

**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  
 )

**COMMENTS OF  
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**I. Introduction and Summary**

These comments are submitted in response to the FCC Notice of Inquiry seeking comment concerning the development of a national broadband plan for the United States.<sup>1</sup> The goal of developing a national broadband plan is a worthy one – if done right. Doing it right first means the plan must contain within its parameters sufficient flexibility to allow policymakers and broadband providers to respond to the rapid pace of technological and marketplace changes. The Soviet Union was known for adopting elaborate national plans of the five-year variety. The plans set rigid goals, production quotas, input costs, output prices, and the like. To put it nicely, things did not turn out well for the Soviet economy under such rigid state planning notions. So built-in

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\* These comments express the views of Randolph J. May, President of the Free State Foundation, an independent, non-profit free market-oriented think tank. They do not necessarily represent the views of the Board of Directors, staff, or others associated with FSF. The research assistance of FSF Research Assistant Tristan Hardy is gratefully acknowledged.

<sup>1</sup> Notice of Inquiry, A National Broadband Plan for Our Future, GN Docket No. 09-51, April 8, 2009.

flexibility that preserves considerable private sector discretion for adaptation and experimentation is essential.

The second key to doing it right means the plan must be grounded in certain fundamental free market-oriented principles. These principles should dictate that federal support for broadband should be targeted predominantly to providing access to presently unserved areas and to increasing, if this can be accomplished efficiently and effectively, broadband usage; any federal support should favor private sector companies over government providers; competitive bidding procedures should be used to the extent possible to distribute any federal support; and the government should not adopt any further mandates requiring net neutrality or open access because these regulations have the effect of deterring investment and chilling innovation. Ultimately, the costs imposed by such regulations – in terms of lost opportunity for the realization of further broadband investment, innovation, and other consumer gains – outweigh any perceived benefits.

Unless the national broadband plan contains sufficiently flexibility within itself and incorporates core free market principles, it will be unsound. For that reason most of the remainder of this first set of comments in this inquiry will be devoted to urging the Commission to incorporate these first principles as plan guideposts. Before discussing the principles, however, the next section will provide – briefly - some factual context which grounds my perspective.

## **II. The Substantial Progress Regarding Broadband Deployment and Usage Should Be Recognized**

It is at this point that I suppose I could fill up pages and pages with reams of statistics relating to the trajectory of broadband progress in this country. I know many

parties will do so, and much of this information will have substantial value for the Commission. What I want to do here is likely more limited, but no less important. I want to recite just a few key statistics that, in my view, ought to have an undeniable bearing on the development of the plan and which support the adoption of the market-oriented principles I advocate. If these basic facts are refuted, which I don't think they have been or will be, then that perhaps would warrant changes to what I advocate.

Broadband is already accessible to over 90% of America's households. At least 93% of America's households have access to cable broadband; over 82% have access to telephone company-provided DSL broadband; 14% have access to fiber-to-the-premises; and 82% have access to mobile wireless broadband services. This leaves 6-7% of U.S. households (about 7-8 million households) without any access to broadband.

Depending on the measurement, nearly 60% of America's families already subscribe to broadband. Prices for broadband have been declining while speed has been steadily increasing (according to Pew, prices declined by 4% between December 2005 and April 2008, as speeds increased.)<sup>2</sup>

Broadband adoption has become a key input into the productivity that drives the United State's GDP growth. The growth that can be attributed to the information, technology, and communications sector supported by broadband infrastructure has been estimated to have accounted for at least \$100 billion of the \$300 billion of productivity-driven GDP growth in the non-farm business sector that occurred between 2007 and

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<sup>2</sup> There are many examples of the price declines, but within the past two months Qwest announced it was significantly reducing its DSL rates in Washington and Oregon. For example the monthly rate for a 7 megabit-per-second service was reduced from \$60 to \$35, and the 1.5 Mbs rate was reduced to \$30 per month from \$50.

