of the process of formal policy analysis should be left to the specific leadership and direction of the agency staff, as the experts and the neutral parties.⁵ And it

⁴ See *supra* note 2

⁵ Given the relatively broad nature of the *NOI* and the nature of the public comment process itself, it is not at all surprising that the initial comments lacked any truly neutral

is ultimately the Chairman and at least two other Commissioners who will have to make the tough decisions, and take ownership and responsibility over the policy proposals in the National Broadband Plan.

In our initial comments we offered the Commission a detailed analysis of past policy failures and offered solutions that will achieve the goals Congress outlined in the Communications Act and in the American Recovery and Reinvestment Act. Our overall recommendations were for the Commission to:

- 1) Conduct a review of all post-1996 broadband policies to examine the outcomes of past predictions, in order to begin the new policy framework with a clear understanding of what works and what doesn't.
- 2) Develop a set of common standards for competition analysis.
- 3) Reclassify facilities-based broadband Internet access as an information service with a telecommunications service component.
- 4) Make a finding that the Section 706 test is not being met.
- 5) Use the new standard of competition analysis to revisit deregulatory decisions made in the special access and enterprise broadband markets.
- 6) Identify spectrum that could be used on an unlicensed or quasi-licensed basis.
- 7) Expand the *Internet Policy Statement* to include a fifth principle of non-discrimination and codify these principles into rules.
- 8) Transition the USF High-Cost Fund to a broadband infrastructure construction support fund over a 10-year period, accomplished in a revenue-neutral fashion by changing the current rate-of-return and price-cap support structures to a system that bases ongoing support on an infrastructure's forward-looking cost and revenue earning potential.
- 9) Modernize the low-income USF program to support broadband access; with recognition that subsidies alone are not enough to encourage adoption -- that education and competition are just as important.

formal policy analyses. Proper policy analysis follows an "eight-fold path" – define the problem, assemble evidence, construct alternatives, select criteria, project outcomes, confront trade-offs, decide, tell the story. Some comments do more of these steps than others, but the public comment period by its nature cannot easily do much more than assemble evidence. This is particularly true in this instance, where the Commission sought a wide range of input. The Commission should proceed next to conduct a formal analysis, based in part on evidence gathered through the public comment process.

The above recommendations are designed to promote meaningful competition, which in turn will lead to greater deployment, adoption and utilization of broadband services. These recommendations are not radical -- they are essentially designed to get our broadband policy framework back in line with the vision outlined by Congress in the 1996 Act -- a framework that would have been successful had it not been completely derailed before it was really given a chance to work.

Given the extensive and comprehensive nature of our initial comments, it is not useful to rehash many of our arguments in these reply comments. We instead devote our time to addressing and rebutting some of the more egregious and misleading falsehoods, strawmen arguments and general myths about the broadband market offered by incumbent commenters. These reply comments focus on three topics: The relationship between regulation and investment; marketplace competition; and the need to protect the open nature of the Internet on all broadband networks. While these comments do not focus on specific policy proposals (that was the subject of our initial comments), we feel it is useful to provide the Commission with additional evidence that supports the fact that our broadband market lacks effective competition; that regulation does not deter investment, but ineffective competition does; and that openness rules will enhance, not harm the Internet economy.

II. DISCUSSION

A. The Nexus Between Regulation and Investment

i. The Commission Must Not Be Swayed By Bogus and Misleading Interpretations of the Law and Subsequent Legislative and Regulatory History

Despite mounting evidence -- within the telecom sector and throughout the general economy -- that demonstrates the perils of following the path of blind deregulation,⁶ network operators continue to advocate for the failed policies of the past. In making the case that our National Broadband Plan should essentially be nothing more than total hands-off deregulation of the communications giants, incumbent commenters rely on flimsy evidence and discredited arguments. In some instances incumbent commenters even use misdirection -- offering wildly broad and plainly incorrect conclusions about the language of the 1996 Act, and the motivations behind those policymakers responsible for enacting and implementing the law. As they have so many times in the past, the incumbents attempt to dupe the Commission into believing that Congress intended for the communications market to be completely devoid of any rules or oversight.

Nowhere is this misdirection more evident than when the incumbents cite Section 230 of the Act.⁷ The title of Section 230 is “Protection for Private Blocking and

⁶ See e.g. Comments of Free Press at 21-25; Stephen Labaton, “Agency’s ’04 Rule Let Banks Pile Up New Debt,” *New York Times*, Oct. 2, 2008; Comments of Free Press at 90-102. See also Comments of National Association of Telecommunications Officers and Advisors at 16-18; Comments of BT Americas at 14-18.

⁷ See § 509 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), (*1996 Act*), reproduced in the notes under 47 U.S.C. § 230 of the Communications Act (*The Act*).

Screening of Offensive Material.”⁸ The Section pertains not to those who provide *access* to the Internet but to the *Internet itself* -- an important distinction completely lost on the incumbent commenters. Despite the clear intent and plain meaning of the language in Section 230, the proponents of deregulation have a long history of offering the Commission a highly misleading interpretation of this portion of the Act.

The language in question states, “it is the policy of the United States...to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services and other interactive media.”⁹ Congress defined “Internet” as meaning “the international *computer* network of both Federal and non-Federal interoperable packet switched data networks.”¹⁰ In other words, Section 230 is generally adopting the regulatory approach taken by the Commission in the *Computer Inquiries* -- building a layered model of regulation, with defined areas of separation between the unregulated ends of the network (the computers), and the regulated network operators who provide access to the Internet over local bottleneck facilities. The accompanying conference report further illustrates the fact that Congress did not intend for Section 230 to be a general policy of deregulation targeting Internet *access* providers.¹¹

⁸ 47 U.S.C. § 230.

⁹ 47 U.S.C. § 230(b)(2).

¹⁰ 47 U.S.C. § 230(e)(1) [*emphasis added*]. See also Pub. L. No. 105-277, § 1101(d)(3)(C).

¹¹ Senate Report No. 104-230. “The conference agreement adopts the House provision with minor modifications as a new section 230 of the Communications Act. This section provides “Good Samaritan” protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering

Despite the obvious Congressional intent, in the *Cable Modem* proceeding, providers offered Section 230 as justification for deregulation.¹² The Powell Commission bought into this bogus reading of the law, citing Section 230 as justification for not imposing Title-II or *Computer Inquiry*-style regulations in the *Cable Modem Order*.¹³ This false justification was also a part of the *BPL Order*¹⁴ and the *Wireless Broadband Order*.¹⁵ However, by 2008, the Martin Commission finally recognized the folly of this interpretation, rejecting Comcast's broad deregulatory interpretation of Section 230.¹⁶

parents to determine the content of communications their children receive through interactive computer services.”

¹² See e.g. Comments of Comcast Corp. In the Matter of *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to Internet Over Cable Facilities*, GN Docket 00-185, CS Docket 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, at p. 17 (2002); Comments of AOL Time Warner Inc., In the Matter of *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to Internet Over Cable Facilities*, GN Docket 00-185, CS Docket 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, at p. 3 (2002).

¹³ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling and NPRM*) at para. 4, 73.

¹⁴ *Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (*BPL Order*) at para. 10.

¹⁵ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (*Wireless Broadband Order*) at para. 27.

¹⁶ See *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008) (*Comcast Order*) at 13043-4 paras. 25, 26. This came despite provider attempts. See e.g. Comments

However, the Commission's rejection of this line of argument may have fallen on deaf ears -- as incumbents repeatedly offered this backwards interpretation of Section 230 in their comments in the instant proceeding.¹⁷

The comments of incumbents in this docket are filled with fanciful interpretations of the history of telecommunications policy in the post-1996 Act era. Verizon attempts to equate Clinton-era policies (which were occupied with the business of implementing the regulatory regime of the 1996 Act) to the blind deregulatory path of the last eight years, relying heavily on vague statements regarding the role of private industry.¹⁸ For example, Verizon highlights the Clinton Administration's "National Information Infrastructure Agenda for Action" as an example of the deregulatory philosophy in place since the mid 1990s.¹⁹ This document states that in order to promote private sector investment, "passage of communications reform legislation" was needed.²⁰ But when Vice President Gore subsequently presented the Administration's legislative model, he clearly laid out the principles to be included in the new framework. Gore stated:

of AT&T Corp., *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, at p. 47. (All short hand abbreviations with "Comments of..." refer to June 8th Comments in the instant proceeding).

¹⁷ The two most common references are to: 47 U.S.C. § 230(a)(4), (b)(2). *See e.g.* Comments of AT&T at 40-41; Comments of Comcast at 23; Comments of the NCTA at 45.

¹⁸ Comments of Verizon and Verizon Wireless at 78-80

¹⁹ *Ibid.* at 79.

²⁰ "The National Information Infrastructure: Agenda for Action," Department of Commerce, Information Infrastructure Task Force, Sept. 15, 1993, V(1).

Preserving the free flow of information requires *open access*, our third basic principle...Accordingly, our legislative package will contain provisions designed to ensure that each telephone carrier's networks will be readily accessible to other users. We will create an affirmative obligation to interconnect and to afford *nondiscriminatory access* to network facilities, services, functions and information.”²¹

Incumbent commenters also attempt to convince the current Democratic-majority Commission that their predecessors in the Clinton administration were responsible for sending us down the deregulatory path. However, the examples cited are highly misleading, and actually point to the fact that the Clinton-era FCC was largely devoted to faithfully implementing the 1996 Act, by using policies that created competition through regulation.

For instance, AT&T claims the Clinton-era FCC to be “perhaps the most outspoken advocate of a ‘hands-off’ approach to the Internet”.²² Evidence for this suspect claim comes in the form of a long quote from an FCC document providing a telecommunications guide to overseas regulators, which states in part that “regulatory agencies should refrain from taking actions that could stifle the growth of the Internet”.²³ But what AT&T fails to grasp (or ignores) is that at the time, the Commission fully recognized the distinction between the Internet and offering *access* to the Internet.²⁴

²¹ Vice President Gore went on to state “our legislative package will grant the Federal Communications Commission the future authority, under appropriate conditions, to impose non-discriminatory access requirements on cable companies.” See Speech of Vice President Al Gore, before the Television Academy, UCLA, June 11, 1994 (emphasis added).

²² Comments of AT&T at 41

²³ *Ibid.*

²⁴ Free Press also highlighted this distinction in previous comments to the Commission. See *e.g.* Reply Comments of Free Press, In the Matter of *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the*

Indeed, this distinction is made completely clear in the very next page of the document, which states “limiting the ability of new competitors to access, build, and utilize the underlying network inhibits infrastructure deployment and ultimately retards the introduction of facilities necessary for the Internet to flourish.”²⁵

Verizon and Comcast point to a line from a 1999 speech by Chairman Kennard to make their case that the blind deregulatory path was in place from the beginning. They cite a passage of the speech where Chairman Kennard stated, “[s]o how do we get Americans broadband pipes? The answer lies in the history that I just laid out for you: by letting a competitive marketplace thrive.”²⁶ In the incumbent’s eyes, “letting a competitive marketplace thrive,” means the deregulation of network operators practiced by the Powell and Martin Commissions. But that is *their* interpretation, not the actual meaning of Chairman Kennard’s words. This is made plainly obvious by what Chairman Kennard said in the same speech when discussing how his Commission had implemented strict co-location rules (i.e. regulations imposed on incumbents) to make the market more “competitive”:

Recently, we have continued this competitive, deregulatory approach to the Internet. Just this past April, we issued rules that made it easier for competitors to co-locate their equipment in the RBOC central office, a move that would help competitive DSL providers.²⁷

FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,” File No. EB-08-IH-1518, WC Docket No. 07-52, at p. 33.

²⁵ Chairman William E. Kennard, “Connecting the Globe: A Regulator’s Guide to Building a Global Information Community,” Federal Communications Commission, 1999, IX-4.

²⁶ See Comments of Verizon and Verizon Wireless at 80; Comments of Comcast at 23.

²⁷ Chairman William E. Kennard, “The Unregulation of the Internet: Laying a Competitive Course for the Future,” Before the Federal Communications Bar Northern California Chapter, July, 20, 1999.

There should be no misunderstanding about how the Clinton Commissions viewed the role of regulation in promoting competition. It was integral to their approach and perfectly consistent with the goals of the 1996 Act. And there should be no doubt about the extraordinary reversal of those regulatory policies that occurred in the last eight years. Any attempt to elide those differences is ahistorical, an Orwellian inversion of actual events, and insulting to anyone who has observed this history.

ii. Rules that Promote Competition Encourage Investment. Incumbent's Claims of Regulations Deterring Investment Are Without Merit

Incumbents are quick to brag about how much they are investing in their networks, while warning that any and all regulation will deter future investment. But the belief that investment is deterred by rules designed to protect consumers and promote competition is based on nothing more than self-interested economic dogma. In reality, regulations designed to prevent the abuses of market power actually *encourage* investment, while the absence of such rules in highly concentrated markets leads to higher prices and/or delayed investment.²⁸ Regulations that keep market power in check

²⁸ See Free Press Comments at 115-117, “The hallmark of a market lacking effective competition is the presence of a firm that is able to substantially raise the price of its goods and sustain that price increase over time. This is because in a competitive market, such supra-competitive profits would encourage other firms to enter the market with a lower-priced offering. However, the lack of the ability to raise prices alone does not mean a market is competitive. If demand for a good is relatively elastic (i.e., consumers are very sensitive to price increases), then a firm even with substantial market power is constrained from raising prices. This is because the total revenues lost from customers exiting the market will be more than the additional per-customer revenues generated by the price increase... At the core of the Commission’s recent regulatory actions is the belief that the mere presence of more than one provider is proof alone that the market is, or might in the future become, competitive. The FCC finds a duopoly in the emerging broadband market acceptable, because the limited competition in combination with consumer price sensitivity might be enough to restrain the “substantial and sustained” price increases that are the main symptom of market power abuse. But this narrow view

are designed to make the telecom market -- a market that has natural monopoly qualities -
- work more like the textbook *free* market. Without rules, the game is rigged in favor of
the entrenched incumbents, and consumers lose.

Competition -- *meaningful and real competition* -- and not regulation is the
primary driver behind investment decisions.²⁹ Where meaningful competition exists,
incumbents are compelled to innovate and invest in order to maintain marketshare and
future growth. Where competition is lacking -- such as it is in our broadband duopoly --
incumbents will delay investment, knowing full well they can pad their profits on the
backs of captured customers who have no viable alternatives.

ignores other basic anti-competitive realities about oligopolistic marketplaces. In these
highly concentrated markets, incumbents artificially restrain investment and discourage
innovation. Incumbents in a duopoly simply will not invest in new technologies until the
costs of the old investments are fully recovered.”

