



*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
WASHINGTON, DC 20554

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

**COMMENTS OF MEDIA ACCESS PROJECT**

Andrew Jay Schwartzman  
Parul Desai

Law Student Intern:  
Bryan Utter  
University of Missouri School of Law

Media Access Project  
Suite 1000  
1625 K Street, NW  
Washington, DC 20006

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## SUMMARY

MAP calls upon the Commission to recognize that the First Amendment requires government to adopt policies which promote the creation of a robust platform for the free expression of ideas. This includes, but is not limited to, policies assuring non-discrimination in network management and interconnection, *i.e.*, “Network Neutrality.” This policy directive is underscored by numerous provisions of the Communications Act of 1934. MAP also addresses several specific policy goals of the National Broadband Plan for the purpose of demonstrating how First Amendment objectives can be implemented.

A long and unbroken line of Supreme Court cases emphasizes that government can and should consider fulfillment of the goals of the First Amendment in applying the laws of the United States. As Justice Black said in *U.S. v. Associated Press*, the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public....” The Supreme Court elaborated on this principle in *Red Lion Broadcasting Co. v. FCC*, saying that “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.” *Id.* Significantly, the Court emphasized that “It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.” *Id.*

To meet the constitutional imperative to create a vibrant platform for democratic discourse and to promote the exchange of political, social, artistic and philosophical expression, as well to create an opportunity for economic growth and innovation, the FCC should take an aggressive view of the role of government in the buildout and expansion of broadband.

National broadband access can revolutionize the way that American citizens communicate, work, entertain, and inform themselves, but unless federal action is taken to ensure that such access is truly affordable, competitive and ubiquitous, the digital divide will grow into a gaping chasm.



The Internet is an open and interactive medium, facilitating communication by anyone to and from everyone. *Id.* Unlike traditional mass media such as television and cable, the Internet is not simply a medium through which programmers make decisions for passive viewers about content. Rather, it is a medium that supports and enhances the free expression of citizens and serves as a vehicle for democratic governance and economic activities. As Professor Lessig has said, “The architecture of the Internet, as it is right now, is perhaps the most important model of free speech since the founding.” Lessig, *Code and Other Laws of Cyberspace* 167 (1999).

In granting Internet communications the highest protection under the Constitution, the Supreme Court found that the “Internet ... now enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is ‘a unique and wholly new medium of worldwide human communication.’” *Reno v. ACLU*, *supra* at 845 (*quoting ACLU v. Reno*, 929 F.Supp. 824, 844 (E.D. Pa. 1996)). Unimpeded access to broadband and the Internet is an essential component for social, economic, and political discourse. According to Professor Lessig, “[T]he model for speech that the framers embraced was the model of the Internet- distributed, noncentralized, fully free and diverse.” Lessig, *supra* at 185.

The seminal case addressing the relationship of the First Amendment to the policymaking role in media and telecommunications is *United States v. Associated Press*, 326 US 1 (1945), where the Supreme Court applied the Sherman Act to newspapers. Writing for the majority, Justice Black held that the First Amendment provided powerful support for applying and interpreting the Sherman Act because it “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public....” *Id.*, 326 U.S. at 20. Justice Frankfurter emphasized in his concurring opinion that the case was about a commodity more important than peanuts or potatoes, that it was about who we are as a nation. “A free press,” he said, “is indispensable to the workings of our democratic society.” *Id.*, 326 U.S. at 28. For that reason, he wrote, “the incidence of restraints upon the promotion of truth through denial of access to the basis

for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.” *Id.*

A notable example of how this concept has been applied in practice can be found in Judge Greene’s treatment of the AT&T consent decree. *U.S. v. AT&T*, 551 F.Supp. 131 (D.D.C. 1982) In imposing restrictions on what was then described as “electronic publishing,” he held that both competitive and First Amendment considerations separately supported his action.

Judge Greene made clear that application of these objectives is not delimited to Title III of the Communications Act, or to the FCC. “Certainly,” he said, “the Court does not here sit to decide on the allocation of broadcast licenses. Yet, like the FCC, it is called upon to make a judgment with respect to the public interest and, like the FCC, it must make that decision with respect to a regulated industry and a regulated company.” *U.S. v. AT&T*, *supra* at 184. Thus, he said, it was necessary for him to

take into account the decree’s effect on other public policies, such as the First Amendment principle of diversity in dissemination of information to the American public. Consideration of this policy is especially appropriate because, as the Supreme Court has recognized, in promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws.

