Before the
Federal Communications Commission
Washington, DC 20554

In the Matters of	)	
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International Comparison and Survey Requirements in the Broadband Data Improvement Act	)	GN Docket No. 09-47
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion	)	GN Docket No. 09-137

To: The Commission

COMMENTS – NBP PUBLIC NOTICE # 13
OF
THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Danielle Coffey
Vice President, Government Affairs

Rebecca Schwartz
Director, Regulatory and Government Affairs

TELECOMMUNICATIONS INDUSTRY ASSOCIATION
10 G Street, NE
Suite 550
Washington, D.C. 20002
(202) 346-3240

Its Attorneys

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I. INTRODUCTION AND SUMMARY

The Telecommunications Industry Association ("TIA"), pursuant to the FCC's Public Notice # 13 in the above-captioned proceedings,[1] hereby submits its comments on the Broadband Study conducted by the Berkman Center for Internet and Society.[2] TIA commends the FCC for commissioning the Broadband Study and for seeking to incorporate data from international markets into developing its National Broadband Plan.[3] However, TIA believes that the

[1] Comment Sought on Impact of Broadband Study Conducted by the Berkman Center for Internet and Society (NBP Public Notice # 13), *Public Notice*, DA 09-2217 (rel. Oct. 14, 2009) ("Broadband Study PN").

[2] The Berkman Center for Internet & Society at Harvard University, *Next Generation Connectivity: A review of broadband Internet Transitions and policy from around the word* (Oct. 2009 Draft), *available at* http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf ("Broadband Study").

[3] TIA has long advocated that the Commission take a look at the practices of governments of other nations that often are far more proactive in support of private sector innovation and in encouraging broadband adoption by stimulating demand for broadband services. *See* Comments of the Telecommunications Industry Association, GN Docket No. 07-45 (filed May 16, 2007); TIA Industry Policy Playbook 2009 at 14; Comments of the Telecommunications Industry Association, GN Docket No. 09-51 (filed June 5, 2009) ("TIA Broadband Plan Comments").

Broadband Study has strayed far from its initial charge of conducting "an expert review of existing literature and studies about broadband deployment and usage throughout the world."[4] Moreover, even before the close of the comment period, numerous observers have identified flaws and concerns with the Broadband Study, particularly its "judgment-laced call for the implementation of onerous 'open access' regulatory policies."[5]

Specifically, the Broadband Study appears to show a lack of appreciation for the competitive, multi-platform U.S. broadband marketplace. Indeed, the study appears to omit and/or understate key industry and regulatory events and their collective impact on U.S. broadband infrastructure and service providers.[6] Instead of getting pulled into a renewed debate over "open access" policies, the Commission should focus on the very real challenges facing the U.S. broadband market including the goal of improving broadband availability in rural markets and the need to drive broadband adoption across all demographics.[7]

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[4] Broadband Study PN at 1.

[5] Seth L. Cooper, *The Faulty Berkman Report: The Fallacy of Overlooking Secondary Consequences*, The Free State Foundation, at 2 (Nov. 3, 2009) ("Cooper"). *See also* George Ou, *Flawed Data in Berkman broadband study*, Digital Society (Oct. 19, 2009), *available at* http://www.digitalsociety.org/2009/10/flawed-data-in-berkman-broadband-study/ (last visited Nov. 11, 2009) (questioning the Broadband Study's use and omission of a number of different broadband data points); Suzanne Blackwell, *Broadband Internet International Comparisons – Redux*, Giganomics Consulting, Inc. (Oct. 16, 2009), *available at* http://giganomicsconsulting.squarespace.com/observations-old/2009/10/16/broadband-internet-international-comparisons-redux.html (last visited Nov. 11, 2009) ("Blackwell") (highlighting in part concerns regarding the Broadband Study's analysis of 3G mobile penetration in Canada and the U.S.).