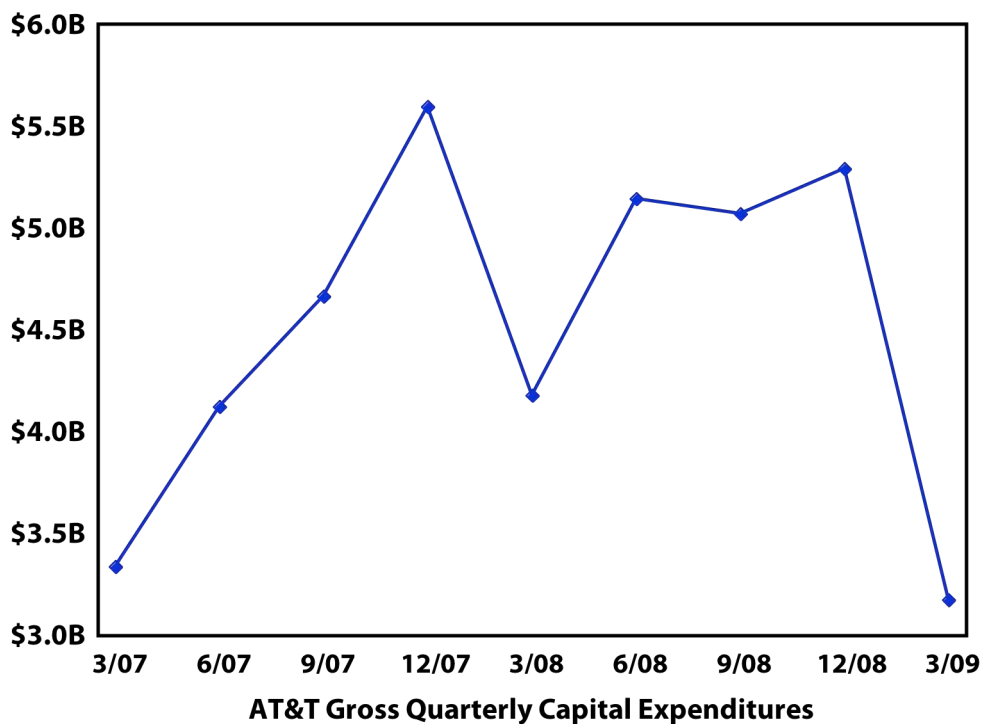
²⁹ See Free Press Comments at 145-146, “In network industries, regulations have only
a minor influence over investment decisions. More important are considerations about
future growth potential and fear of competition eroding profits. In fact, fear of potential
regulations can actually encourage capital investment and counteract the most important
factor discouraging investment - short-term shareholder concerns. This mistaken belief
about the relationship between regulation and investment is not supported by evidence
from the past decade -- a period that saw the imposition of substantial regulation,
followed by a period of equally substantial deregulation. During the years following the
implementation of the 1996 Act, ILEC capital expenditures as a percentage of revenues
rose dramatically. However, investment declined in the period following the FCC’s
dismantling of this regulatory regime.” (*Internal footnotes omitted*). See also Testimony
of Blair Levin, Stifel Nicolaus & Company Inc., Before the United States Senate
Committee on the Judiciary, on the matter of Reconsidering Our Communications Laws:
Ensuring Competition and Innovation, June 14, 2006 (*2006 Levin Testimony*); Comments
of Cbeyond and NuVox Communications, In the Matter of *Review of Regulatory
Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket
01-337, Notice of Proposed Rulemaking, Attachment 2, at p. 23-24 (2002). (“Since 1997,
CLECs have invested \$56 billion in infrastructure that will carry the next generation of
communications...In 2000, CLECs invested almost 64% of their revenues in capital
expenditures.”).

For example, AT&T has touted their overall investment as proof that the Commission's recent deregulatory broadband framework is working.³⁰ However, this claim should be looked at in the context of the conditions placed on AT&T as a result of its 2006 merger with Bell South. The Commission approved this merger only after AT&T agreed to operate a neutral network (by adhering to the *Internet Policy Statement* plus a fifth principle of non-discrimination) for two years following the transaction.³¹ A review of AT&T's gross capital investments over those two years shows quite clearly that a strict non-discrimination rule did not in any way act as a deterrent on capital spending. Gross capital investment increased immediately following the imposition of the net neutrality merger condition, and continued to rise in the following quarters. Only when the neutrality condition sunset on Dec. 29, 2008, do we see a sharp *decrease* in investment (see Figure 1).

³⁰ See e.g. Comments of AT&T at 79; Reply Comments of AT&T, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Notice of Inquiry, at 4 (2007).

³¹ See Letter from Robert W. Quinn, Senior Vice President, Federal Regulatory, AT&T, In the Matter of *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74 (Dec. 28, 2006).

**Figure 1:
Non-Discrimination Does Not Deter Capital Spending
AT&T's Gross CapEx 2007-2009**



Source: Free Press Analysis; AT&T Quarterly Earning Reports

The story is no different for wireless, particularly the wireless voice sector. Wireless voices services are classified under Title III of The Act, and are subject to Section 332.³² This section of Title III subjects CMRS providers to many of the rules governing telecommunications providers under Title II, and specifically states that such services are subject to the non-discriminatory provisions that lie at the heart of Title II.³³ In enacting Section 10 as a part of the 1996 Act, Congress made it clear that the non-

³² 47 U.S.C. § 332

³³ Section 332(c)(1) states that, “A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act, except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission *may not* specify any provision of section 201, 202, or 208” (emphasis added). In other words, the Act specifically states that CMRS providers must operate under the non-discriminatory provisions of Title-II.

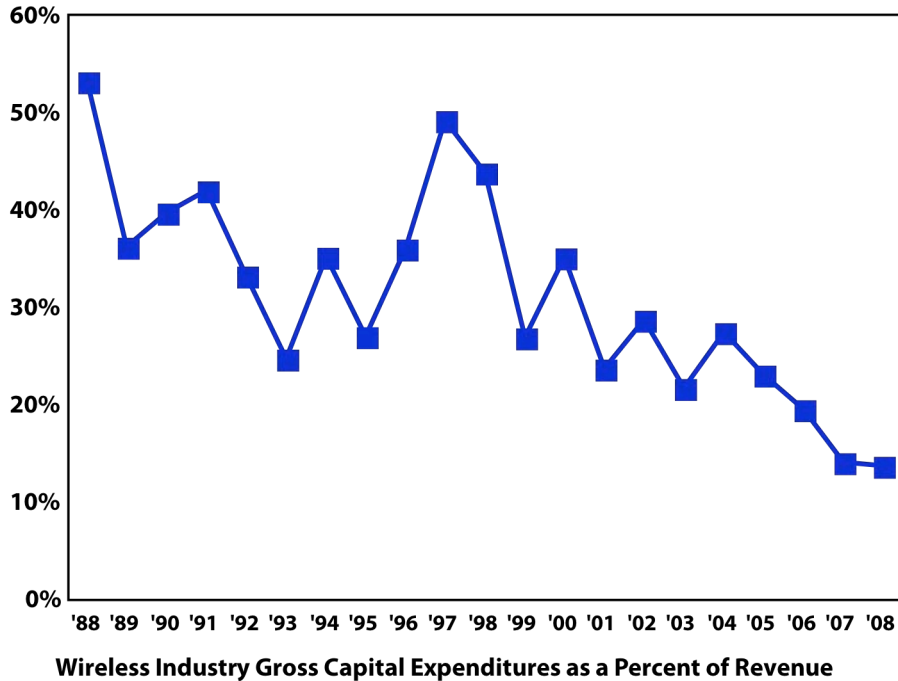
discriminatory provisions of the law that applied to CMRS providers could not be forboreed by the Commission.³⁴ Thus, if we believe the logic of the incumbents, the investment taking place in the wireless voice sector should have ground to a halt following this clear signal from Congress that Title-II's non-discriminatory provisions would always apply to CMRS providers, regardless of the overall level of marketplace competition.

However, during the period following the implementation of these “highly regulatory” provisions of the 1996 Act we see high levels of investment (relative to revenues) in the wireless sector (see Figure 2). But after this period of heavy initial investment that took place under the non-discriminatory regulatory requirements of Section 332, we see a relative steady decline. This decline took place during a period where CMRS providers received less and less regulatory attention, and as the industry underwent substantial consolidation. Verizon Wireless exhibits similar declining investments during the 2005-2009 period (see Figure 3). The period with the lowest investment is from 2007 to the present. This is notable, as March 22, 2007 is when the Commission affirmatively removed wireless broadband from any Title-II protections.³⁵

³⁴ 104 P.L. 104, Section 401.

³⁵ See *Wireless Broadband Order*, *supra* note 15.

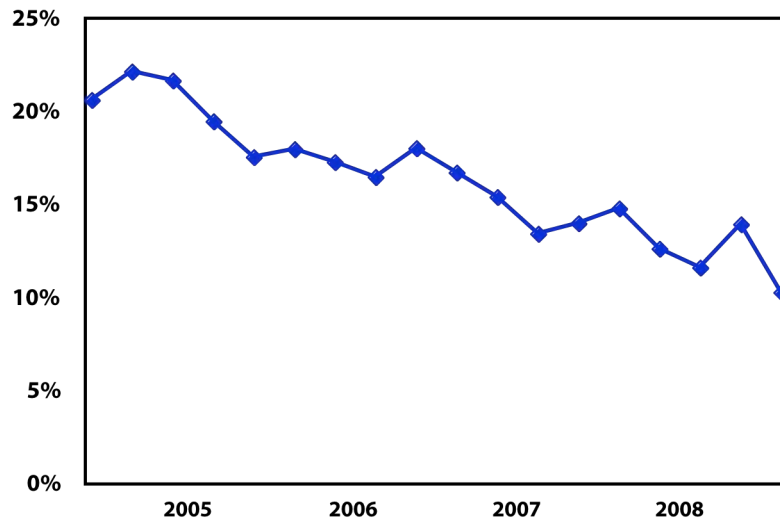
**Figure 2:
No Relationship Between CapEx and Non-Discrimination
Wireless Sector Gross CapEx Spending as a Percent of Revenue
1988-2008**



Source: Free Press Analysis; Data collected from the CTIA’s Semi-Annual Wireless Industry Survey. The Commission attached the results of this survey in nearly all the annual CMRS competition reports. Until 2004, the CTIA publicly reported both revenue and *cumulative* capital investment. In 2005, the CTIA began to publicly publish only revenue figures (and therefore so did the CMRS competition reports). Thus, the capital investment figures for 2005-2009 were collected from CTIA comments to the Commission in response to the annual CMRS competition report public comment period. In cases where the CTIA only offered the capital investment figure for the first six months (2005 and 2007) that figure was doubled.

The data in Figures 2 and 3 suggest that there is little if any relationship between regulation and capital investment. Investment decisions in this sector are governed not by regulation, but by competition and growth opportunity. CMRS carriers made substantial initial investments in their networks despite being subject to the non-discrimination provisions of Sections 201 and 202 of Title II. Only when the industry began to consolidate and competition decline did we see an accompanying decline in investment relative to revenues.

**Figure 3:
Verizon Wireless Gross CapEx Spending as a Percent of Revenue
2004-2009**



Verizon Wireless Gross Capital Expenditures as a Percent of Revenue

Source: Verizon Quarterly Earnings Reports

This finding should not come as a surprise to the Commission. In the annual CMRS reports, the Commission has repeatedly highlighted the investments made during the initial proliferation of mobile voice services.³⁶ Ironically, in his statement accompanying the *Wireless Broadband Order* Chairman Martin pronounced, “[t]oday’s classification eliminates unnecessary regulatory barriers for wireless broadband Internet access service providers and will further encourage investment and promote competition in the broadband market.”³⁷ But as we see, that was not the case at all. Relative to revenues, gross capex spending declined as the industry became more consolidated.

³⁶ See e.g. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Eighth Report*, 18 FCC Rcd 14783 (2003) at 14819, para. 70.

³⁷ Statement of Chairman Kevin J. Martin, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket 07-53, Declaratory Ruling (2007).

Locked-in CMRS customers were left in the lurch with no meaningful competitive alternatives.

The record in this proceeding is full of evidence that pro-competition rules that curb incumbent market power encourage investment.³⁸ The Commission should be very skeptical of the arguments that open access discourages investment, as the evidence to the contrary, both in the U.S. and around the world³⁹ is compelling and impossible to ignore.⁴⁰

³⁸ See e.g. Comments of BT Americas at 17-21, noting that “Between 1987 and 1995, the growth rate of annual investment in computers, software, and telecommunications equipment in the US was 13.5 percent. Between 1995 and 2000, however, this annual growth rate jumped to 22.2 percent. For the same periods, the decline of information technology prices accelerated from 3.3 to 7.3 percent per year. By 2001 telecommunications investment hit a high which has not been matched in reported figures post 2001.”

³⁹ See e.g. Comments of the Government of Japan, Appendix 3-3, showing that the requirement that the incumbent NTT unbundle its fiber-optic connections has NOT impacted NTT’s investment in fiber. This is noteworthy, as Japan has some of the most extensive fiber, DSL and cable deployments, and has the fastest and least expensive broadband connections of any country in the world.

⁴⁰ Other commenters and analysts have also recognized the benefits of targeted regulation over providers. See e.g. Comments of Big Think Strategies at 1-18, Comments of CBeyond Inc. et al. at 17-19, Comments of BT Americas at 14-18, Comments of Covad at 15-17, Comments of New Jersey Division of Rate Counsel at 34, Comments of Media and Democracy Coalition at 2, Comments of Public Knowledge et al. at 22-26, Comments of Ionary Consulting at 4, Comments of Broadband Development Group at 2-3, Comments of Wired.com at 2, Comments of Google at 18, Comments of EDUCAUSE, Internet2 and ACUTA at 10-11, Comments of Rural Telecom Group at 16-18. See also Benoît Felton and Wally Swain, "Fiber to the Home: Making That Business Model Work," Yankee Group, June 30, 2009, available at http://blogs.yankeegroup.com/wp-content/uploads/2009/07/june-webinar_ftth_slide-deck_final.pdf; OECD, "Policy Responses to the Economic Crisis: Investing in Innovation for Long-Term Growth," June 2009. ("Investment in high speed broadband communication networks that are part of economic stimulus packages must be accompanied by regulatory frameworks which support open access to networks and competition in the market"); OECD, "Broadband Growth and Policies in OECD Countries," June 2008, pp. 29, 68-69. ("Clearly the blossoming of competition among providers in the Netherlands and Denmark has been a key factor in their strong penetration gains during the period and may also explain their leading places in the OECD as a whole. Both the Netherlands and Denmark benefit from

iii. Contrary to their Claims, Incumbent Phone and Cable Companies Have Actually Disinvested In their Networks Over the Past Several Years. Depleted Asset Values Exceed the Amount of New Capital Spending.

Contrary to all the boasts of investments in a deregulatory climate, the data shows that U.S. incumbent phone and cable companies have actually *disinvested* in their networks over the past several years, even amidst rising profits, declining costs and soaring demand. That this disinvestment coupled with rising prices is taking place in a deregulatory environment is a clear sign that the market is broken.