*Id.*

In *Red Lion*, the Supreme Court unanimously embraced a robust view of the affirmative duty of government to facilitate speech, pointing to the public’s “collective right to have the medium function consistently with the ends and purposes of the First Amendment.” *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Justice White elaborated that “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.” *Id.* He added that “It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.” *Id.*

The Court relied on similar principles in upholding the FCC’s broadcast ownership rules in

*FCC v. NCCB*, 436 U.S. 775 (1978). Quoting the Court of Appeals, the unanimous decision held that “far from seeking to limit the flow of information, the Commission has acted...‘to enhance the diversity of information heard by the public without on-going surveillance of the content of speech.’” *Id.*, 436 U.S. at 801 (citation omitted).

The role of the First Amendment was dramatically restated in the Supreme Court’s *Turner* cases. Echoing the issues framed in *Associated Press*, the majority in *Turner* held that considerations of both competition and diversity justified enactment of cable must carry rules. In *Turner I*, the majority held that “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.” *Turner Broadcasting System v. FCC*, 512 U.S. 622, 663 (1994). After remand for fact finding, it reaffirmed that holding in *Turner II*. *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1978). Interestingly, Justice Breyer concurred in *Turner II*. Based on the record which had been developed, he disagreed that the must carry regime was justified by competitive considerations. However, he did agree with the majority’s finding about the impact of the must carry rules on the marketplace of ideas. He wrote separately to express the view that diversity was, by itself, a sufficient basis to sustain those rules. The “basic noneconomic purpose” of the 1992 amendments to the Communications Act, he said, “is to prevent too precipitous a decline in the quality and quantity of programming choice....” *Id.*, 520 U.S. at 227. Quoting *U.S. v. Midwest Video* and *Associated Press*, he said that “This purpose reflects ‘what has long been a basic tenet of national communications policy,’ namely that ‘the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. That policy, in turn, seeks to facilitate the public discussion and informed deliberation which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve.’” *Id.* (citations omitted.)

Thus, there is a long and unbroken line of authority that government can and must take into account the effect of its policies on diversity and the marketplace of ideas. Application of these

precedents compels creation of a National Broadband Plan in which the government affirmatively acts to promote free speech and expression.

**B. The Communications Act of 1934.**

Having been the agency charged with the creation of a government-wide plan, the FCC must also view its mandate through the lens of its duties under the Communications Act. Its actions should reflect the diversity goals of the public interest standard Act. *See, e.g.*, 47 U.S.C. §§ 230, 301, 303, 307, 309. For instance, in Section 230(a)(3), Congress found that

The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenue for intellectual activities.

Accordingly, in Section 230(b), Congress declared, *inter alia*, that 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, unfettered by Federal or State regulation;...

Similarly, §§ 301, 303, 307, 309 of the Communications Act require the Commission to base its decisions on a public interest standard, which, among other things, requires the Commission to ensure a diversity of voices in the marketplace of ideas. *See e.g., Further Notice of Proposed Rulemaking*, 21 FCCRcd, 8834, 8837 (2006).

The Supreme Court has definitively held that the FCC's construction of the public interest "invites reference to First Amendment principles." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122. A consistent line of precedent underscores the importance of a national communications policy that enhances the diversity of information sources. *See, e.g., CBS, Inc. v. FCC*, 453 U.S. 367, 395-96 (1981); *FCC v. NCCB, supra*, 436 U.S. at 797-97; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390; *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 216-17 (1943).

**II. THE NATIONAL BROADBAND PLAN SHOULD BE PREMISED ON STRONG AND ENFORCEABLE POLICIES PROMOTING NON-DISCRIMINATION AND INTER-CONNECTION.**

One of the best ways to fulfill the goals of the First Amendment in construction of the National Broadband Plan is to insure Network Neutrality.

The First Amendment's mandate, as well as the need to create a platform for economic growth, require the Commission to make plain that the National Broadband Plan be based on strong and enforceable interconnection and non-discrimination obligations. Without such requirements, broadband users will face real and potential constraints which would have a dramatic effect on the exercise of First Amendment rights to speak and to be heard in the marketplace of ideas. Prohibition of access to particular content or content providers or on the ability of devices to network with each other can all interfere with vibrant civic discourse. The same is true of practices which degrade the functionality of devices or the accessibility of certain applications, content, or services.

**III. THE COMMISSION CAN BEST MEET ITS OBLIGATIONS UNDER THE FIRST AMENDMENT BY FOSTERING AN AGGRESSIVE PLAN FOR BROADBAND DEVELOPMENT.**

To meet the constitutional imperative to create a vibrant platform for democratic discourse and the exchange of political, social, artistic and philosophical expression, as well to create an opportunity for economic growth and innovation, the FCC should take an aggressive view of the role of government in the buildout and expansion of broadband.

National broadband access can revolutionize the way that American citizens communicate, work, entertain, and inform themselves, but unless federal action is taken to ensure that such access is truly ubiquitous, the digital divide will grow into a gaping chasm.