[6] "Although the report is subtitled 'A review of broadband Internet ***transitions and policy*** from around the world' (emphasis added), [the Broadband Study] does not correctly review the most pronounced and obvious *transition* in the very nation for whom [the Broadband Study] would now radically remake *policy*." Bret Swanson, *Preparing to Pounce: D.C. angles for another industry*, The Technology Liberation Front (Oct. 19, 2009), *available at* http://techliberation.com/2009/10/19/preparing-to-pounce-d-c-angles-for-another-industry/ (last visited Nov. 11, 2009) ("Swanson") (emphasis in original).

[7] The Broadband Study defines "open access" policies to include "unbundling, bitstream access, collocation requirements, wholesaling, and/or functional separation" policies that have played a core role in the first generation transition to broadband in most "high performing countries." Broadband Study at 11.

Finally, before the Commission even begins to consider taking action based on the Broadband Study, it must ensure compliance with the Data Quality Act ("DQA") by putting the Broadband Study out for a rigorous, independent, peer review.

II. THE BROADBAND STUDY FALLS SHORT OF ITS MANDATE AND DOES NOT ACKNOWLEDGE THE UNIQUE STATUS OF THE U.S. BROADBAND MARKET

The Broadband Study falls short of the Commission's stated goal of providing a review of existing broadband literature and studies from around the world.[8] One observer has commented that the study "isn't a reliable straightforward comparison of deployment, adoption, speeds and prices of broadband technology among different countries that one might have expected – or at least hoped for."[9] Lenard echoes these concerns, noting that the study ignores some important scholarly contributions to the broadband discussion and is thus "incomplete and not objective" and "does not accomplish its intended purpose."[10]

These views reflect TIA's own concerns with the Broadband Study. In fact, the Broadband Study appears to be predisposed to "prove" that the U.S. broadband market is lagging and thus U.S. regulatory polices should be questioned.[11] In fact, it ignores readily available data that would at least provide a counterweight to the regulatory policies it seeks to advance.[12]

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[8] For example, it is surprising that the Broadband Study would fail to include average global connection speeds from Akamai's quarterly State of the Internet, "Through its globally deployed server network and by virtue of the billions of requests for Web content that it services on a daily basis, Akamai has a unique level of visibility into the connection speeds of the systems issu-ing [sic] the requests, and as such, of broadband adoption around the globe." Akamai, *The State of the Internet*, Vol. 2, No. 2, at 25 (2009). *See also* George Ou, *Measure broadband versus advertised broadband ranking*, Digital Society (Oct. 9, 2009), *available at* http://www.digitalsociety.org/2009/10/measured-broadband-versus-advertised-broadband-ranking/ (last visited Nov. 12, 2009) (comparing real-world Akamai results to other studies to show the shrinking difference between the U.S. broadband market and other traditional international broadband leaders, such as South Korea, Sweden and Japan). *See also* Broadband Study PN, Questions 1-2.

[9] Cooper at 2.

[10] Comments of Thomas M. Lenard, Ph.D., at 1 (filed Nov. 9, 2009) ("Lenard Comments").

[11] "Our findings confirm the *widespread perception* that the United States is a middle-of-the-pack performer." Broadband Study at 10 (emphasis added).

[12] In his June 2009 paper, Wallsten provides a very compelling analysis of certain flaws in OECD's estimates of

While there is "is much to be learned from the growing body of international comparisons including the Berkman Center Broadband Report,"[13] TIA is concerned that some may seek to rely on elements and rankings from the Broadband Study without accounting for the study's methodological and analytic flaws. Indeed, Ford suggests that the Broadband Study actually supports the notion that open access polices reduce the consumption of broadband.[14] The Commission should exercise caution to view the Broadband Study with a careful and critical eye particularly in light of the substantial body of countervailing work as it relates to the unique status of the U.S. broadband market.[15]

A. The Broadband Study Fails To Account For The Multi-Platform U.S. Broadband Market

The U.S. enjoys a multi-platform broadband marketplace that is relatively unique to the rest of the world.[16] Unlike most other nations, providers in the U.S. compete aggressively in terms of price, service, and technology to provide the best broadband experience to consumers.[17]

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international broadband connections, in particular the organization's reliance on per capita estimates. Wallsten notes that because "average household sizes differ across countries, when *every household in every country* is connected to broadband the U.S. will rank 18th among OECD countries and much lower when compared to all countries in the world." Scott Wallsten, *Understanding International Broadband Comparisons 2009 Update*, Technology Policy Institute, at 2 (June 2009) ("Wallsten").