2008.<sup>3</sup> The ITC sector can be credited for contributing \$902 billion in GDP in 2007, making it the fourth largest sector in the U.S. economy.<sup>4</sup>

Consumers have shown a strong preference for moving away from traditional voice services to high-speed broadband and mobile services.<sup>5</sup> Broadband also has enabled the creation of entirely new business models, such as online music retailers and Internet video services that provide American consumers with additional new choices of suppliers.<sup>6</sup>

Investment by broadband providers in the U.S. marketplace has been estimated to have reached at least \$64.2 billion in 2008, and nearly that much the year before.<sup>7</sup> The U.S. Census Bureau, recording a broader measure of telecommunications-related capital expenditures, estimates an even higher figure of \$80 billion.<sup>8</sup> The cable industry estimates that since 1996 cable companies have invested \$146 billion in broadband facilities. In 2008, Verizon alone invested \$17 billion in the continuing build out of its broadband fiber network, while in March 2009 AT&T said it plans capital expenditures for this year in the range of \$17 billion, in line with the same amount last year, with approximately two-thirds directed to wireline and wireless broadband network

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<sup>3</sup> Patrick S. Brogan, *The Economic Benefits of Broadband and Information Technology*, 18 MEDIA L. & POL'Y 65, Appendix (2009) (citing Press Release, U.S. Department of Labor, BLS, "Productivity and Costs: Fourth Quarter and Annual Averages, 2008 Revised" (Mar. 5, 2009), available at <http://www.bls.gov/news.release/prod2.nr0.htm>).

<sup>4</sup> "GDP-By-Industry Data 1998-2007," authored by the U.S. Department of Commerce Bureau of Economic Analysis, available at [http://www.bea.gov/industry/gdpbyind\\_data.htm](http://www.bea.gov/industry/gdpbyind_data.htm).

<sup>5</sup> In the Matter of Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC-DA 09-54, Table 12 at 93, January 16, 2009).

<sup>6</sup> See Patrick S. Brogan, "The Economic Benefits of Broadband and Information Technology," 18 MEDIA L. & POL'Y 65, 68 (2009).

<sup>7</sup> Yankee Group Research, Inc.

<sup>8</sup> U.S. Census Bureau, 2007 Annual Capital Expenditure Survey, Table 4a, and 2004 Annual Capital Expenditure Survey, Table 4b, available at <http://www.census.gov/csd/ace/>.

enhancements.<sup>9</sup> It is possible to quibble about the price accuracy of any of these figures, but to do so would miss the larger, more fundamental point: It is indisputable that over the past number of years there has been a huge investment in the hundreds of billions of dollars by private sector companies in broadband infrastructure.

The United States is currently well ahead of Europe in fiber-to-the-home deployments.<sup>10</sup> Cable providers are rapidly upgrading their broadband networks with DOCSIS 3.0 technology, enabling speeds of 50-100 Mbps and higher. They plan to reach 99% of U.S. homes with DOCSIS 3.0 by 2013.<sup>11</sup> In other words, competitive market forces – as one would expect – are driving an ongoing transition to ever faster broadband technologies, from DSL to fiber-to-the-home, from existing generation to cable, to DOCSIS 3.0 and beyond, and so on.

Although some in the U.S. continue to "talk broadband down," seemingly for the purpose of advancing a pro-regulatory policy agenda that tilts heavily in the direction of more government regulatory control, if not ownership, of broadband networks<sup>12</sup> the reality is that the U.S. has made remarkable progress in making available reasonably-

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<sup>9</sup> See Press Release, AT&T to Invest More Than \$17 Billion in 2009 to Drive Economic Growth, March 10, 2009, available at: <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26597>

<sup>10</sup> See Press Release, "Inventory of FTTH in Europe," pg. 4, Feb. 11, 2009, authored by IDATE, available at: [http://www.idate.fr/pages/download.php?id=573&rub=news\\_telech&nom=459\\_FTTx%20in%20Europe\\_EngV2.pdf](http://www.idate.fr/pages/download.php?id=573&rub=news_telech&nom=459_FTTx%20in%20Europe_EngV2.pdf).