Many people in this country do not have access to broadband, because their communities are unserved or underserved. The problem is one of quantity. Either there is no broadband at all, or there is not enough, putting the cost of high-speed internet access at a premium. Whether the problem is no service or deficient service, the result is the same. Broadband access is placed out of reach.

The right plan must prioritize providing the benefits of broadband to these quite-often poor, rural, or other underprivileged areas. That plan should emphasize availability and competition in the interest of consumers. Increased competition will drive down prices, open up new markets for businesses, and provide customers with access to the full spectrum of national broadband providers.

The swift injection of capital to deliver affordable broadband to these areas would have the greatest benefit with the fastest return. The alternative, to simply facilitate market forces, would have lackluster results which may not be seen for years. Given the aims of the Recovery Act, the choice seems obvious.

The following are but a few of the foreseeable benefits of a plan that invests in providing access to unserved and underserved areas. A nationwide system of internet access available to all would have many positive effects in the area of civic participation. In fact, if implemented properly, the system could make the U.S. into an even brighter example of democracy. Contact between citizens and public servants would increase, as would the ease of such contacts. Indeed, ubiquitous broadband would lead to a more participatory “E-Government” system wherein the public could make better informed decisions and the government could respond quickly to citizen needs.

It is impossible to envision the advent of E-Government without the existence of widespread broadband access. If the government makes ubiquitous broadband its policy priority, e-voting, citizen- and interest-group policy facilitation, and voter participation will flow from that choice. Without nationwide broadband access for all citizens, the benefits to democracy offered by the information revolution will never be realized.

The proposition that nationwide access to high speed broadband would consequentially increase civic participation is supported by the results of a Pew Internet & American Life Project poll, published on April 15, 2009. Those results show that during the recent presidential election nearly three-quarters of all internet users, or 55% of the adult population of the U.S., logged onto the internet “to get involved in the political process or to get news and information about the

election.”<sup>1</sup> More Americans than ever used the internet to voice their opinion about political topics, to share political content with one-another, and to take part in the political debate. This was especially true of young voters, over two-thirds of whom used social networking sites to engage in political activity.<sup>2</sup> Pew’s research also shows that increased political activity on the internet has enhanced voters’ desire to remain politically engaged between elections.<sup>3</sup> Those who are engaged expect to have contact with public officials. Nationwide broadband would help facilitate that contact.

Pew’s poll is not the only study showing that ubiquitous broadband internet access would lead to greater civic participation. Research conducted on content posted to Howard Dean’s Blog for America during the 2004 election discovered a focus on substantive issues, as opposed to mere partisan sniping.<sup>4</sup> Furthermore, many of those who contributed had never participated in politics prior to their involvement with the weblog.<sup>5</sup> Such participation is only likely to grow if more individuals are given the keys to enter the online debate.

Consumer welfare will also be advanced by ubiquitous broadband. Easier access to the wealth of information accessible online will increase public awareness. By ensuring that all citizens have high speed access to the internet, the government will assist in making its primary stakeholders into more informed individuals. The federal government has already taken great strides towards public transparency through noteworthy efforts like the Freedom of Information Act, and its digital successor, E-FOIA. By creating publicly-accessible, government-run information clearinghouses, the federal government has enabled the public to view the inner workings of how law and policy take shape. Moving those clearinghouses out of the confines of filing cabinets and into the limitless potential of the internet made access to that information easier.

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<sup>1</sup> <http://www.pewinternet.org/Reports/2009/6--The-Internets-Role-in-Campaign-2008.aspx>

<sup>2</sup> *Id.*

<sup>3</sup> <http://www.pewinternet.org/Infographics/Obama-voters-expect-to-remain-mobilized.aspx>

<sup>4</sup> Kerbel and Bloom, *Blog for America and Civic Involvement*, 10 Harvard International Journal Of Press/politics, 3, 4 (2005).

<sup>5</sup> *Id.* at 5.

But ease of access, or access at all, cannot be the sole measurement for the success of such a system. It must be measured by the full scope of its availability. At present, due to a lack of high speed connections, many Americans cannot reliably access this information. A disparity exists: those with broadband connections can comb through volumes of information in microseconds, while others may not be able to access that information at all.

The right federal policy could level the playing field, providing all citizens with direct access to information straight from government sources. Consequently, the citizenry would become more informed and aware of public issues. The government would, in turn, be more responsive. Public officials could more easily identify topics of concern to their constituents, and officials' time would be freed up by reducing the need for formalized, in-person public meetings. By moving these meetings to the internet, more citizens could participate, and public officials could more thoughtfully address the concerns raised. Incidentally, this would also have a positive impact on the environment and on infrastructure; removing the need for in-person attendance at these meetings will mean fewer cars on the road. All of this would greatly benefit democracy.