While incumbents like to highlight their capital expenditures before the Commission⁴¹ and in feel-good commercials⁴² (but not before Wall Street analysts, who tend to frown on such investment)⁴³, they never highlight the *net investment* figure -- the amount of money devoted to new assets minus the depreciated value of old assets. In a capital-intensive industry like telecom, old assets are constantly being depleted and are in

infrastructure-based competition and same-line competition over DSL. In addition, fibre-to-the-home networks are appearing in both countries, often with the partnership of local municipality or utility company").

⁴¹ See e.g. AT&T Comments at 79, "During [the past decade], incumbent wireline carriers and the cable industry have spent far more than a hundred billion dollars to lay millions of miles of fiber, copper, and coaxial cable, and to deploy countless routers, multiplexers, and other equipment." But in this statement there is no mention of the value of assets depleted during this time -- i.e. what the *net* investment was, or how much was invested above the value of network assets that had been fully depreciated. See Figures 4-6 below.

⁴² AT&T has flooded DC-area airwaves with self-congratulatory commercials for the company's diversity practices, its green vehicle purchases, and its planned investment of \$17 billion in 2009. However, this is the lowest gross level of capex since the company merged the legacy AT&T with SBC, and based on prior trends, the company is likely to depreciate more in assets than it invests in new capex. See "AT&T to Invest More Than \$17 Billion in 2009 to Drive Economic Growth: Wireless and Wired Broadband Investment Will Expand Service Coverage, Capacity, Quality", AT&T Press Release, Washington, District of Columbia, March 10, 2009.

⁴³ See e.g. Arshad Mohammed, "Verizon Lays It on the Line: CEO Sticks By Costly Rollout of Fiber-Optic Network", *Washington Post*, February 1, 2006.

need of replacement. Thus, a single company could spend ten billion dollars on new capital expenditures, but still not fully replace the assets that are depleted through the normal course of business. Depleted assets can still earn revenues, but in competitive markets such a practice is infeasible. For example, consider the car rental business. A company might purchase a car with a value of \$20,000, and then estimate that after four years the wear-and-tear on the vehicle will result in the full depreciation of the asset (i.e. the car will be worth no more than the salvage value). With maintenance, the rental company could of course operate the car for several additional years. But in a competitive market, such a practice would never occur, because other companies would gain marketshare by offering newer vehicles (indeed, in the rental car industry, which is regarded as moderately competitive, companies often replace fleet vehicles after one year of use).

So while at first glance it may seem impressive that a company like AT&T made \$51 billion in capital expenditures between 2005 and 2008, this becomes much less remarkable when you consider that during the same period AT&T depreciated \$59 billion in assets. That is, during the time when AT&T's wireline segment was receiving substantial deregulatory FCC treatment (alongside of the growth in the nearly completely unregulated wireless segment), the company *depleted nearly \$8 billion more in assets than it made in new capital investments.*

This pattern of disinvestment is industry-wide. During the four-year period from 2005 to 2008, the top publicly traded incumbent phone and cable companies depleted nearly \$6 billion more in assets than they spent on capital expenditures. In other words, for every \$1.00 in assets that were depleted during this period, the largest publicly traded

incumbents collectively only made \$0.96 in new capex investments, while the average incumbent only made \$0.89 in investments for every dollar of assets depleted (see Figure 4).

Figure 4:
Disinvestment In Networks Since 2005
Data for Top Publicly Traded Incumbent Phone and Cable Companies

Company	Total CapEx Spending (2005-2008)	Total Asset Depletion (2005-2008)*	Difference	Investment Ratio (dollars spent replacing each dollar of depleted assets)	Percent of All U.S. High-Speed Internet Lines	Operating Profit Margin (2005-2008)
AT&T	\$51,289,000,000	\$59,010,000,000	(\$7,721,000,000)	0.87	20.9%	19.1%
Verizon	\$66,841,000,000	\$57,102,000,000	\$9,739,000,000	1.17	12.0%	16.8%
Comcast	\$21,444,000,000	\$21,982,000,000	(\$538,000,000)	0.98	20.7%	18.4%
Time Warner Cable	\$11,704,000,000	\$9,651,000,000	\$2,053,000,000	1.21	12.1%	18.4%^
Qwest	\$6,691,000,000	\$10,648,000,000	(\$3,957,000,000)	0.63	4.0%	10.5%
Charter	\$4,637,000,000	\$5,499,000,000	(\$862,000,000)	0.84	4.0%	4.7%
Embarq	\$3,266,000,000	\$4,031,000,000	(\$765,000,000)	0.81	2.0%	24.8%
CenturyTel	\$1,490,770,000	\$2,115,480,000	(\$624,710,000)	0.70	0.9%	28.6%
Windstream	\$1,413,900,000	\$1,925,800,000	(\$511,900,000)	0.73	1.4%	30.8%
Frontier	\$1,132,310,000	\$2,104,350,000	(\$972,040,000)	0.54	0.8%	30.8%
MediaCom	\$955,690,000	\$899,730,000	\$55,960,000	1.06	1.0%	82.6%
Cincinnati Bell	\$759,000,000	\$622,400,000	\$136,600,000	1.22	0.3%	20.5%
Fairpoint	\$688,470,000	\$799,160,000	(\$110,690,000)	0.86	0.4%	9.1%
Total Top ILEC (publicly traded)	\$95,496,804,000	\$101,988,190,000	(\$6,491,386,000)	0.94 (total) 0.84 (average)	42.7%	21.2% (average)
Total Top Cable (publicly traded)	\$38,740,690,000	\$38,031,730,000	\$708,960,000	1.02 (total) 1.02 (average)	37.8%	31.0% (average)
Total Incumbent Phone and Cable (publicly traded)	\$134,237,494,000	\$140,019,920,000	(\$5,782,426,000)	0.96 (total) 0.89 (average)	80.5%	24.2% (average)

Source: Company 10-K filings. Companies listed in this chart are the publicly traded companies that were listed in Figure 5 of Free Press' Initial Comments in 09-51. * Values in this column are for depreciation plus amortization, as most of these companies did not separate out this data in their annual reports. However, as shown below, these net investment ratios are still well below that of other publicly traded companies when examined using the same methodology. ^ In order to more accurately reflect TWC's business health, operating margins for TWC exclude 2008, which was artificially low due to a one-time non-cash accounting expense of \$14.8 billion recorded for the "impairment of cable franchise rights."

How do these net investment levels compare with other industry sectors? An examination of the companies that make up the Dow Jones Industrial Average (DJIA, excluding AT&T and Verizon) shows that during the 2005-2008 period the DJIA companies' capex investments were nearly 40 percent higher than the value of the assets depleted over this four-year period. Companies in capital-intensive and scale-economy

industries like Chevron and Alcoa have much higher net investment ratios than the incumbent network operators, yet have lower operating profit margins (see Figure 5).

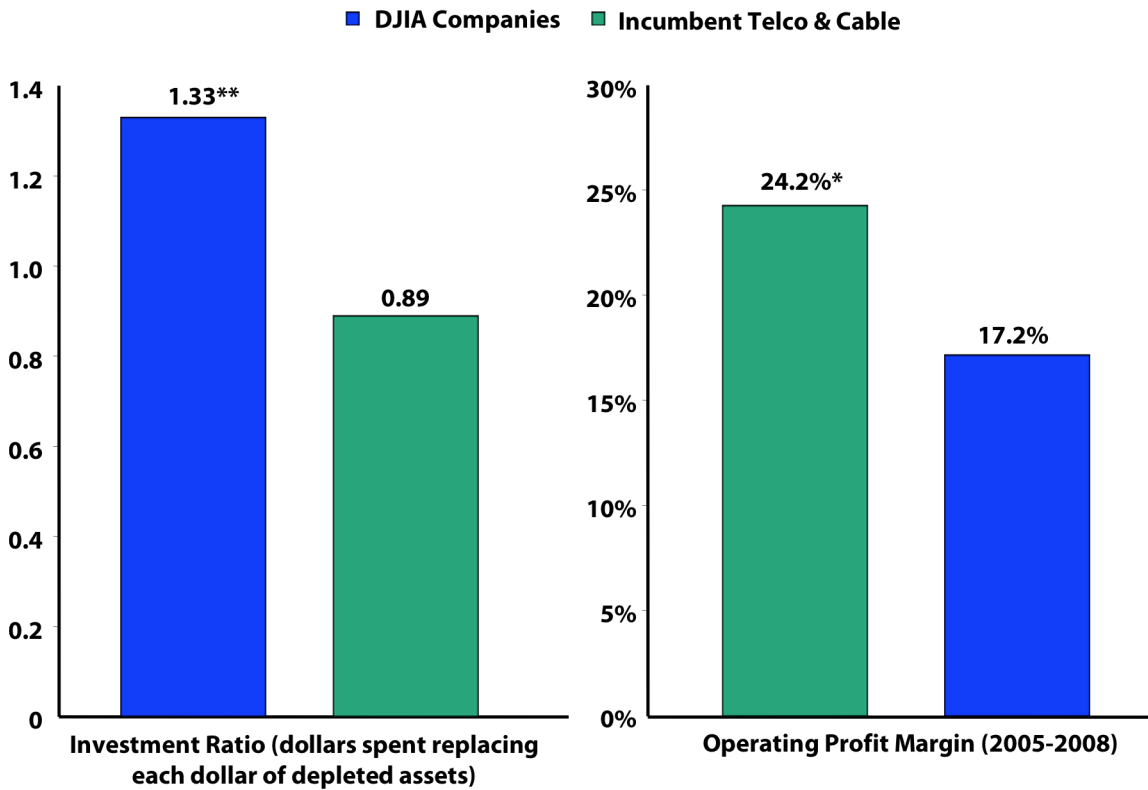
**Figure 5:
Net Investments by DJIA Companies**

Company	Total CapEx Spending (2005-2008)	Total Asset Depletion (2005-2008)*	Difference	Investment Ratio (dollars spent replacing each dollar of depleted assets)	Operating Profit Margin (2005-2008)
3M	\$5,004,000,000	\$4,290,000,000	\$714,000,000	1.17	23.4%
Alcoa	\$12,417,000,000	\$4,989,000,000	\$7,428,000,000	2.49	10.0%
American Express	\$3,331,000,000	\$2,535,000,000	\$796,000,000	1.31	16.0%
Bank of America	\$6,217,000,000	\$4,726,000,000	\$1,491,000,000	1.32	n/a
Boeing	\$6,633,000,000	\$5,516,000,000	\$1,117,000,000	1.20	6.4%
Caterpillar	\$12,141,000,000	\$6,856,000,000	\$5,285,000,000	1.77	10.4%
Chevron Corporation	\$58,858,000,000	\$31,655,000,000	\$27,203,000,000	1.86	14.7%
Cisco Systems	\$3,983,000,000	\$5,470,000,000	(\$1,487,000,000)	0.73	25.4%
Coca-Cola	\$5,922,000,000	\$4,261,000,000	\$1,661,000,000	1.39	26.0%
DuPont	\$6,435,000,000	\$4,612,000,000	\$1,823,000,000	1.40	10.9%
ExxonMobil	\$64,006,000,000	\$46,298,000,000	\$17,708,000,000	1.38	17.1%
General Electric	\$63,363,000,000	\$38,065,000,000	\$25,298,000,000	1.66	14.0%
Hewlett-Packard	\$10,561,000,000	\$10,758,000,000	(\$197,000,000)	0.98	7.3%
The Home Depot	\$12,828,000,000	\$7,273,000,000	\$5,555,000,000	1.76	9.7%
Intel	\$21,928,000,000	\$18,921,000,000	\$3,007,000,000	1.16	22.7%
IBM	\$20,192,000,000	\$20,822,000,000	(\$630,000,000)	0.97	13.2%
Johnson & Johnson	\$11,306,000,000	\$9,879,000,000	\$1,427,000,000	1.14	25.3%
Kraft Foods	\$4,948,000,000	\$3,642,000,000	\$1,306,000,000	1.36	11.5%
McDonald's	\$7,431,000,000	\$4,921,300,000	\$2,509,700,000	1.51	21.7%
Merck	\$4,692,200,000	\$7,595,900,000	(\$2,903,700,000)	0.62	28.9%
Microsoft	\$7,836,000,000	\$5,254,000,000	\$2,582,000,000	1.49	36.4%
Pfizer	\$8,642,000,000	\$21,159,000,000	(\$12,517,000,000)	0.41	22.2%
Procter & Gamble	\$10,839,000,000	\$10,807,000,000	\$32,000,000	1.00	19.7%
United Technologies	\$4,252,000,000	\$4,511,000,000	(\$259,000,000)	0.94	12.7%
Wal-Mart	\$56,632,000,000	\$23,160,000,000	\$33,472,000,000	2.45	5.8%
Walt Disney	\$6,259,000,000	\$5,858,000,000	\$401,000,000	1.07	17.5%
Total DJIA	\$436,656,200,000	\$313,834,200,000	\$122,822,000,000	1.39 (total) 1.33 (average)	17.2%

Source: Company 10-K filings. Data was incomplete for JP Morgan and Travelers Insurance, and these companies were excluded. Bank of America's 10-K did not disclose enough information to calculate the 4-year operating margin.

Overall, the DJIA companies have significantly higher levels of net investment but lower profit margins than the network operating companies (see Figure 6). This is a strong indication that the phone and cable incumbents operate in concentrated, uncompetitive markets where they abuse market power by delaying investment in order to reap higher short-term profits.

Figure 6
Signs of Market Power:
Incumbent Phone and Cable Companies Invest Less, Profit More



*Source: Company 10-K Filings. DJIA companies include the 30 DJIA, except AT&T, Verizon (which included in the Incumbent phone group), JP Morgan and Travelers (excluded due to incomplete data). * $p = 0.11$. ** = $p = 0.004$*

It is worth noting that the data in Figure 4 above suggests that Verizon is bucking the trend of incumbent disinvestment. However, if we closely examine Verizon’s wireline operation (whose investment in FiOS is widely touted as being in response to the Commission’s deregulatory policies), we find troubling evidence of disinvestment -- disinvestment not only by high levels of asset depreciation, but disinvestment through a repeat practice of dumping less profitable geographic service areas.⁴⁴ Since the company

⁴⁴ See e.g. Jeffrey Bartash and Steve Gelsi, “Verizon to spin out rural business to Frontier,” *MarketWatch*, May 13, 2009. (“The spin-off reflects part of a long-term strategy by Verizon to mimic its rivals in the cable industry by “clustering” its main operations in more lucrative metropolitan markets. Two years ago the company sold off its rural phone business in New England.”) See also Comments of EDUCAUSE,

began rolling out FiOS they have shed service areas they found to be less lucrative. In some cases these abandoned markets were those areas where Verizon had failed to meet minimum service quality standards.⁴⁵ As one commenter noted “Verizon has simply chosen not to expend the resources necessary to prevent deterioration in this and other metrics of service quality.”⁴⁶ That is, rather than invest in areas outside the most densely populated areas, as one might expect given the supposedly extremely attractive deregulatory climate, they instead sold them to ill-equipped companies resulting in consumers being stranded on the wrong side of the digital divide. As one article notes, “Verizon wants to divest rural operations to pay down its multibillion-dollar debt and invest more heavily in densely developed markets.”⁴⁷

Verizon began the purging of less lucrative areas with the sale of Verizon Hawaii to the Carlyle Group in 2005,⁴⁸ a company that had no previous experience in operating telecommunications services. By Dec. 2008, the company, now called Hawaii Telecom, had lost 21% of customers and filed for bankruptcy.⁴⁹

Internet2 and ACUTA at 7; Comments of the New Jersey Division of Rate Counsel at 35-38.