<sup>11</sup> See Todd Spangler, "Report: DOCSIS 3.0 to Blanket U.S. By 2013," MULTICHANNEL NEWS (May 1, 2009), available at [http://www.multichannel.com/article/231033-Report\\_DOCSIS\\_3\\_0\\_To\\_Blanket\\_U\\_S\\_By\\_2013.php?rssid=20059&q=DOCSIS+3.0+Pike+and+Fisher](http://www.multichannel.com/article/231033-Report_DOCSIS_3_0_To_Blanket_U_S_By_2013.php?rssid=20059&q=DOCSIS+3.0+Pike+and+Fisher).

<sup>12</sup> I first began to write about "The Talking Broadband Down Crowd" on April 25, 2007, now more than two years ago. See this blog, available at: <http://freestatefoundation.blogspot.com/2007/04/talking-broadband-down-crowd.html>. There I said: "Quite simply, those here in the U.S. who continue to talk down this country's broadband achievements clearly have a policy agenda in mind. The agenda is to impose net neutrality (read: common carrier regulation) on broadband providers on the perverse theory that somehow consumers will take more broadband if all the providers are required to offer exactly the same service--just as in the good ol' days of Ma Bell."

priced, high-speed broadband on a nearly ubiquitous basis. The broadband glass is much more than half-full than half-empty. The remarkable progress has been achieved under a generally deregulatory broadband environment that has encouraged massive private sector investment. Incorporating the free market-oriented principles discussed below into the national plan provides will facilitate continued progress towards ubiquitous access to, and greater usage of, ever more advanced broadband capabilities.

### **III. The Broadband Plan Should Incorporate Free Market Principles**

#### **A. Focus Predominantly on Unserved Areas**

A key element of the national broadband plan should be an explicit recognition that any federal support should be targeted predominantly towards making broadband service available in areas that remain unserved by any provider.<sup>13</sup> By definition, unserved areas are ones in which the private sector has not yet chosen to invest because of the high cost of building out networks in relation to the expected returns on invested capital.

These unserved areas are most appropriate for government intervention because subsidies and other forms of government intervention in the marketplace are not as likely to displace private investment in unserved areas as they will in areas that are not

“unserved.”<sup>14</sup>

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<sup>13</sup> It is true that satellite broadband operators now provide service that is available almost everywhere in the country. But because this service, while certainly vastly superior to traditional "dial-up," is not presently on a par with the quality of broadband service provided by telephone companies or cable operators, for purposes of defining "unserved" in this particular context, it may be appropriate to discount satellite broadband. Of course, as satellite technology continues to evolve, or spectrum allocations and assignments change, this assessment might well change.

<sup>14</sup> The European Commission recently declared a “hands-off” policy for geographic zones with at least two facilities-based broadband providers because it could find no market failure in this situation with two competitors. The EC noted that state funding in these areas would only distort competition and crowd out private initiative in the broadband sector. *See* Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, ¶ 37, May 19, 2009, authored by the European

Sound public policy and fiscal responsibility dictates that the government should avoid, whenever possible, providing taxpayer subsidies to support activities that can otherwise be supported by the private sector. The same is true with respect to the employment by the government of regulatory regimes, such as universal service, to direct subsidies for broadband. These subsidies are, in effect, taxes just the same, whether called "fees" or by some other name. When such subsidies are directed to areas that are not unserved, they are wasteful and they inevitably have a distortive economic effect on the business plans of the providers which already have chosen to provide service without such government subsidies. By focusing primarily on unserved areas, the broadband plan is less likely to stifle the development of private sector competition that otherwise might emerge in areas that already have one or more providers.