Likewise, by enabling all Americans to connect to the internet at broadband speeds, the manner in which information flows will be bettered. Take for example the reputable SCOTUSblog, [www.scotusblog.org](http://www.scotusblog.org), which tracks and monitors Supreme Court opinions. This website, run by members of the public, lays out the holdings of complicated cases handled by the nation's highest court, and comments on the arguments forwarded by the Justices. This weblog makes these opinions, which are often cryptic when viewed in isolation, understandable to laypersons. The inevitable consequence of increased internet access is the creation of other websites like this one, on just about any given topic.

The FCC would be wise to recognize the opportunity afforded to the government by such topic-based group cohesion. By adopting a ubiquitous broadband policy, the Commission will help to aid individuals in connecting with other persons of like mind. As those individuals identify with

others, new interest groups will arise and existing groups will grow. By aiding the formation and growth of such groups, the government will see a decrease in the number of individual citizen complaints, and will enable citizens to seek alternative means of airing grievances. This will free up governmental time and resources. Additionally, it will be easier for the government to expend those resources which it must in response to the inquiries of large groups, as opposed to scores of solitary individuals.

Enhancing the nation's online presence will also lead to innovation in the online public arena, which results in content that is free to access and serves a public good. One such site came into the limelight during the recent advent of the new strain of swine flu. The Flu Wiki, [www.fluwikie.com](http://www.fluwikie.com), tracks government responses to localized flu outbreaks, provides flu preparedness information, and allows users to create and edit content. Creating a ubiquitous national broadband network would allow those who currently cannot get reliable information on catastrophic event preparedness to do so. This would be of great public benefit because many of those who lack access would be among the most vulnerable were an outbreak to occur.

As noted before, increasing access to the internet will enable people to consume more information. They will, in turn, become more discriminating consumers of that information. This has been shown to be true in recent scholarly research. Consumers of news media are more likely to seek verification or refutation of, or simple commentary on, news reports by accessing news-related weblogs and other websites.<sup>6</sup> Readers are then likely to issue comments of their own, which are commented on in turn, leading to an ongoing discussion that is unhindered by regional or cultural barriers.

Furthermore, as traditional newspapers move from a primary print format to a primary web-centric format, the need for ubiquitous public access to the internet will increase. Though newspapers

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<sup>6</sup> See, e.g., Delwiche, *Agenda-setting, opinion leadership, and the world of Web logs*, 10 First Monday 12 (2005).

may never truly die, it is true that they are struggling financially. Many, such as the Seattle Post-Intelligencer, have opted to go web-only in order to cut costs and remain competitive. Were this to happen in smaller markets, the only source of local or national news might no longer exist. Widespread broadband would alleviate, or even completely negate, this problem, allowing the public to continue to receive important news.

The purely economic benefits of a ubiquitous nationwide broadband network cannot be discounted, either. One estimate projects that a stimulus of \$5 billion, less than that included in the Recovery Act, would create 100,000 jobs in the short term, and 2.5 million jobs through network effects.<sup>7</sup> Adding new voices and ideas into the mix will also increase innovation as these persons bring novel ideas to the table. It is through the sharing of collective experiences and collaboration that new technologies and products are being developed.<sup>8</sup> Increasing the availability of high speed internet access will also increase productivity.<sup>9</sup> One positive consequence is that businesses in unserved and underserved areas will be able to communicate more effectively.

We are also likely to see a repeat of the benefits which were realized when broadband was made available to those areas currently fully served. Consumers will be able to research and purchase products online, putting more cash into the stream of commerce. Businesses will find a new marketplace for their products. Entrepreneurs will bring new business ventures into being. The benefits of bringing faster information flows to communities where it is currently dry or but a trickle are many and vast.

In conclusion, providing the capital to enhance broadband service for underserved areas, or bring it to those areas currently without it, is a wise investment. Creating a nationwide broadband system that is truly ubiquitous in its availability would result in the greatest returns in the short term,

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<sup>7</sup> Adamski, *Broandband Stimulus Policy in Europe and the US: a Comparative Review*, 18 Media Law & Policy 155 (2009).

<sup>8</sup> Bogan, *The Economic Benefits of Broadband and Information Technology*, 18 Media Law & Policy 161 (2009).

<sup>9</sup> *Id.* at 173.

and have many foreseeable long-term benefits as well. Reliable, affordable broadband internet access will benefit the American economy and the American democratic system. The federal government should aggressively pursue the goal of high speed connectivity for all citizens.

## CONCLUSION

The Commission has a once in a lifetime opportunity to create conditions that promote democracy and prosperity by construction of a National Broadband Plan. MAP urges the Commission to be bold in its implementation of this directive.

Respectfully submitted,

Andrew Jay Schwartzman

Parul Desai

Law Student Intern:  
Bryan Utter  
University of Missouri School of Law

Media Access Project  
Suite 1000  
1625 K Street, NW  
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