⁴⁵ Ex Parte of the Communications Workers of America and International Brotherhood of Electrical Workers, *In the Matter of Application Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire and Vermont from Verizon Communications Inc and its Subsidiaries to FairPoint Communications, Inc.* Oct. 26, 2007, Attachment - Brief to Vermont Public Service Board, pp. 26-29.

⁴⁶ *Ibid.* at 29.

⁴⁷ Jeffry Bartash, “Verizon to spin off local-phone assets,” *MarketWatch*, Jan. 16, 2007.

⁴⁸ Federal Communications Commission, “Streamlined Domestic Section 214 Application Granted,” Public Notice, Aug. 17, 2004, WC Docket 04-234, DA 04-2541.

⁴⁹ “Hawaii Telecom Files for Bankruptcy,” *New York Times*, Dealbook, Dec. 2, 2008.

Verizon next moved to dump their somewhat rural service territories in Maine, New Hampshire and Vermont, by selling them to FairPoint Communications.⁵⁰ According to Verizon, outside of “a bit of fiber in southern New Hampshire”, these customers had not been offered any fiber based service.⁵¹ (Apparently, the consumers in these states did not deserve the same “pro-investment benefits of deregulation” as those in Westchester County New York, or McLean Virginia).

FairPoint, which maintained 300,000 access lines at the time, increased that to 1.8 million as a result of the deal.⁵² To consummate this massive acquisition, FairPoint had to take on a tremendous debt load, on the order of \$2.2 billion.⁵³ Not surprisingly, the company has run into serious operational and financial difficulty since the deal was completed, which has resulted in a substantial negative impact on FairPoint’s customers. Last winter, when an ice storm hit the region, Fairpoint needed days to restore service, in some cases more than a week. The head of the local electrical workers union noted, “Verizon had the capabilities to do whatever needed to get done. Fairpoint doesn’t.”⁵⁴ Only two years after the transaction, Fairpoint has failed to meet state benchmarks and

⁵⁰ *Application Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire and Vermont from Verizon Communications Inc and its Subsidiaries to FairPoint Communications, Inc*, WC Docket 07-22, Memorandum Opinion and Order, 23 FCC Rcd 514 (2008).

⁵¹ Paula Bernier, “FairPoint-Verizon Deal Gets the Green Light,” *xchange Magazine*, Feb. 29, 2008.

⁵² Kevin Kelley, “Fairpoint on its own as competition builds,” *Vermont Business Magazine*, Feb. 1, 2009.

⁵³ Tux Turkel, “FairPoint’s debt to rise N.H. officials call meeting for Sunday,” *Kennebec Journal*, March 29, 2008.

⁵⁴ See *supra* note 52.

has asked bondholders to accept delayed payments.⁵⁵ If bondholders do not agree to this request, the company may be forced into bankruptcy.⁵⁶

Most recently, Verizon announced that it intends to sell-off mostly rural areas in 14 additional states.⁵⁷ Frontier, the purchasing company, will be saddled with an additional \$3 billion in debt.⁵⁸ The company will increase their access lines from 2.2 million to 7 million.⁵⁹ Thus, seemingly indifferent to the lessons of recent history, Verizon is eager to offload its rural customers onto another small company. Furthermore through a tax loophole, known as a Reverse Morris trust, Verizon did not pay taxes on the FairPoint transaction, and has similar plans for the Frontier deal.⁶⁰ But the loophole requires Verizon to sell its assets to a smaller company - so Verizon not only sought to get rid of these customers, but sold (or will sell) to small and perhaps ill-equipped companies in order to further enrich their bottom line. Thus, the one major provider that is spending resources to invest in next generation networks is ultimately breaking deployment promises made to the Commission by selling to ill-equipped companies, all in the context of pleadings for further deregulation.

⁵⁵ Steve Zind, "Vermont still not happy with Fairpoint service," *Vermont Public Radio*, June 22, 2009.

⁵⁶ David Brooks, "FairPoint Struggles to Reduce Debt," *Nashua Telegraph*, June 26, 2009.

⁵⁷ Amol Sharma, "Verizon Sells Phone Lines in 14 States to Frontier," *Wall Street Journal*, May 14, 2009.

⁵⁸ Amy Thomson, "Verizon to Sell Lines to Frontier for \$5.25 Billion," *Bloomberg*, May 13, 2009.

⁵⁹ "Frontier Communications to Acquire Verizon Assets Creating Nation's Largest Pure Rural Communications Services Provider," Frontier Communications Press Release, May 13, 2009.

⁶⁰ Roger Cheng, "Frontier Communications Can Learn A Lot From Fairpoint-Verizon Deal," *Dow Jones Newswires*, May 13, 2009.

For publicly traded incumbents, the short-term outlook dominates all other considerations. Even for Verizon, whose FiOS investments seem outwardly progressive, the stock market is still a zero-sum-game. The company's long-term FiOS investments were only allowed to proceed if Verizon also mollified Wall Street by dumping rural customers. In yet another case of depressing irony, Chairman Martin touted the deregulation of the *Triennial Review Order* for allowing Verizon to extend "the benefits of broadband technology to rural and suburban communities."⁶¹ But the residents in rural areas of eighteen states who never saw these supposed benefits might see things a bit differently.

iv. Despite the Recession, Incumbents are Earning Higher Profits, and Are Using these Profits to Pay Higher Dividends Instead of Making Significant Net Investments in Network Capital.

While providers often tout their gross capital expenditures, they overlook much more revealing figures.⁶² First is the revenues generated from those investments. One need only listen to a quarterly financial call to see that investment is something ISPs attempt to *downplay* and reduce at every opportunity.⁶³ Despite their political posturing before the Commission and state regulatory agencies, these publicly traded companies have a single goal in mind -- reduce expenses and increase revenues. Many times the

⁶¹ Statement of FCC Commissioner Kevin Martin Regarding Verizon's Broadband Announcement, March 19, 2003.

⁶² See e.g. Comcast Comments at 2.

⁶³ "[I]n the first quarter of 2009 solid operating cash flow growth of 8.5%, coupled with reduced capital expenditures, resulted in free cash flow growth of 95% to \$1.4 billion." Comcast Corporation Q1 2009 Earnings Call Transcript, April 30, 2009; "The reductions in CapEx have come predominately in two areas; again the same areas we talked about when we provided guidance for the year. About half of the reduction year-over-year came in success based demand related capital. About half of it or maybe a little more than half came in portfolio capital. Again, that is where we brought CapEx down." AT&T Inc. Q1 2009 Earnings Call Transcript, April 22, 2009.

focus is on increasing the average revenue per user (ARPU), or the total amount on consumers' monthly bills.⁶⁴ The strong, increasingly inelastic demand for Internet access, along with continuously rising ARPU has resulted in broadband providers still being able to offer shareholders extremely high dividends despite the serious economic downturn. Dividends (or payments made to shareholders) is one way to put profits to use. Another is investment. One is frowned upon by investors, the other is not.

In 2008, AT&T used 70 percent of their free cash flow on dividends to shareholders. AT&T is currently "the highest dividend yielding DOW company."⁶⁵ Verizon is not far behind.⁶⁶ Furthermore, the four largest broadband providers all *increased* their dividends since the economic crisis began.⁶⁷ In other words, despite soaring revenues and high demand, providers are spending large sums on shareholders, rather than investments that benefit both shareholders and customers in the long-term.

v. Delayed Investments, Higher Prices and Obscenely High Profits Despite Increasing Demand Are Signs of Broken Market.

Broadband is now a must-have product for a substantial majority of the American population. Even low-income consumers are subscribing in greater numbers despite the

⁶⁴ "Looking at year-over-year ARPU by product line for the quarter, video ARPU increased 4% driven primarily by price increases and higher penetration of digital video services including DVR's. HSD ARPU increased 1% driven by increases in HSD pricing." Time Warner Cable, Inc. Q1 2009 Earnings Call Transcript, April 29, 2009.

⁶⁵ AT&T Inc. Q1 2009 Earnings Call Transcript, April 22, 2009.

⁶⁶ Andy Obermueller, "The Safest Dividend in the Dow," Dividend Opportunities, Feb 4 2009.

⁶⁷ See "AT&T raises dividend despite job cuts," *Reuters*, Dec. 12, 2008; "Bullish Verizon Promises Dividend Growth," *TheStreet.com*, March 9, 2009; "As Earnings Drop 32%, Comcast Raises Dividend," Associated Press, Feb. 18 2009; "Time Warner to get fat dividend from cable arm," *Reuters*, May 21, 2008.

ongoing recession and higher monthly broadband prices.⁶⁸ It is quite clear that nearly every segment of the American populace derives great utility from the Internet, and dropping service because of higher prices and sub-par quality is simply not an option.⁶⁹ As a result of this captive market, broadband providers are in an enviable position -- they are essentially providing a utility service, enjoying all the benefits that come with that (including substantial favorable tax and other regulatory treatment) without *any* of the responsibilities associated with being a utility company. In this duopoly market, network access providers do not have to create or innovate in order to earn increasing levels of profit. Advancements and investments can be trickled out on an incremental basis -- just enough to keep regulators from actually doing something to curb abuses of market power.

The fact that carriers are able to earn increasingly large profits, while also reducing net investment and raising retail prices makes it quite clear that the broadband market lacks effective competition. The fact that these high profit margins have failed to entice new competition is further evidence that the barriers to entry for new competitors are insurmountable.

It is true that incumbents made substantial network investments in the years following the 1996 Act. However, these early investments were largely driven by the

⁶⁸ See Pew Internet & American Life Project, "Home Broadband Adoption 2009," June 2009 (*Pew 2009 Report*).

⁶⁹ This utility is driven by the innovation taking place at the edges of the network -- innovation chiefly attributable to the open nature of the Internet. It is this openness that has led to Internet access adoption becoming "among the fastest of any communications technology introduced in the United States over the last 150 years." See Comments of Comcast at 77. Providers seem to forget that they are not responsible for creating the Internet -- the thing that consumers actually place value in. They earn healthy profits providing an on-ramp to the Internet, but add little else in the way of value or innovation to the Internet ecosystem.

threat of competition⁷⁰ -- competition that accelerated the pace of investment.⁷¹ But the incumbents quickly squashed the threat of competition posed by the 1996 Act by pursuing a strategy of litigation and lobbying. The giant cable and telecom incumbents were then free to use their pre-existing dominance over their respective markets to make essentially risk-free initial capital investments, knowing full well that these initial sunk

⁷⁰ It is worth noting the underlying motivation for much of this early investment. ILEC investments were directly influenced by the competitive threat posed by CLECs, and rose substantially in the years directly following the 1996 Act. However, once the CLEC threat was disposed of, and once the ILECs consolidated with the IXCs and CMRS providers, investments dropped. Likewise, the cable industry routinely highlights the investments it made during the middle 1990s as proof of their early commitment to broadband. But much of cable's early investment was driven by the immediate threat to their video business posed by Satellite (spurred by the 1992 Cable Act) and the potential threat posed by teleco-video services (enabled by the Open Video System sections of the 1996 Act). See e.g. Reply Comments of Cox Communications, *Appropriate Regulatory Framework for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Appendix A, para. 3. **“Cox's and other cable operators' upgrades of their cable systems are not driven by the provision of cable modem services.** Rather, these upgrades were and are necessary to provide the entire menu of next generation digital services - with primary focus on the addition of video channels to maintain customer satisfaction and remain competitive against the offerings of direct broadcast satellite ("DBS")... Cable video services could not have remained competitive without the cable system upgrades that operators undertook. The provision of cable modem services has no impact on cable operators' decisions to upgrade to increase their cable system bandwidth, because the spectrum used for cable modem service is only 12MHz, or 1.6% of the total bandwidth on a 750MHz cable system. Likewise, cable modem services is [sic] not the driver for cable operators' upgrades to provide two-way capacity. Cable modem services utilizes only 16.2% of the 37 MHz of bandwidth dedicated to "upstream" transmissions on an upgraded cable system. To remain competitive, even a cable system providing only cable video services would require two-way capability for such services as video-on-demand and impulse pay-per-view, as well as such basic needs as network telemetry to monitor the network's operations.”

⁷¹ See e.g. *Second 706 Report*, para. 185, “Since 1996, industry investment in infrastructure to support high-speed services has increased dramatically, and analysts forecast that this upward trend will continue. One factor spurring this rise in investment appears to be the introduction of competition into the telecommunications market. Since the passage of the 1996 Act, infrastructure investments by incumbent LECs, competitive LECs and wireless carriers have risen substantially.” See also para. 196, “DSL deployment started later than cable upgrades and began in response to the 1996 Act and the presence of competitive access providers. The availability of unbundled network elements and line sharing has spurred tremendous investment in DSL deployment.”

costs would be quickly recouped,⁷² and that low operating costs⁷³ coupled with inadequate duopoly competition would lead to guaranteed high profit margins.⁷⁴

As mentioned above network investments made in a duopoly market with increasing demand are essentially risk-free investments. However, for some incumbents, this is not enough. They have taken the unnecessary step of retiring the valuable copper loop plant that was long ago paid for by ratepayers, and which could be used to offer new and innovative services like Ethernet over Copper.⁷⁵ The Commission must closely examine this loop retirement practice, and ensure that this valuable resource is not being squandered simply to protect against marginal competition from competitive carriers operating under Section 251.⁷⁶

⁷² See Shane Greenstein and Ryan McDevitt, "Broadband Bonus: Accounting for Broadband Internet's Impact on U.S. GDP," NBER Working Paper No. 14758, Feb. 2009, pp. 33-34.

⁷³ For example, large cable operators operating costs largely consist of maintenance and bandwidth expenses, enabling the earning of high margins. Time Warner Cable had 8.4 million high-speed data customers and high-speed data revenues of \$4.2 billion in 2008. Yet, the company's high-speed data "costs of revenues" were \$146 million in 2008 (down 11% from 2007). Furthermore, Time Warner Cable projects bandwidth costs will only be \$40 million in 2009. Time Warner Cable Inc. Form 10-K, Filed Feb. 20, 2009, pp. 1, 60, 78, 89.

⁷⁴ It is estimated that Cablevision enjoys "80 percent margins for wired high-speed Internet services." See Jeff Baumgartner, "Does Cable Really *Need* Wireless?" *Cable Digital News*, Dec. 5, 2008.