It is appropriate for the broadband plan, in considering how to address the presently "unserved," to focus some attention on those who have *access available*, but who have chosen not to subscribe. As pointed out earlier, broadband is accessible to over 90% of U.S. households. To the extent that the reason for non-subscription is related to low income, it is appropriate for the government to fashion a "demand-side" program to target some financial assistance to such users in the manner of the current Lifeline and Link-up programs. But many surveys have shown that there are numerous reasons for non-subscription among those where access is readily available, such as lack of interest or a steep learning curve. The well-regarded Pew surveys consistently confirm the

existence of such reasons.<sup>15</sup> It may be appropriate for the national plan to incorporate some modest programs of an educational nature designed to stimulate greater take-up rates, or perhaps subsidize the purchase of computers by low income persons. But the Commission should be aware of the natural limitations the government faces in this regard, and the fact that it is likely, even in the absence of government action, take-up rates will continue to steadily increase at a fairly steady pace.

### **B. Favor Private Companies over Government Providers**

Another market-oriented principle that should be incorporated into the national plan is that private sector companies should be favored over government-owned providers. Provision of communications services has not traditionally been considered a core government function in this country. Just the opposite. Indeed, most countries – think most of Europe, for example -- that historically did view provision of communications services an appropriate governmental function have now privatized their formerly government-owned communications companies, or are well along on the road to complete privatization.

While there may be certain very limited exceptions to this rule, most government-owned communications ventures have not turned out well for the taxpayers or subscribers. This surely has been the case with respect to most municipalities and states

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<sup>15</sup> See John B. Horrigan, “Home Broadband Adoption 2008,” PEW INTERNET AND AMERICAN LIFE PROJECT, July 2008, available at [http://www.pewinternet.org/~media/Files/Reports/2008/PIP\\_Broadband\\_2008.pdf](http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Broadband_2008.pdf). Pew surveys have indicated that only 14% of dial-up users continue to use the slower service because broadband is unavailable.



that have gotten into the business of providing broadband services.<sup>16</sup> While state and localities can play important consultative roles, especially in providing information concerning unserved and underserved communities, these government entities do not have the expertise and experience required to build and operate modern broadband communications networks as efficiently and effectively as private sector companies.<sup>17</sup> More often than not, even putting aside substantial fees paid to outside consultants and managers, taxpayers are left to foot the bill for ever larger build-out and operating subsidies than originally envisioned. For this reason, the broadband plan should adopt the principle of favoring private sector operators.

### **C. Competitive Bidding Procedures Should Be Used in Awarding Support**

The broadband plan should favor the use of competitive bidding procedures for disbursement of funding support, whether funds are provided directly through the Treasury or via some form of universal service program.<sup>18</sup> This market-oriented approach, which is the prevailing norm in most government programs involving the award of funds, makes sense if the funds available are to be used most efficiently to achieve "the biggest bang for the buck." The FCC should utilize relatively simple and straightforward forms of "reverse auctions" to award funds to the lowest bidder. The plan

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<sup>16</sup> See, for example, the very good recent Institute for Policy Innovation paper, "We Told You So! Continue to Say No to Municipal Broadband Networks," March 6, 2009, authored by Barry Aarons, IPI Senior Research Fellow. The paper may be found at: [www.ipi.org](http://www.ipi.org) and contains citations to other studies.

<sup>17</sup> It is worth noting in this context that when then-President-elect Obama was asked in November why the government just didn't take over General Motors and Chrysler, he responded: "We don't want government to run companies. Generally, government historically hasn't done that very well." That was November. I doubt the government will prove adept at running car companies. In any event, history shows ineptness more often than not when state and local governments have tried to run communications companies.

<sup>18</sup> I am not here advocating expansion of the universal service program to include broadband support. To the extent federal support is made available, it is far better to provide it directly from Treasury funds.

should specify that grants should not be made to multiple providers to build out facilities in the same area.