[13] Blackwell.

[14] George S. Ford, Ph.D., *Whoops! Berkman Study Shows "Open Access" Reduces Broadband Consumption*, Phoenix Center Perspectives 09-05, at 1 ("Ford") ("[T]he Berkman Study first improperly estimates its econometric model and then incorrectly interprets the results from it. The error in the interpretation is significant. While the study's authors verbally conclude that open access policies stimulate increased consumption of broadband, the econometric model they rely upon shows the opposite—open access *reduces* the consumption of broadband.") *See also* Broadband Study PN, Question 3.

[15] *See* Blackwell. *See also* Lenard Comments at 7 ("The Berkman study describes the experiences of a number of countries but does not incorporate any of the case studies that do not support its conclusions.").

[16] *See* Broadband Study at 29, Table 3.1 (detailing broadband penetration by technology).

[17] *See* Comments of the National Cable and Telecommunications Association, GN Docket No. 09-51, at 10 (filed June 8, 2009) ("NCTA Broadband Plan Comments") (In 2000, only 46 percent of households had access to high-speed Internet access provided by a cable operator. Ten years later, that figure has doubled as cable operators now offer high-speed Internet service to more than 92 percent of American households.); Comments of the United States Telecom Association, GN Docket No. 09-51, at i (filed June 8, 2009) ("By some estimates, cumulative capital expenditures by broadband providers from 2000-2008 were over half a trillion dollars, and private investment in broadband infrastructure has grown consistently since 2003. As a result of this massive private investment in infrastructure, . . . [o]ver 90% of U.S. households can choose from either a wireline or a cable broadband service and

Swanson well summarizes the differences between the U.S. broadband market and the rest of the world as follows:

> Another important market distinction: The U.S. has by far [sic] largest cable TV presence of any nation reviewed. Cable has a larger broadband share than DSL+fiber, and has since the late 1990s. No nation has nearly the divided market between two very substantial technology/service platforms. This unique environment makes many of the [Broadband Study] comparisons less relevant and the policy points far less salient.[18]

In short, broadband service in the U.S. is provided through multiple platforms and cannot reasonably be compared to broadband service in countries operating on a single platform paradigm. The suggestion found in the Broadband Study that "[f]acilities-based competition usually complements, rather than substitutes for, access-based competition" simply does not hold true for the U.S.[19] Investment incentives are much different for a country with a single technological platform, particularly one that is significantly funded by the government and thus by taxpayers.

The Broadband Study, however, failed to consider adequately the competitive marketplace in the U.S. Rather, it "dismissed facilities-based competition and instead emphasizes government-managed competition."[20] In its review of the structure of the U.S. broadband marketplace, the Broadband Study offered this skeptical observation:

> In summary, resistance by incumbents and skepticism by the courts meant that the unbundling provisions of the 1996

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approximately four-fifths of U.S. households have access to both. In addition, mobile wireless broadband, from at least one of several providers, is available to more than 95% of U.S. households."); Comments of CTIA-The Wireless Association®, GN Docket No. 09-157 *et al*., at 66 (filed Sept. 30) (citing Sarah Keefe, *U.S. tops worldwide charts for mobile web browsing and spending*, Bango (Mar. 12, 2009), *available at* http://news.bango.com/2009/03/12/us-tops-mobile-web-browsing-and-spending-charts/) (Wireless web use in the U.S. ranks first in the world, accounting for 29.3 percent of all mobile web surfing worldwide according to Bango, a firm that tracks statistics for surfing of web sites optimized for mobile users.).