⁷⁵ See e.g. Comments of XO Communications, p. 10.

⁷⁶ Copper loop plant of course costs money to maintain, but ILECs are only required to maintain unused copper if it is leased. Verizon expects to save \$5 billion in operating expenses due to the efficiencies of fiber (see Leslie Cauley, "Verizon's army toils at daunting upgrade" *USA Today*, March 1, 2007; see also R. Scott Raynovic, "\$1 billion in saving in annual operating expenses by 2010", *Light Reading*, September 27, 2006). Unfortunately, Verizon is also simultaneously eliminating potential intermodal competitors during these build-outs, through massive copper plant retirement. By removing copper lines, any potential threat of competition from CLECs is eliminated. While offering a segment of the population next generation Internet access, Verizon is simultaneously removing any potential for DSL competition, using technologies like Ethernet over Copper or VDSL2.

The investment climate for incumbents is now even more favorable given the fact that consumers increasingly view broadband as an essentially utility service -- a status that means that marginal consumers are now much less likely to drop service in the face of price increases.⁷⁷ Indeed, recent data indicates that broadband prices are on the rise⁷⁸, and providers have even come out and explicitly stated that they have no intention of even mentioning prices in advertisements.⁷⁹

Despite this, the demand for broadband continues to rise. Even with a severe economic downturn and consumers dropping other home subscription services, the latest pew numbers show broadband adoption *increasing* from 55 to 63 percent in the past 11 months.⁸⁰ This adoption comes despite few choices, slow speeds, and higher prices, which indicates that broadband access is quickly becoming a utility in consumers' minds.

This development should influence the Commission's policy thinking. In the case of the broadband access market, the initial absence of pricing discipline in a concentrated market meant that prices were initially set high, came down slightly as the market expanded, and are now once again rising as the market matures and demand becomes

⁷⁷ See Mark Dutz, Jonathan Orszag and Robert Willig, "The Substantial Consumer Benefits of Broadband Connectivity for U.S. Households," CompassLexicon, Study Commissioned by the Internet Innovation Alliance, July 2009, showing that the broadband own-price elasticities decreased from -1.53 in 2005 to -0.69 in 2008. It should however be noted that the increasingly inelastic value of -0.69 is still quite elastic compared to values observed for basic phone connectivity (on the order of -0.02). Thus, it still is a bad idea at this time to assess residential broadband connections for the purpose of USF contributions, as this will likely lead to an overall net decline in broadband adoption (*see* Free Press Comments, p. 237).

⁷⁸ See *Pew 2009 Report*.

⁷⁹ Verizon's feelings about competition were made clear during this recent non-price-war: "You will not see us advertising prices any more. You will see more about what the experience can be." See Karl Bode, "Verizon Stops Seriously Competing On Price," *DSLReports.com*, June 23, 2009.

⁸⁰ See *Pew 2009 Report*.

more inelastic. Premature deregulation in concentrated duopoly markets⁸¹ where demand is relatively inelastic will inevitably lead to higher prices and reduced investment -- as history has shown.

B. Cosmetic Competition Does Not Equal Meaningful Competition

i. The Third Pipe: The Sasquatch of The Broadband Market

Providers have once again clung to their widely discredited and extremely misleading talking points on competition.⁸² But all the spin in the world cannot disguise the fact that overwhelming majority of U.S. consumers have but two options for residential broadband service -- at best. All the other supposed “third pipe” competitors are simply not viable options for most consumers. There is no large scale fixed wireless deployment;⁸³ mobile broadband is slow, expensive and dominated by the telecom incumbents;⁸⁴ BPL is virtually non-existent;⁸⁵ and satellite remains a slow-speed, high-

⁸¹ “Duopoly competition is problematic because both firms are likely to have the incentive and ability to maintain prices above competitive levels” Comments of AT&T Corp., In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 04-54, Notice of Inquiry, at p. 9 (2004). See also Comments of New Jersey Division of Rate Counsel at 19-21.

⁸² See e.g. Comments of Comcast at 40-44; Comments of NCTA at 13; Comments of Verizon and Verizon Wireless at 22-23; Comments of USTA at 3-4; Comments of Qwest Communications International Inc. at 17-22.

⁸³ It is worth noting that the 2009 Pew survey shows that 17 percent of respondents report having a fixed wireless or satellite home broadband connection when asked, “At home, do you connect to the internet through a dial-up telephone line, or do you have some other type of connection, such as a DSL-enabled phone line, a cable TV modem, a wireless connection, a fiber optic connection or a T-1?” The value of 17 percent is obviously well higher than it actually is, as FCC data at the end of 2007 showed that satellite and fixed wireless connections only made up 1.7 percent of the 74 million residential high-speed connections. It is likely that some survey respondents who have a home WiFi network using either a cable or DSL connection are responding that they have a fixed wireless connection.

⁸⁴ See Comments of Free Press at Figure 23.

latency and expensive last ditch option for rural consumers.⁸⁶ It is simply an indisputable fact that cable and phone companies dominate the broadband access market, a situation virtually unchanged since the Commission first set out on the path of blind deregulation.⁸⁷

Over the past decade, along with many other companies and interest groups,⁸⁸ we

⁸⁵ See Comments of Free Press at note 43.

⁸⁶ See Comments of Free Press at 103.

⁸⁷ See Comments of Free Press at Figure 21.

⁸⁸ See e.g. Comments of California Internet Service Providers Association, In the Matters of *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos 02-33, 05-20, 98-10, Notice of Proposed Rulemaking, at p. 28 (2002); Ex Parte of the Information Technology Association of America, In the Matter of *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, at p. 8 (March 28, 2003); Comments of MCI, In the Matter of *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, at pp. 13-14 (2004); Comments of Consumer Federation of America and Consumers Union, In the Matters of *IP-Enabled Services; Petition of SBC Communications Inc. For Forbearance*, WC Dockets Nos. 04-36, 04-29, Notice of Proposed Rulemaking, Attachment, at pp. 63-71 (2004); Comments of the California Public Utilities Commission, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 04-54, Notice of Inquiry, Attachment, at pp. 39-41 (2004); Reply Comments of AT&T Corp., In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 04-54, Notice of Inquiry, at pp. 1-2 (2004); Reply Comments of MCI, Inc., In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 04-54, Notice of Inquiry, at p. 2 (2004); Comments of the New Jersey Division of Rate Counsel, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 07-45, Notice of Inquiry, at pp. 18-21 (2007); Comments of Consumer Federation of

have offered the Commission mountains of evidence illustrating the reality that consumers face an uncompetitive broadband market.⁸⁹ We and others have repeatedly warned that without Commission intervention, this reality will only continue to worsen.

This is in contrast to incumbents and their hired proxies, who have largely resorted to hand waving and misleading and meaningless data.⁹⁰ As time passes, the predictions that marketplace consolidation and lack of regulatory oversight would lead to consumer harm have proven true, while the incumbent's predictions of deregulation

America and Consumers Union at 30-31; Comments of National Association of Telecommunications Officers and Advisors et al. at 40; Comments of New Jersey Division of Rate Counsel at 39.

⁸⁹ See e.g. Comments of Free Press et al., *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Notice of Inquiry, pp. 29-36 (2007); Reply Comments of Free Press et al., *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Notice of Inquiry, pp. 3-11 (2007) (*Sec. 706 Reply Comments*); Free Press Petition for Reconsideration, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Notice of Inquiry, pp. 8-9 (2008); Reply Comments of Free Press et al., *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Petition for Reconsideration, pp. 11-17 (2008); Comments of Free Press, *In the Matter of A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, pp. 58-129 (2009).

⁹⁰ Perhaps the most common talking point offered to counter the critiques of our broadband market is that the United States has the highest number of high-speed Internet connections. Of course, this is no longer the case (China has overtaken the U.S.), but nevertheless it remains a meaningless metric due to obvious fact that our country is one the world's most populated and wealthy. See also Ex Parte of Verizon, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Notice of Inquiry, Attachment (May 17, 2007).

leading to market competition and consumer benefits have failed to come to fruition.⁹¹

Comments to the Commission in response to the Notice of Inquiry for the *Fourth 706 Report* in 2004 aptly illustrate this point:⁹²

- *Industry Prediction*: “CMRS providers are starting to provide Internet access at speeds comparable to DSL and cable modem services, but with the additional benefits of mobility.”⁹³
 - *Reality*: Mobile broadband speeds are nowhere near the level of speeds offered by DSL and cable modem, and as a result, their only redeeming feature is mobility. This coupled with high prices has resulted in mobile services being a complement, not a substitute to fixed wireline services.⁹⁴
- *Industry Prediction*: “Recent evidence confirms that fixed wireless continues to be a viable broadband alternative for many customers, and is likely to grow significantly in the future...As the Chairman of that association [WISPA] has noted, “[w]ireless ISPs have rolled out broadband service in virtually every state of the union – and in hundreds of rural and metropolitan markets...Wireless has boldly become the nation’s third pipe for last-mile access.”⁹⁵

⁹¹ See e.g. Ex Parte of the Information Technology Association of America, In the Matter of *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, p. 8 (March 28, 2003). (“Because ISPs remain dependent on the ILECs for the provision of wholesale mass-market broadband telecommunications services that ISPs require to provide information services to their subscribers, elimination of the *Computer II* unbundling rules effectively would replace today’s competitive information services market with a broadband duopoly, in which many users would be forced to choose between an ILEC-selected and a cable-selected ISP.”)

⁹² *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report, 19 FCC Rcd 20540 (2004) (*Fourth 706 Report*).

⁹³ Reply Comments of CTIA, In the matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Notice of Inquiry, p. 4 (2004).

⁹⁴ See Comments of Free Press at Figure 22.

⁹⁵ Comments of Verizon, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Notice of Inquiry, Exhibit A, p. 23 (2004).

- *Reality*: Large scale fixed wireless deployments have yet to materialize, with such connections accounting for less than one percent of all advanced service connections.⁹⁶ Furthermore, these services are often only deployed in areas neglected by the phone and cable incumbents (see discussion below). And where municipalities have tried to deploy their own fixed services, incumbents have used their lobbying muscle to crush these self-reliant efforts (see discussion below).
- *Industry Prediction*: “WiMax enables wireless networks to extend as far as 30 miles and transfer data, voice, and video at faster speeds than cable or DSL.”⁹⁷
 - *Reality*: While theoretical speeds sound impressive on paper, the fact is only 5 percent of U.S. fixed wireless connections exceed speeds of 2.5Mbps in the downstream direction and 200kbps in the upstream direction.⁹⁸
- *Industry Prediction*: “Satellite is another broadband alternative that has begun a resurgence. As one industry observer has recently noted, ‘satellite broadband will be on the upswing again in 2004.’”⁹⁹
 - *Reality*: According to FCC data, satellite connections made up less than 0.01 percent of all advanced residential lines in 2005. By the end of 2007 this had increased to less than 0.07 percent.¹⁰⁰ This hardly seems like much of a “resurgence” or “upswing.”
- *Industry Prediction*: “BPL will encompass six million power lines by 2006, promising revenues of \$3.5 billion.”¹⁰¹
 - *Reality*: By the end of 2006, there were 4,776 BPL lines in service, one hundred lines less than the total in mid-2005. By the end of 2007 BPL was up to 5,274 lines, but recent closing of high-profile BPL projects likely means that number has fallen substantially since then.¹⁰²

The Commission subsequently pointed to these “third pipe” technologies to

⁹⁶ See Comments of Free Press at note 352.

⁹⁷ *Supra* note 95 at 18.

⁹⁸ See Comments of Free Press at Figure 7.

⁹⁹ *Supra* note 95 at 22.

¹⁰⁰ See “High-Speed Services for Internet Access as of December 31, 2007,” Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, Table 5 (*December 2007 FCC Form 477 Data*).

¹⁰¹ *Supra* note 95 at 20.

¹⁰² See Comments of Free Press at note 395.

justify the determination that the Section 706 test was being met.¹⁰³ As was the case then, none of these technologies has resulted in meaningful choice for consumers.

Many industry commenters point to mobile wireless as a competitor or substitute for wireline service,¹⁰⁴ and the Commission has touted 3G mobile technology as an alternative to wireline access.¹⁰⁵ Our initial comments offered an extensive explanation why this is simply not the case.¹⁰⁶ Though there is little need to revisit this issue yet again in these reply comments, we will address a few points.

Deregulatory proponents tout the 2 Mbps peak speeds of 3G as evidence of its substitutability for a wireline connection.¹⁰⁷ However, in the real world consumers experience nothing near these speeds. This basic reality has itself spawned a technical solution for those who can afford it. If a consumer wants to establish a mobile wireless connection that even *approaches* the low end of the speed of a landline connection, they now can purchase a device that bonds four separate mobile wireless connections. This of

¹⁰³ *Fourth 706 Report* at 14-24.

¹⁰⁴ See e.g. Comments of NCTA at 20; Comments of Comcast at 41.

¹⁰⁵ See e.g. , Reply Comments of the CTIA, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 04-54, Notice of Inquiry, at pp. 4-7 (2004); *Fourth 706 Report* at 20-22.

¹⁰⁶ Comments of Free Press at 42-43, 105-106.

¹⁰⁷ See e.g. Comments of Verizon, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 04-54, Notice of Inquiry, at p. 13 (2004); Comments of Comcast, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 04-54, Notice of Inquiry, at p. 10 (2004).

course doesn't come cheap, with the price tag hovering near \$285 per month.¹⁰⁸

The hype over 3G is quickly fading, with incumbents moving to hype the next flavor of mobile broadband -- 4G WiMax and LTE ("Long Term Evolution") technologies. As they did with 3G, incumbents are promising that 4G mobile wireless will be the ever-elusive market savior.¹⁰⁹ Yet existing deployments and market plans are not adequate today, and will likely remain so for the foreseeable future. For example, Clearwire's deployment of 4G WiMax in Baltimore promises speeds of 2-4 Mbps, the speed of cable modem service in 2003.¹¹⁰ Even Verizon concedes that "the throughput capabilities of wireless services are much more constrained than in the wireline environment...Although 4G wireless technologies, such as LTE and Wi-MAX, will substantially improve those speeds, they will still lag behind the speeds available using next-generation wireline networks."¹¹¹

We have long pointed to the fact that mobile and wireline broadband are marketed

¹⁰⁸ This price assumes four \$60 per month wireless broadband subscriptions and leasing the bonding device for \$45 per month. *See* Stacey Higginbotham, "Three Startups That Want to Deliver a Fat Mobile Pipe," *GigaOm*, June 30, 2009.

¹⁰⁹ In the *Fourth 706 Report*, the Commission touted WiMax speeds of "up to 75 Mbps". *Fourth 706 Report* at 19. An admission of the inadequacy of wireless is many times found not in comments made by providers on competition but in regards to network management. For instance, Verizon concedes "As a result, the throughput capabilities of wireless services are much more constrained than in the wireline environment...Although 4G wireless technologies, such as LTE and Wi-MAX, will substantially improve those speeds, they will still lag behind the speeds available using next-generation wireline networks." Comments of Verizon and Verizon Wireless at 105.