Just such an approach of subsidizing multiple service providers to build out facilities in the same area led to the explosive growth in the existing high cost USF fund. Even if some funds are awarded through a process other than reverse auctions, such auctions should still be used to distribute a significant proportion of any broadband funds. The plan should explicitly recognize that competitive bidding mechanisms such as reverse auctions offer the opportunity to ensure that the specified programmatic objective is met in the most efficient and effective manner. Resources (dollars) are limited. Last year, the FCC Inspector General found that 23% of the USF subsidy payments to phone companies were "erroneous." "Overpayments" amounted to 98% of improper payments.<sup>19</sup> With error rates like these – which increase the bottom-line charges of everyone's telephone bills – surely the FCC should have an interest in recommending adoption of market-oriented mechanisms for the disbursement of any funds made available to providers.

#### **D. The Plan Should Recommend Maintaining a Deregulatory Broadband Environment**

I have written often and at considerable length as to why it is important to maintain a deregulatory broadband environment if the substantial progress that already has been achieved is to continue. Others affiliated with the Free State Foundation or who have appeared at Free State Foundation events have done so as well. Rather than

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<sup>19</sup> See FCC's Inspector General's Report on the High-Cost Fund, available at: <http://www.benton.org/node/19359>.

repeating those analyses and arguments here, all of which are readily available on the Free State Foundations website,<sup>20</sup> I am attaching as Appendix A a partial list of some of these more recent writings that in one way or another address broadband regulation.

For present purposes, the brief recital at the outset of these comments as to the substantial progress achieved to date is testament to the success of the existing (largely) market-oriented policies in stimulating massive private sector investment and inciting innovation. Note that there is not a dispute that 90% of households in the U.S. now have access to broadband. Indeed, the NOI itself acknowledges that "[m]arket mechanisms have been successful in ensuring access to broadband in many areas of the country."<sup>21</sup> The next sentence then asks the question: "What is the best way to attract risk capital to broadband infrastructure projects?" The answer should be clear: By continuing to maintain the "minimal regulatory environment" policy for broadband that the Commission first formally adopted in 2002 when it determined that the broadband marketplace already was developing in a competitive fashion and was likely to continue to do so.<sup>22</sup>

At a time of a severe economic downturn, it would be foolish for the Commission to ignore the fact that the market for broadband services and applications continues to grow – and that it is not the facilities-based broadband infrastructure providers that are seeking billions of taxpayers' bailout dollars to keep from going under. Rather, quite remarkably considering the downturn, the facilities-based broadband providers continue

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<sup>20</sup> See <http://www.freestatefoundation.org/publications/allfsfpublications.html>

<sup>21</sup> NOI, para. 37.

<sup>22</sup> Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 17 FCC Rcd. 3019, 3022 (2002).

to invest many billions of dollars each month to expand their broadband networks. It would be a mistake for the Commission to propose any additional regulatory requirements, such as a fifth net neutrality principle suggested by Acting Chairman Copps, or a return to old-fashioned common carrier regulation suggested by Free Press.<sup>23</sup> An attempt to turn back the clock to a public utility regime that may have been appropriate in an earlier monopolistic era almost certainly would be disastrous in today's technologically dynamic, competitive broadband environment.

#### **IV. Conclusion**

In developing the national broadband plan, the Commission should act consistent with the views expressed herein.

Respectfully submitted,

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<sup>23</sup> See these two pieces addressing Free Press's advocacy of imposition of common carrier regulation on broadband providers: "Deconstructing Dismantling Digital Deregulation," May 13, 2009, available at: <http://freestatefoundation.blogspot.com/2009/05/deconstructing-dismantling-digital.html>; "Deconstructing Dismantling Digital Deregulation – Part II," May 22, 2009, available at: [http://www.freestatefoundation.org/images/Deconstructing\\_Dismantling\\_Deregulation\\_II.pdf](http://www.freestatefoundation.org/images/Deconstructing_Dismantling_Deregulation_II.pdf)

## Appendix A

### Recent Free State Foundation Papers Regarding the Regulation of Broadband

[Deconstructing "Dismantling Digital Deregulation" - Part II](#), by Randolph J. May, President, Free State Foundation, May 22, 2009. .