[18] Swanson.

[19] Broadband Study at 76, Table 4.1. *See also* Broadband Study PN Questions 2. 4.

[20] Cooper at 3.

> Telecommunications Act were largely stillborn; certainly in their application to the emerging broadband market. In their stead, the FCC decided to embrace a theory that competition between the incumbent telephone companies and incumbent cable companies—inter-modal competition—introduced sufficient competition to discipline both. That decision was then upheld by a divided Supreme Court as permissible, if not necessarily advisable. Our review of the experiences of other countries during this past decade, relative to that of the United States, suggests that the original judgment made by Congress [] represented the better course. . . . [T]he weight of the evidence supports the conclusion that open access policies, where seriously implemented by an engaged regulator, contributed to a more competitive market and better outcomes.[21]

This commentary, however, is belied by the undisputed growth of the U.S. broadband marketplace over the past five to ten years.[22] Moreover, as Cooper rightly notes, with "its seeming embrace of a 'wasteful competition' rationale, the [Broadband Study's] recommended 'open access' policy lends itself to the unending regulation of almost every conceivable aspect of broadband infrastructure technology."[23] Put another way, under the preferred approach of the Broadband Study, government regulators would be responsible for driving investment in the network(s) as there simply would be little to no incentive for the incumbent provider to upgrade facilities when they in turn would be shared with competitors.

Even the Broadband Study acknowledges that while "the relative share of direct government investment is harder to gauge outside of Sweden, it does appear that the leaders in fiber deployment—South Korea, Japan, and Sweden—are also the leading examples of large, long term capital investments through expenditures, tax breaks, and low cost loans that helped

[21] Broadband Study at 83.

[22] *See infra* n.17.

[23] Cooper at 3 (citing a reference to "approaches to share costs, risk, and facilities, rather than focusing primarily on *creating redundant facilities to assure competition*." Broadband Study at 76, Table 4.1) (emphasis added).

deployment in those countries. These countries have *spent substantially more*, in public spending on a per capita basis, than the U.S. has appropriated for stimulus funding."[24]

B. The Broadband Study Fails To Correctly Acknowledge The History Of U.S. Broadband Infrastructure Deployment

The Broadband Study also misses the mark by failing to acknowledge the regulatory and industry events that preceded the current state of U.S. broadband deployment.[25] For example, the study suggests that the FCC decided to abandon an open access model of regulation for broadband in a series of decisions in 2001 and 2002.[26] To the contrary, the FCC's regulatory paradigm for broadband was not established with any degree of certainty until several years *after* the FCC's 2003 *Triennial Review Order*.[27] Key decisions that followed the *Triennial Review Order* include the Supreme Court's *Brand X* ruling[28] and the FCC's several reclassification orders that came after *Brand X* in 2005-2007.[29] Consequently, an accurate review of the U.S. broadband market is best analyzed from 2005 forward to understand how the regulatory system

[24] Broadband Study at 13 (emphasis added). The study also adds that France is an example of a high performing country that invested almost nothing directly into the underlying network and instead relied almost exclusively on fostering a competitive environment. *Id.* But with 95 percent of broadband customers served by DSL, the Broadband Study notes that the French government has announced its intention to help finance the deployment of fiber networks. *Id.* at 181. This is not surprising given the lack of incentive for providers to develop next generation networks.

[25] *See* Broadband Study PN, Questions 2, 4.

[26] Broadband Study at 12, 82-83.

[27] *See* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004).

[28] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (affirming FCC's cable modem analysis) ("*Brand X*").