¹¹⁰ *See* Sprint, "Important 4G coverage and plan information," 2009; Comments of Comcast at 37.

¹¹¹ Admission of the shortcomings of 4G is found not in comments made by providers on competition, but in comments seeking to relieve themselves of network neutrality obligations. *See* Comments of Verizon and Verizon Wireless at 105.

as a bundle¹¹², indicating that they are not viewed as competing technologies.¹¹³ For example, similar to phone providers,¹¹⁴ Cable operator Cox purchased 700 MHz spectrum and intends to deploy wireless service throughout their service territory. Cox will bundle the service with other offerings including their cable modem service.¹¹⁵ Further evidence comes from Comcast's recently announced wireless service through their wholesale agreement (and partial ownership) with Clearwire. A Comcast

¹¹² Comments of Free Press, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 07-45, Notice of Inquiry, at pp. 29-36 (2007); Reply Comments of Free Press et al., In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 07-45, Notice of Inquiry, at p. 4 (2007); Reply Comments of Free Press et al., In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 07-45, Petition for Reconsideration, at p. 16 (2008); Comments of Free Press at p. 43 note 40.

¹¹³ The NCTA effectively recognizes this. See Comments of NCTA at 12 (“Cable operators also are providing value to customers by deploying wireless technology.

Cablevision, for example, is offering free Wi-Fi service to its high-speed Internet customers across large portions of its service area. This service offers speeds up to 3 Mbps downstream and 1.5 Mbps upstream. Similarly, Comcast has been testing a free Wi-Fi service that is available to its customers at more than 100 New Jersey Transit rail stations. In addition to Wi-Fi projects, many cable operators are pursuing advanced wireless broadband by developing their own networks utilizing purchased spectrum (e.g., Cox) or through strategic investments (e.g., investment by Comcast, Time Warner Cable, and Bright House Networks in Clearwire.)” (footnotes omitted).

¹¹⁴ See e.g. Comments of Consumer Federation of America et al., In the Matter of *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket 09-66, at p. 24 (2009).

¹¹⁵ Jim Barthold, “On the Hot Seat with Cox’s Stephen Bye,” *FierceWireless*, Dec. 15, 2008.

representative calls the offering “a natural *extension* to our existing Internet service.”¹¹⁶

That wireline and wireless exist in two separate product markets (or as complements) is made abundantly clear in comments from the Wireless Communications Association International (WCAI):

In areas where both fixed and mobile wireless broadband are available, consumers commonly subscribe to both services, which shows that they are complementary products rather than substitutes.¹¹⁷

If fixed wireless is a distinct product from mobile wireless, then certainly wireline must also be distinct from mobile wireless. WCAI goes on to highlight the fact that the *Sprint-Clearwire Order* specifically treated the two as distinct markets:

[T]he FCC determined that the combined product market for mobile telephony/broadband services includes mobile telephony services and emerging, next-generation mobile wireless broadband services. Conversely, the FCC defined the fixed broadband services market consistent with previous definitions applied in the fixed service context, which exclude mobility.¹¹⁸

This is consistent with a recent survey in which nearly half of respondents stated that in cutting back on household expenses they were willing cancel their mobile data plan, while only 10 percent would stop subscribing to wireline broadband. The research firm concluded “while American consumers consider home broadband service to be a vital utility, they see mobile data service as simply a 'nice to have.’”¹¹⁹ Despite repeated efforts by providers, a mountain of evidence continues to build illustrating that mobile

¹¹⁶ Todd Spangler, “Comcast: Mobile Voice, Video In The Cards,” *Multichannel News*, June 30, 2009 (emphasis added).

¹¹⁷ Comments of the Wireless Communications Association International, Inc at 40

¹¹⁸ *Ibid.* at 40-41.

¹¹⁹ Mike Sachoff, “Close To Half Of Americans Would Drop Mobile Plans,” *WebProNews*, June 25, 2009.

broadband is *complementary* and certainly no competitor to a DSL or cable modem connection.

Finally, on this issue it is worth highlighting the “have their cake and eat it too” comments offered CTIA (a trade association whose central purpose is to lobby the government to prevent meaningful competition in the oligopoly wireless market). CTIA first utilizes bogus Commission broadband data to assert “that wireless broadband additions from December 2006 to December 2007 outpaced, by nearly three to one, the additions for cable companies and wireline telephone companies combined”¹²⁰ in an apparent attempt to convince the Commission that the elusive “third broadband pipe” already exists.¹²¹ They subsequently request that the Internet Policy Statement not apply to wireless because “[p]ut simply, wireless broadband networks are different.”¹²² This is a common theme from the mobile wireless sector, where they label themselves as a competitor to broadband when they attempt to portray the market as competitive, but characterize their services as a something “different” when that would mean a lack of regulation.¹²³ We encourage the Commission to dismiss these contradictory and self-interested claims.

Providers also point to fixed wireless technology as a viable third-pipe platform, even more so than mobile wireless. While this technology certainly plays a valuable role in bringing some level of broadband access to “rural and hard-to-reach” areas, it is rarely

¹²⁰ Comments of CTIA at 5. *See also e.g.* Comments of Free Press at 272, note 407.

¹²¹ *Ibid.* at 1.

¹²² Comments of CTIA at 29.

¹²³ CTIA also attempts to attack Free Press for our *consistent* stance on metered broadband. *See* Comments of CTIA at 13. We have fully responded to other industry representatives who are *seeking* to gouge consumers, unlike the wireless industry, which has been doing so for years. *See* Ben Scott, “Free Press Debates the Cable Lobby on Internet Penalties,” Free Press, April 15, 2009.

deployed in the same geographic territory as a cable or phone company services,¹²⁴ and as a consequence only accounts for 0.75 percent of the residential market.¹²⁵ Furthermore, incumbent phone and cable companies have been largely successful in blocking community efforts to provide their own broadband access services -- even in areas that are un- and underserved.¹²⁶ In the few areas where fixed wireless is deployed alongside wireline services, fixed wireless is often marketed as a complement. For example, Cablevision *gives* away free WiFi access, calling it simply “an enhancement” for existing customers.¹²⁷ Similarly, AT&T offers existing wireline customers access to WiFi hotspots at no charge.¹²⁸ Even in areas where they don’t provide DSL, they struck a partnership with Qwest in order for the company to make a similar offer.¹²⁹ Clearly, wireline providers do not view such services as direct competition.

Satellite data services are available to most consumers, but at high prices, low speeds, low caps and nearly unacceptable latencies.¹³⁰ Though the technology has matured somewhat, these basic shortcomings remain. For Internet users in unserved rural

¹²⁴ “WISPA Urges Congress to Help to Bring Broadband to Rural and Unserved Americans,” WISPA Press Release, Feb. 4, 2009.

¹²⁵ See *December 2007 FCC Form 477 Data*.

¹²⁶ See e.g. Comments of National Association of Telecommunications Officers and Advisors et al. at 60.

¹²⁷ Jeff Baumgartner, “Cablevision Plays WiFi Card,” *Cable Digital News*, Sept. 4, 2008.

¹²⁸ See e.g. “AT&T gives all DSL subs free WiFi access,” *FierceWireless*, Jan. 23, 2008.

¹²⁹ See e.g. Andrew LaVallee, “Qwest Unveils Wi-Fi Deal With AT&T,” *Wall Street Journal Digits Blog*, May 6, 2009. See also Dan Nosowitz, “Verizon Partnering with Boingo to Give Free Wi-Fi to FiOS and DSL Customers,” *Gizmodo*, May 2, 2009.

¹³⁰ See e.g. Comments of Free Press et al., In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 07-45, Notice of Inquiry, at p. 13 (2007).

areas, satellite services are a welcome alternative to nothing. But it is widely recognized and accepted that satellite Internet access is simply not a viable competitive alternative to wireline and terrestrial wireless high-speed Internet access services. Even the head of the largest satellite operator, SES, recently stated that he remains convinced that satellite data service, long term, is not a profitable business, even with new satellites being launched.¹³¹ Yet, despite this basic and well understood reality, the dominant providers are still attempting to point to this service as a competitor.¹³²

The final competitor mentioned by providers is perhaps the most illustrative of their sheer desperation to find something -- anything -- that covers up the lack of real marketplace competition.¹³³ Broadband over Power Line (BPL) has been cited year after year as the Internet delivery mechanism that's always just around the corner.¹³⁴ The Commission willingly went along with these whimsical predictions.¹³⁵ In fact, recent evidence indicates the Commission also made questionable efforts to ensure BPL remained a technology that could continue to be highlighted as viable.¹³⁶ Currently, the technology (aggregated with other niche technologies) includes roughly five thousand

¹³¹ Peter B. de Selding, "Intelsat Maneuvering Has Rival SES Rethinking Its Own Plans," *Space News*, May 25, 2009.

¹³² See e.g. Comments of USTA at 4; Comments of Comcast at 32; Comments of AT&T at 79.

¹³³ See e.g. Comments of AT&T at 79; Comments of Time Warner Cable at 7.

¹³⁴ See e.g. *Fourth Section 706 Report*, supra note 92.

¹³⁵ See e.g. *Fourth 706 Report* at 22-23; *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 07-45, Fifth Report, 23 FCC Rcd 9615 (2008) at 9628, para. 22-23 (*Fifth 706 Report*).

¹³⁶ Matthew Lasar, "Did the FCC cook the books on broadband over power lines," *Ars Technica*, May 14, 2009.

subscribers -- less than 0.004% of the broadband market.¹³⁷ While we encourage the Commission to continue monitor and facilitate the development of BPL, the technology's role as a viable actual or potential competitor must be dismissed.

We encourage the Commission to see through providers' obvious attempts to deter Commission action through misleading figures and claims.¹³⁸ The much-heralded third and fourth pipes are not coming. Blair Levin, now charged with overseeing the Commission's formulation of the National Broadband Plan, laid out what the Commission should expect with regards to future third platform competition:

Prospects for the long-heralded 'third pipe' appear dim and dimming... The market is as competitive as it is ever going to be, as far as we can see. And it could become less competitive.¹³⁹

We agree with Mr. Levin's assessment. It is long past time for the incumbents to quit trying to promote their thoroughly debunked Sasquatch-esque myths about the third pipe.

ii. Price Increases are Not a Sign of a Competitive Market

Without line sharing rules, wholesale open access rules, or a viable third pipe,

¹³⁷ High-Speed Services for Internet Access as of December 31, 2007," Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, Table 1.

¹³⁸ Unlike in the past. See e.g. *Fifth Section 706 Report*.

¹³⁹ Ed Gubbins, "Broadband Competition: Is this as good as it gets?" *TelephonyOnline*, Aug. 21, 2008. See also Reply Comments of AT&T Corp., In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket 04-54, Notice of Inquiry, at pp. 1-2 (2004) ("Currently, the broadband marketplace is at best a duopoly of cable modem service and ILEC-provided DSL service, with DSL approaching and attaining parity with cable modem services. Satellite and fixed wireless have virtually dropped out of sight, having failed to become viable alternatives to cable or to DSL.") (footnotes omitted).

consumers are stuck in a duopoly utility market, while the regulator who is supposed to look out for their best interest continues its near-decade long abdication of its duty.

The lack of effective competition isn't just the case for the average U.S. consumer living in suburbia, but holds true even in markets where competition should in theory be robust. Consider New York City, our nation's largest and densest city, which should have the most competitive broadband market in the U.S. In this market, Cablevision rolled out a 101Mbps service in certain parts of the New York metro area, but included an activation fee of \$300.¹⁴⁰ Verizon's response to this was a bump up in the speed of their FiOS tiers, but it also *increased* the price of their base-level offering, and increased the price of their bundled double and triple play offerings.¹⁴¹ While Verizon and Cablevision engaged in cosmetic competition in the suburbs outside of downtown New York, Time Warner's "surgical" roll out of higher speeds has yet to reach any of its service territory, including New York City.¹⁴²

Verizon's feelings about competition were made clear during this recent non-price-war: "You will not see us advertising prices any more. You will see more about what the experience can be."¹⁴³ This is no surprise -- cable operators made similar statements in 2006.¹⁴⁴ Thus, even in the country's most lucrative market, providers feel

¹⁴⁰ Karl Bode, "Cablevision 101Mbps: \$300 'Activation Fee'," *DSLReports.com*, May 11, 2009.

¹⁴¹ Todd Spangler, "Verizon Eliminates Symmetrical FiOS Internet Tier," *Multichannel News*, June 23, 2009.

¹⁴² David B. Wilkerson, "Time Warner Cable COO: DOCSIS 3.0 to roll out 'surgically'," *MarketWatch*, Sept. 9, 2008.

¹⁴³ Karl Bode, "Verizon Stops Seriously Competing On Price," *DSLReports.com*, June 23, 2009.

¹⁴⁴ "Remember, cable Internet is the *premium* service. We may charge more than DSL because cable Internet is *worth* more." Testimony of David L. Cohen, Comcast Corporation before the Senate Judiciary Committee, June 14, 2006. *See also* Mike

free to take a casual approach to competition.

iii. Ignoring Consumer Demand for Adequate Upload Speeds is Not a Sign of a Competitive Market

Broadband consumers have for years pleaded with incumbents to offer higher upload speeds.¹⁴⁵ Even though the Internet is increasingly becoming a user-created content medium, we have seen little response from this “robustly competitive” market in the way of increased upload speeds.¹⁴⁶ This can be seen in Comcast’s proposed definition of broadband tiers (which align very closely to their current offerings). Outside of basic broadband (set by Comcast at a symmetrical 256 kbps), Comcast proposes connections that increase in asymmetry as the speed rises.¹⁴⁷

Despite the mandates of Section 706, symmetrical connections are nowhere to be found. The single symmetrical offering from a major provider is no longer being

Farrell, “Roberts Upbeat at CTAM Summit,” *Multichannel News*, July 26, 2005. (“We continue to believe and continue to charge for our services a rate that we think is a great value because the product is so much better. When Hyundai cuts their prices, BMW isn’t exactly upset about it.”)

¹⁴⁵ See e.g. Pew Internet & American Life Project, “The Broadband Difference,” 2002, p. 3; Jonathan Tombes, “Peer to Peer,” *Communications Technology*, July 1, 2003; Reply Comments of Free Press et al., In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Petition for Reconsideration, p. 9-10 (2008); Om Malik, “The Ugly Truth About Broadband: Upload Speeds,” *GigaOM*, April 2, 2009; Stacey Higginbotham, “Broadband Confession: I Have Pipe Envy,” *GigaOM*, June 11, 2009; Troy Wolverton, “Internet service providers not keeping up with user trends,” *Mercury News*, June 29, 2009. Even the equipment industry recognizes this fact. See e.g. “Better Returns from the Return Path: Implementing an Economical Migration Plan for Increasing Upstream Capacity,” Motorola White Paper, 2008, pp. 4-5.