[Good Laws Spur Technology, Investment](#), by Free State Foundation Distinguished Adjunct Senior Fellow Deborah Taylor Tate, in *The Tennessean*, April 19, 2009.

[The "Free Press" Free Lunch](#), by Free State Foundation President Randolph J. May, April 16, 2009.

[Give Consumers a Tax Break Now](#), by Deborah Taylor Tate, FSF Distinguished Adjunct Senior Fellow, in the *Washington Times*, on March 11, 2009.

[Broadband Stimulus: Prudent Mimimalism Will Lead to Maximum Impact](#), Free State Foundation President Randolph J. May, March 9, 2009.

[A Modest Plea for FCC Modesty Regarding the Public Interest Standard](#), by Randolph J. May, President, Free State Foundation, the *Administrative Law Review*, Volume 60, No. 4, Fall 2008.

[Don't Foil the Digital Age](#), by Randolph J. May, President, Free State Foundation, in *Legal Times*, December 1, 2008.

[Archaic Intercarrier Compensation and Universal Service Regimes: Proposals for Reform](#), Transcript of Proceedings, Free State Foundation Seminar, October 24, 2008.

[Deregulation as Scapegoat](#), by FSF President Randolph J. May, in the *Washington Times*, on October 7, 2008.

[Testimony](#) of Randolph J. May, President, The Free State Foundation, at hearing before the House Subcommittee on Telecommunications and the Internet on "The Future of Universal Service," June 24, 2008.

[Why Forbearance History Matters](#), by Randolph J. May, President, Free State Foundation, June 17, 2008.

[Reply Comments of Randolph J. May, President, Free State Foundation, to the FCC in the Universal Service Proceeding](#), July 2, 2008.

[The FCC's Sometimes Wayward Course](#), by Free State Foundation President Randolph J. May, on April 21, 2008.

[At FCC, Change Must Be the Mantra](#), by Randolph J. May, President, The Free State Foundation, on February 27, 2008.

[On Market Power and the Power of Markets: A Schumpeterian View of Dynamic Industries](#), by Dennis L. Weisman, Free State Foundation Board of Academic Advisors, February 26, 2008.

[Rep. Markey's Internet Bill: Curiously Off the Mark](#), by Randolph J. May, President, The Free State Foundation, on February 19, 2008.

[Comments to the FCC of Randolph J. May, Free State Foundation President, in Broadband Industries Practices Proceeding](#), on February 12, 2008.

[Bundles of Joy: The Ubiquity and Efficiency of Bundles in New Technology Markets](#) by Stan J. Liebowitz and Stephen E. Margolis, on January 24, 2008.

[The Unbundling Panel](#) by Randolph J. May, President, The Free State Foundation, and Christopher S. Yoo, Professor of Law and Communication and Director of the Center for Technology, Innovation, and Competition at the University of Pennsylvania, in the Washington Times, on December 16, 2007.

[The Public Interest Is In Free Markets](#) by Senator Jim DeMint, a Keynote Address delivered on October 30, 2007, at the "Federal Unbundling Commission?" conference sponsored by the Free State Foundation and the Institute for Policy Innovation.

[Wireless Works--Without More Regulation](#) by Solveig Singleton, Adjunct Senior Fellow, The Free State Foundation, on November 28, 2007.

[Hold the Line on Light Touch Regulation](#) by Representative Marsha Blackburn, a Keynote Address delivered on October 30, 2007, at the "Federal Unbundling Commission?" conference sponsored by the Free State Foundation and the Institute for Policy Innovation.

[Net Neutrality, Freedom, and First Principles](#) by Randolph J. May, President, The Free State Foundation, on November 7, 2007.