¹⁴⁶ Comments of AT&T at 80.

¹⁴⁷ Comments of Comcast at 11.

offered.¹⁴⁸ Instead, we are seeing an *increase* in asymmetry. AT&T recently increased the download speed of its highest U-Verse DSL tier, without a corresponding upload increase.¹⁴⁹ Qwest's latest speed increase (rolled out over a year ago) resulted in this service having upstream speeds 22 times slower than the downstream speeds.¹⁵⁰

Unfortunately, in many cases the asymmetry of a connection *grows* as the price of the package increases.¹⁵¹ This leaves Internet users who are looking for high upload speeds with no place to turn. Their best option is to pay over \$100 for services that still lack adequate upstream capacity.

iv. The U.S. Broadband Market is Not Living Up to Its Full Potential. The Commission Must Ignore Provider's Attempts to Excuse Away our Failure Relative to Our International Competitors.

Providers have long sought to dismiss the declining global position of the U.S. broadband market.¹⁵² We have extensively rebutted these excuses in our initial comments in this proceeding¹⁵³, as well as in prior proceedings¹⁵⁴ and other

¹⁴⁸ *Supra* note 141.

¹⁴⁹ Jeff Baumgartner, "AT&T Jabs at Cable With More Perks," *Cable Digital News*, June 16, 2009.

¹⁵⁰ Bill Burns, "When Will Qwest Learn?" *Light Reading*, July 1, 2008.

¹⁵¹ See Mike Robuck, "Comcast hits the pedal on DOCSIS 3.0 in Bay Area," *CedMagazine.com*, March 4, 2009.

¹⁵² See e.g. NCTA pp. 22-25.

¹⁵³ See Comments of Free Press at 36-38.

¹⁵⁴ See e.g. Comments of Free Press et al., In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Notice of Inquiry, pp. 40-46 (2007); Reply Comments of Free Press et al., In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Notice of Inquiry, pp. 12-17 (2007); Reply Comments of Free Press et al., In the Matter of *Development of Nationwide Broadband Data to Evaluate Reasonable*

publications.¹⁵⁵ Unfortunately, some of the arguments offered are misleading at best, and simply dishonest at worse. We urge the Commission to view our initial comments on this topic, but we will briefly address a few of the more misleading and hollow attempts to excuse away America's broadband problem.

In the past, Verizon attempted to show the superiority of the U.S. broadband market by simply ignoring the significant intramodal competition taking place in overseas markets.¹⁵⁶ This tactic ignores the fact that for consumers, the primary consideration is how many choices are available, not who those providers are. Verizon includes a chart that shows two providers of DSL versus "Other." This chart does little to inform the Commission as to the standing of the U.S. in comparison to other countries. It merely substitutes *platform* diversity for *actual* competition.¹⁵⁷

Several incumbent commenters and their hired proxies take aim at the OECD's

and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscription Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, WC Docket No. 07-38, Notice of Proposed Rulemaking, pp. 17-23 (2007); Reply Comments of Free Press et al., *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Petition for Reconsideration, pp. 9-12 (2008).

¹⁵⁵ See e.g. "Broadband Reality Check II," S. Derek Turner, Free Press, August 2006; "Shooting the Messenger: Myth vs. Reality: U.S. Broadband Policy and International Broadband Rankings," S. Derek Turner, Free Press, July 2007.

¹⁵⁶ Comments of Verizon, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Notice of Inquiry, p. 24 (2007).

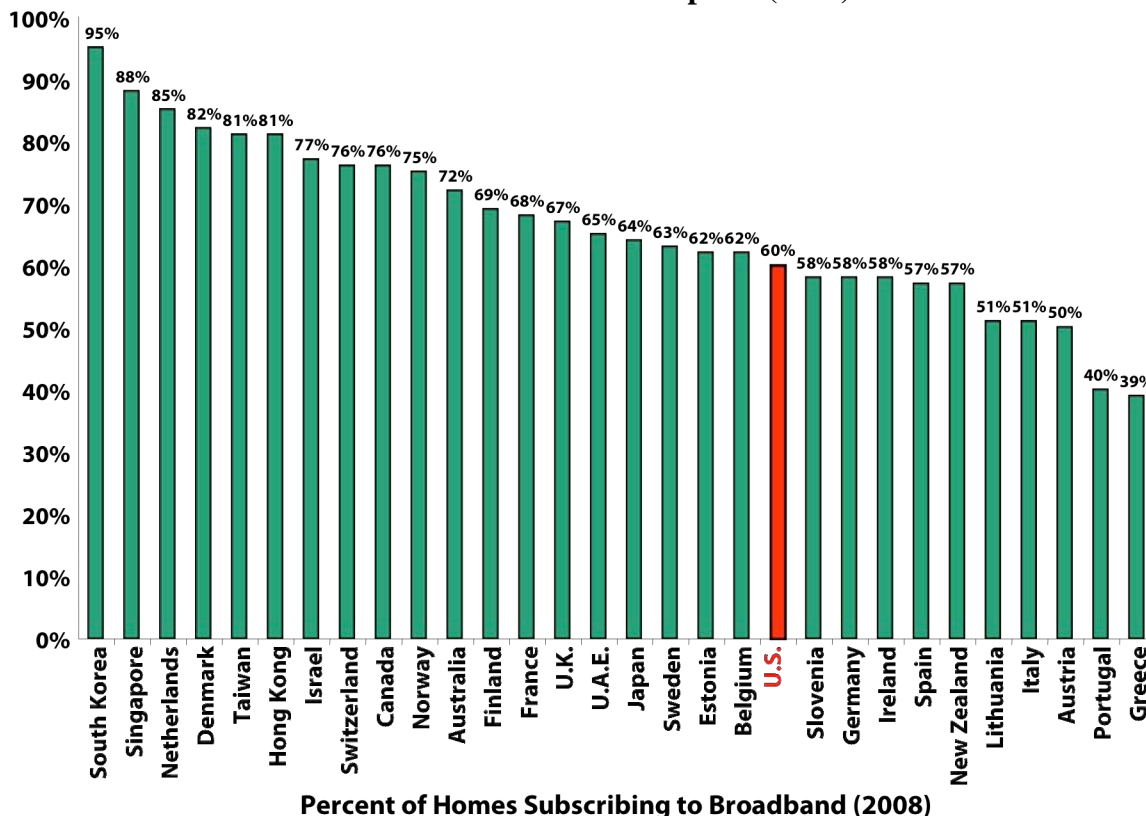
¹⁵⁷ See also Reply Comments of Free Press et al., *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Notice of Inquiry, pp. 16-17 (2007).

use of per capita rankings. We have recognized the shortcomings of the per capita data, and have offered numerous other examples that are signs of our failing broadband market.¹⁵⁸ But the Commission should realize that per capita data, while certainly not the only or most meaningful metric to gauge our international importance, it still remains useful proxy for our relative adoption of broadband throughout the residential and business sector. Furthermore, recent household level data (correctly described by some commenters as a more meaningful metric) shows the U.S. well behind our economic counterparts, and tracks closely with our performance in the overall penetration rankings.¹⁵⁹ According to this recent data, the U.S. ranks 20th in the world in household broadband adoption (see Figure 7), which is very close to our 22nd-place ranking in the ITU's ranking of overall broadband penetration.

¹⁵⁸ See Comments of Free Press at 36-39.

¹⁵⁹ See "Strategy Analytics: US Ranks 20th in Global Broadband Household Penetration South Korea Leads with 95% in 2008," Strategy Analytics, Press Release, June 18, 2009. The above data would place us at 14th in household penetration among the 30 OECD nations, not the estimate of 8th-to-10th place recently suggested in a report by the industry-funded Technology Policy Institute. See Scott Wallsten, "Understanding International Broadband Comparisons: 2009 Update", Technology Policy Institute, June 2009. The estimation here should be suspect even without the Strategy Analytics data, as it relies on the mixing of various surveys, conducted by different researchers at different times using different methodologies, and with corresponding differing margins of error.

**Figure 7:
The U.S. Broadband Problem Cannot Be Excused Away
Household Broadband Adoption (2008)**



Source: Strategy Analytics, 2009.

It is worth noting that the incumbents beat up on international rankings when it suits them, but praise the words of the organizations conducting these international comparisons when it serves as useful propaganda. For example, AT&T is quick to dismiss OECD’s ranking data, but then gushes over a misinterpreted OECD report that they think is dismissive of network neutrality.¹⁶⁰

¹⁶⁰ See e.g. Comments of AT&T at p. 103, n. 294. AT&T cites the OECD as being unresponsive of Net Neutrality regulations. Of course, the OECD was viewing the issue in terms of all OECD countries and noted the primary consideration for regulators should be level of competition that exists in the market. The OECD goes on to state “There remain a few countries in the OECD that rely solely on infrastructure-based competition in the high-speed Internet market. Policy makers in these countries should take special care when evaluating the progress of parallel infrastructure development, keeping in mind that wireless technologies are not perfectly substitutable for physically wired

C. The Commission Must Protect and Promote Openness

i. Openness Will Not Doom the Internet.

Contrary to the claims of major service providers, preserving the open Internet will not result in its complete collapse.¹⁶¹ Providers spend much of their energy in the initial round on such hyperbole. For example, Verizon claims, “The arguments asking policymakers to prospectively restrict providers’ network management practices... fail to account for the complexity and importance of these practices, the evolving threats to networks and services....”¹⁶² Verizon also states that any regulation of network management “would constrain broadband providers’ ability” to deal with “complex” and “ever-changing” challenges, and “would undermine the quality and security of consumers’ services.”¹⁶³ AT&T says, “Left unchecked, the resulting congestion and degradation of Internet service for other users would impose deadweight losses on the industry and consumers alike.”¹⁶⁴ AT&T also claims that regulations to preserve user choice on an open Internet “would deter the free-wheeling experimentation that is at the

connections” See Organisation for Economic Co-operation and Development, *Internet Traffic Prioritisation: An overview*, April 6, 2007, p. 28.

¹⁶¹ Other commenters offered extensive support of preserving and protecting the Internet’s openness. See e.g. nearly 10,000 concerned citizens, Comments of New Jersey Division of Rate Counsel at 54-63, Comments of Arizona Telecommunication and Information Council at 22-23, Comments of American Library Association at 5-6, Comments of Educause, Internet2 and ACUTA at 11-12, Comments of Center for Democracy and Technology at 8, Comments of Media and Democracy Coalition at 1, Comments of Public Knowledge et al. at 7-9, Comments of Media Access Project at 6, Comments of New America Foundation et al. at 33, Comments of Google at 25-26, Comments of the Computer and Communications Industry Association at 18, Comments of Zoom Technologies at 2, Comments of Wired.com at 7-8, Comments of Vonage Holdings Corp. at 3-4, Comments of BT Americas at 2-3.

¹⁶² Comments of Verizon and Verizon Wireless at 93.

¹⁶³ *Ibid.* at 95.

¹⁶⁴ Comments of AT&T at 126.

heart of the Internet's success"¹⁶⁵ – a strange claim as the experimentation has come from applications providers, not the carriers now seeking the right to “experiment.”

Above, we presented evidence that previous Commission regulation of uncompetitive, concentrated markets actually resulted in increased network investment and greater long-term stability. This relationship holds especially true in the case of non-discrimination rules -- specifically those rules that encourage openness and promote edge innovation. Recent developments reinforce the importance of openness specifically as a beneficial network regulation. The NTIA recently recognized the value of openness in promoting investment and growth by attaching strong openness protections as a condition of receiving broadband stimulus -- language developed in consultation with the Commission.¹⁶⁶ The Commission has also signaled its commitment to openness in acting on Free Press et al.'s *petition* against Comcast's blocking of particular applications.¹⁶⁷

Given this history -- not to mention the legacy non-discrimination rules under which phone carriers operated for decades and the global IP standards that networks follow -- (yet still made massive investments and profits, especially in the case of wireless voice) -- the burden should fall on providers to *prove* that a regime of packet degradation is *absolutely* required. Such proof must come in the form of actual data, not empty hand waving.¹⁶⁸

In fact, such data has been missing from provider arguments throughout this

¹⁶⁵ *Ibid.* at 113.

¹⁶⁶ See e.g. Free Press, “Broadband Grant Criteria Reflect Public Interest Priorities,” Press Release, July 1, 2009.

¹⁶⁷ See *Comcast Order*, *supra* note 16.

¹⁶⁸ AT&T spends 13 pages of its initial comments in this proceeding mounting a full-scale assault on the open Internet, without offering any evidence to support it – only generic and heated rhetoric, coupled with misinterpretations of Free Press positions. Comments of AT&T at 103-115.

debate. Perhaps this is because all available evidence points to the contrary. Internet traffic is not spiraling out of control; prices for the equipment necessary to expand networks continue to fall; and finally, the open Internet and reasonable network management can coexist.

False cries of emergency do not justify permitting interference with the Internet by carriers. Providers repeatedly point to a widely discredited study claiming an upcoming “exaflood” that will overwhelm the Internet with traffic, mostly video.¹⁶⁹ However, all available evidence indicates that the rate of traffic growth is declining. Comcast has acknowledged indirectly that the current bandwidth growth rate is slower than in years past.¹⁷⁰ The most comprehensive source for bandwidth usage -- the Minnesota Internet Traffic Studies -- recently concluded, “In spite of the widespread

¹⁶⁹ See e.g. Comments of AT&T, In the Matter of *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,”* File No. EB-08-IH-1518, WC Docket No. 07-52, p. 7 (2008); Reply Comments of Comcast, In the Matter of *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,”* File No. EB-08-IH-1518, WC Docket No. 07-52, at p.12 (2008); Comments of Verizon and Verizon Wireless, In the Matter of *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,”* File No. EB-08-IH-1518, WC Docket No. 07-52, at p. 29 (2008).

¹⁷⁰ See Comments of Comcast at 36 (citing to the Minnesota Internet Traffic Studies, the leading report on traffic usage, which concludes that for the wireline network, the rate of growth is currently decreasing). Comcast also notes that their traffic usage grew by 42 percent, which is in line with (but below) typical growth as presented in the Minnesota study – growth that is significantly below growth rates in previous years. Andrew Odlyzko, “Minnesota Internet Traffic Studies,” University of Minnesota, 2009.

claims of continuing and even accelerating growth rates, Internet traffic growth appears to be decelerating.”¹⁷¹

At the same time, the cost of electronics equipment continues to decline, and transport costs for many providers operating a nationwide backbone are minimal.¹⁷² Reducing growth of traffic coupled with reduced costs for expansion points to an ease in the challenge of network management, rather than a sudden supposed emergency.

Given manageable growth and reduced costs for electronics, providers have given no compelling justifications or evidence to show that the best-efforts Internet is not adequate and/or will not be adequate going forward. Indeed, providers continue to profit tremendously off providing simple access to a valuable social good -- the Internet -- that they did not invent or nurture. The Commission must stand in the way and ensure that the incumbents do not transform this great common good resource into something that merely earns them higher quarterly profits.

Furthermore, even to the extent that providers need to manage the network, they can engage in reasonable and non-discriminatory network management. Providers in this docket and others construct strawman arguments, claiming that an open Internet will prevent them from being able to do anything to deal with congestion or security threats.¹⁷³ This is misdirection -- the true debate is user choice versus carrier control, not whether the network is to be managed or completely anarchistic.

Similarly, in other areas of their comments, the incumbent’s rhetoric does not

¹⁷¹ Andrew Odlyzko, “Minnesota Internet Traffic Studies,” University of Minnesota, 2009.

¹⁷² *Supra* note 73.

¹⁷³ *See e.g.* Comments of Verizon and Verizon Wireless at 93-95; Comments of AT&T at 126.

match reality. AT&T launched a direct attack against Free Press, spending a substantial portion of the filing erecting strawman arguments and making claims that can be considered misleading at best. For example, AT&T claims that Free Press is inconsistent in opposing any packet prioritization in this docket when we supported prioritization three months earlier.¹⁷⁴ AT&T fails to offer a quote to support this claim, because no such quote exists. In a recent report, we stated that if any prioritization were needed, it could and should be done at the user level and in accordance with universal Internet standards¹⁷⁵ -- a far cry from supporting unnecessary ISP-driven prioritization. Furthermore, AT&T should review its own history and its inconsistencies before basing its arguments and its credibility on the supposed inconsistency of others.¹⁷⁶

ii. User Choice Should be Free From Service Provider Control

Providers strangely defend their right to control the network and limit user choice by claiming that they are acting in the best interest of the Internet user -- that they know what Internet users want and need out of an Internet connection.¹⁷⁷ This is a strange

¹⁷⁴ Comments of AT&T at 105.

¹⁷⁵ “If some traffic needs or deserves prioritized treatment, the technical standards underlying the Internet provide a way to do this, and to allow the user (rather than the network operator) to specify which traffic is important and which is not, through the use of DiffServ or IntServ” “Deep Packet Inspection: The End of the Internet as We Know It?” M. Chris Riley and Ben Scott, Free Press, March 2009, p. 8.

¹⁷⁶ See e.g. Comments of Free Press et al., In the Matter of *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,”* File No. EB-08-IH-1518, WC Docket No. 07-52, Appendix 2, p. xvi-xx (2008).

¹⁷⁷ See e.g. Ex Parte of Skype Communications S.A.R.L., In the Matter of *Petition to Confirm a Consumer’s Right to Use Internet Software and Attach Devices to Wireless Networks*, RM-11361, Petition for Rulemaking, Attachment (Sept. 12, 2008).

claim, given that the primary impact of an open Internet is maximizing user choice -- providing an open and nondiscriminatory Internet connection so that users may communicate as they see fit.¹⁷⁸ Essentially, the providers allege that their decisions as to proper use of the Internet are superior to the decisions of their users -- an allegation far out of line with Congressional and Commission policy. Congress directed the Commission to protect consumer choice, not provider “experimentation.”¹⁷⁹ Indeed, the much-heralded Section 230 explicitly emphasizes “user control.”¹⁸⁰ The Commission noted this recently, stating that Comcast’s use of Section 230 to defend their actions “falls wide of the mark given the statute’s emphasis on “maximiz[ing] user control” and “empower[ing]” parents.”¹⁸¹

Internet users should be provided an open connection that offers them the ability to restrict or enable access to certain information or services, should they choose to do so. The Internet began under a technical and legal framework that universally protected openness and consumer choice, thanks to the consumer protections included in Title II. Congress and the Commission have both set policies to maintain this framework, and the Commission’s national broadband plan should recognize and reinforce that.

¹⁷⁸ The claim is also strange when some major Internet service providers have among the lowest consumer ratings of any company in any industry. *See generally* American Customer Satisfaction Index, “Q1 2008 and Historical ACSI Scores,” May 19, 2009. (ranking the cable industry tied for lowest overall at 63 in 2009, along with newspapers, and below airlines; wireless telephone companies are the next lowest, with wireline companies not much further ahead). Furthermore, given the current concentrated market for Internet services, there is little meaningful ability of consumers to switch broadband providers if they are not pleased with their service.

¹⁷⁹ Comments of AT&T at 113.

¹⁸⁰ *See* 47 U.S.C. 230(b) (“It is the policy of the United States--... to encourage the development of technologies which maximize user control over what information is received...”); *see also* 47 U.S.C. 230(a)(2) (“These [Internet and other computer] services offer users a great degree of control over the information that they receive....”).

¹⁸¹ *Comcast Order* at para. 15, n. 69.

iii. Consumers Prefer Open Systems, Not Closed

Providers misleadingly equate their own “flexibility” with customer flexibility,¹⁸² an inapt comparison. Consumers want to control their own experiences,¹⁸³ and offering a consumer a range of “managed” experiences is no substitute. Computers and Internet connections are valuable to consumers because of the variety of options already available to consumers, without any facilitation by service providers. Recently, the proliferation of Web 2.0 services and applications has increased user generated content and other offerings, further increasing the possibilities of user choice without any need for service provider “flexibility” to construct add-on offerings.

Similarly, providers incorrectly -- and inconsistently -- argue that consumers prefer a closed system to an open Internet. Verizon, for example, calls a free and open Internet “plain-vanilla Internet access” and states that many consumers would prefer “more managed services.”¹⁸⁴ But even Verizon, one of the foremost advocates of this

¹⁸² See e.g. Comments of AT&T at 113; Comments of Verizon at 95.

¹⁸³ Leslie Cauley, “Some iPhone owners crave freedom to unlock from AT&T,” *USA Today*, July 6, 2009.

¹⁸⁴ Comments of Verizon at 77. Verizon also states that “the wireless marketplace also shows that many consumers prefer a more highly-managed network environment for their wireless devices, such as the one generally available using popular Blackberry devices.” Such a claim is ludicrous on its face. It confuses the purchasing decisions made in an environment that lacks choice with revealed preferences. Consider a person locked in a room. Should we view their decision to continue to live as evidence they prefer being locked in the room? What if they are finally granted the freedom to roam around the rest of the building, but are still forbidden from leaving the building? Should we view that person’s initial excitement derived from roaming the rooms of the house as evidence that they prefer to be locked in the house? Of course not. This holds true for Internet services, especially for the current smartphone offerings. RIM’s Blackberry surged in popularity, particularly among the business crowd, because it enabled mobile email inside a familiar OS and user interface. But these devices still locked down Wi-Fi and applications, something no consumer was singing jubilation over. Enter the iPhone, a device that is much less managed than the early RIM devices on the applications side, but is still relatively closed compared to personal computers. The popularity of the iPhone is not

approach, later glorifies the services and applications available through the “plain-vanilla Internet.” In an addition to their filing, Verizon spends a page to note all of the many things that consumers currently do with their plain-vanilla connections:

While the advent of the public Internet provided individuals with a place to purchase goods, e-mail friends and family, and surf the Internet, the spread of always-on broadband connections has more fundamentally changed many individuals’ lives. Rather than just browsing the Internet or sending e-mails, Americans today increasingly use their computers and mobile devices to watch “television” shows or even full-length movies from sites such as Netflix and Hulu, communicate with friends over vast social networks such as Facebook and MySpace, attend school on-line and conduct job searches.¹⁸⁵

Empirical research further proves Verizon’s assertions to be wrong. In 2002, a Pew survey of broadband users found unambiguous, widespread support for open Internet:

An open Internet is appealing to broadband users. As habitual posters of content, broadband users seem to desire the widest reach for what they share with the online world. As frequent searchers for information using their always-on connection, broadband users seek out the greatest range of sources to satisfy their thirst for information. Walling off portions of the Internet, which some regulatory proposals may permit, is anathema to how broadband users behave.¹⁸⁶

History is full of confirmation that closed systems are destined to fail when consumers have a meaningful opportunity to choose open systems. Consider AOL, once a major Internet service provider. AOL’s primary offering for consumers was a “walled

because of AT&T or Apple’s control of the service but because it is a device that had less provider control relative to other existing device platforms. Palm’s new Pre with the even more open WebOS is already generating substantial consumer praise, because it is slightly less locked down and managed relative to the iPhone. Some carriers appear to be slowly coming to the obvious realization that consumers want mobility -- not management. But carrier resistance remains high, and consumers suffer as a result.

¹⁸⁵ Verizon, GN Docket 09-51, “Access for All: It’s Time to Ensure America’s Broadband Future,” at 3 (filed June 8, 2009).

¹⁸⁶ Pew Internet & American Life Project, “The Broadband Difference,” 2002, p. 3. (emphasis in original).

garden,” a limited set of content and features available only to AOL subscribers, on top of basic Internet access. By playing gatekeeper to the closed system, AOL could (and did) charge content providers for access to the walled garden -- not for any direct benefit to consumers or added value, but merely to gain access.¹⁸⁷ The introduction of Web browsers, and in particular Microsoft’s decision to bundle the Internet Explorer web browser by default with operating systems, gave consumers an option to migrate away from AOL and show a preference for the open Internet -- an option widely taken.¹⁸⁸

iv. Wireless Networks Must Be Open

We see history repeating itself, in part, on mobile networks -- where wireless providers exert levels of control above and beyond wireline, and in particular exert substantial control over the devices and applications that can be used on the wireless network. Despite the lessons of history, wireless providers insist on playing gatekeeper, a role that impedes growth, opposes federal policy, and aggravates consumers, all in the name of higher profits.¹⁸⁹ They defend these practices through factually inaccurate “sky is falling” claims of growing congestion -- claims that fail to acknowledge that an open Internet and reasonable network management can, in fact, happily co-exist on the

¹⁸⁷ See Tom Grubisch, “Who ‘shackled’ AOL – and when?” *OJR: The Online Journalism Review*, Jan. 12, 2006. (“Second, the service often turned up its nose at interesting content from the outside because its creators wouldn’t – or couldn’t – pay the extortionate carriage fees that AOL demanded.”).

¹⁸⁸ See Saul Hansell, “Now, AOL Everywhere,” *New York Times*, July 4, 1999; Catherine Greenman, “Is There Life After AOL,” *New York Times*, June 21, 2001.

¹⁸⁹ Perhaps if we had more effective competition in the market for wireless services, consumers would be able to demonstrate their preference for open systems, as they did in the wireline context. See *e.g.* Comments of Consumer Federation of America et al., In the Matter of *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 09-66 (2009); Reply Comments of Consumer Federation of America et al., WT Docket No. 09-66 (2009) (*CMRS Reply Comments*).

wireless platform. In order to avoid the inefficient and anti-consumer recreation of failed models of carrier control, the Commission should make open wireless networks a component of the broadband plan.

Some providers point to popularity and growth of wireless networks as evidence that consumers want a closed system.¹⁹⁰ This claim mistakes correlation for causation, and confuses consumer choice in a highly uncompetitive market that lacks meaningful choice with actual revealed consumer preferences. Popularity and growth of wireless services, driven by the development of smartphones such as the iPhone by innovative hardware manufacturers (and only secondarily, if at all, by the development of marginally more robust networks), does not derive from the closed nature of the networks or the level of provider control. Rather, ongoing provider control hampers growth and innovation in the wireless market.¹⁹¹ AT&T's role in the development of the iPhone has been to hold it back, not to advance it.¹⁹²

Closed wireless networks also stand in opposition to established federal policy -- the *Internet Policy Statement* applies, and has always applied to wireless networks, as the Commission has recognized,¹⁹³ and provider assertions of extraordinary circumstances to seek a self-serving carve-out from this policy are inaccurate and misleading. Maintaining a closed network on wireless, as on wired, is simply not necessary. Although it is true that resources in wireless access networks are shared among users, the same is true of cable networks, to which the *Internet Policy Statement* clearly applies. Similarly,

¹⁹⁰ See e.g. Comments of Verizon at 100-101 (“Notwithstanding the momentum towards openness, the wireless marketplace also shows that many consumers prefer a more highly-managed network environment for their wireless devices...”)

¹⁹¹ See *Free Press CMRS Reply Comments* at 3-12.

¹⁹² See *ibid.* at 5-6.

¹⁹³ Comments of Free Press at 166.

although spectrum is not an infinite resource, wireless providers can build additional towers and can increase the deployment of 4G wireless services to improve capacity significantly -- particularly if they increase their capital expenditures in proportion to increasing revenue, instead of cutting investment while profits rise.¹⁹⁴

Provider arguments that limited spectrum, shared capacity, and increased use of mobile data services somehow demand a closed network completely ignore the possibility of managing networks in a manner consistent with the principles of the open Internet.¹⁹⁵ Shared capacity, limited spectrum, and increased use all result in the same basic problem -- the potential for congestion in the network -- the same problem faced by operators of a wireline network. Even if the potential for congestion is greater in wireless networks, and even if this results from features outside the provider's control (a large "if", given decreasing capital expenditures), the proper solution on both networks is still the same. Wireless carriers, like wireline carriers, should continue to be permitted to engage in reasonable network management, narrowly tailored to the problems posed by congestion in the network, and consistent with the framework of an open Internet.

The Commission's national broadband plan should emphasize the importance of the open Internet, and should recognize that absolute provider control is not a value-add but an impediment to growth and innovation. Even one major carrier -- Sprint -- has realized that it may be better for the service providers to play a more hands-off role.¹⁹⁶

¹⁹⁴ See e.g. Free Press CMRS Reply Comments at 6-8.

¹⁹⁵ Comments of Free Press at 167-68.

¹⁹⁶ Kim-Mai Cutler, "MobileBeat: Sprint says it must 'let go' to enable innovation," *VentureBeat* (July 16, 2009), at <http://venturebeat.com/2009/07/16/mobilebeat-sprint-says-it-must-let-go-to-enable-innovation/> (quoting Russ McGuire, Sprint vice president, as saying "We need to let go of demanding permission... It's a fundamental change in

The Commission should reinforce this in the national broadband plan. Providers should relinquish absolute control over their networks, and allow open and nondiscriminatory communications. Providers should also not be permitted to exert undue and complete control over the devices that connect to their network.¹⁹⁷

Respectfully submitted,

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our nature, but we need to keep pushing that and riding that and not be an impediment to the growth of the industry.”).

¹⁹⁷ Although we do not go into detail here, a substantial component of the open Internet debate on wireless networks centers around the anti-competitive, anti-consumer practice of tying up wireless handsets in exclusive deals. See Marguerite Reardon, “Unlocking the unlocked cell phone market,” *CNET News*, July 2, 2009. See generally Comments of the Ad Hoc Public Interest Spectrum Coalition, *Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM-11497, Petition for Rulemaking (2009); Reply Comments of the Ad Hoc Public Interest Spectrum Coalition, In the Matter of *Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM-11497, Petition for Rulemaking (2009).