[29] *See, e.g.*, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005); Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, 22 FCC Rcd 5901 (2007).

for broadband is working because prior to that period the industry was plagued by regulatory uncertainty.[30]

The Broadband Study also fails to mention such major events as the U.S. telecom crash of 2001/2002[31] and the U.S. unbundling experience.[32] Lenard commented that, "The Berkman study gives only brief mention to the U.S. unbundling experience.… In fact, the U.S. experience with unbundling was extensive and it was not positive. While the U.S. experience dealt mostly with entrance into local telephone markets, the lessons are highly relevant to the broadband market. Why the Berkman study chose to essentially ignore the U.S. experience with open access, which is well documented, is unclear."[33] Cooper agrees that "the Berkman Report entirely ignores empirical evidence of the real-world, deleterious economic incentive effects of unbundling regulations."[34] Cooper and Lenard both point to the work done by Crandall detailing the difficult economic and regulatory environment caused by the unbundling regime.[35] Crandall specifically talked about the impact on incumbent local carriers that caused them to reduce their

[30] *See* Preserving the Open Internet, Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, *Notice of Proposed Rulemaking*, FCC 09-93, at ¶ 48 (rel. Oct. 22, 2009) (noting the dramatic increase in broadband Internet access service adoption from approximately thirty percent of American households in 2005 to sixty-three percent in 2009). *See also* John B. Horrigan, *Home Broadband Adoption 2009*, Pew Internet and American Life Project, at 11 (June 2009), *available at* http://www.pewinternet.org/~/media//Files/Reports/2009/Home-Broadband-Adoption-2009.pdf ("Horrigan").

[31] Press Release, Yankee Group, Global Telecommunications Capital Spending to Decline 4 Percent, Despite Revenue Growth (Apr. 1, 2009), *available at* http://www.yankeegroup.com/pressReleaseDetail.do?actionType=getDetailPressRelease&ID=2453 (comparing the 2009 economic crisis to the 2002 telecom nuclear winter – "Unlike during the telecom 'nuclear winter' of 2002, *which saw capex spending fall off of the proverbial cliff*, the current economic crisis is driving measured capex reductions.") (emphasis added). See also Broadband Study PN, Questions 2, 4.

[32] *See, e.g.*, Robert W. Crandall, *Competition and Chaos, U.S. Telecommunications Since the 1996 Telecom Act*, Brookings Institution Press (2005) ("Crandall"); Scott Wallsten and Stephanie Hausladen, *Net Neutrality, Unbundling, and their Effects on International Investment in Next-Generation Networks: Review of Network Economics*, vol. 8, issue 1, Technology Policy Institute, at 90-112 (Mar. 2009), *available at* http://www.techpolicyinstitute.org/files/wallsten_unbundling_march_2009.pdf.

[33] Lenard Comments at 4-5.

[34] Cooper at 4.

[35] *See id*.; Lenard Comments at 5

capital spending more than cable and wireless companies.[36] Crandall also found that in 2002 Bell Company capital spending fell the most in states that were reducing their unbundled network element rates.[37]

Swanson rightly provides a compelling chart that details the level of U.S. information communications and technology ("ICT") investment over the past two decades.[38] What is clear is that ICT investment waned from 2000 to 2003 and since that time has steadily increased to levels exceeding previous peaks. The relationship to the period of regulatory certainty that began in 2003 is noteworthy. Equally noteworthy is the 2008 U.S. investment of $455 billion or 22 percent of the country's capital investment.[39] As Swanson notes, $65 billion alone was invested by communications services providers.[40]

C. The National Broadband Plan Must Look At The Current Broadband Market To Determine How The Government Can Best Stimulate Deployment And Adoption

Private investment has driven the U.S. broadband market to the point that the U.S. has at least 92-94 percent broadband penetration.[41] Yet, the U.S. faces unique challenges in developing a National Broadband Plan that pushes broadband penetration rates higher, stimulates deployment to rural areas and promotes adoption in large and small communities alike.[42] Thus,

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[36] Cooper at 4 (citing Crandall at 69).

[37] *Id*. (citing Crandall at 70).

[38] *See* Swanson, "U.S. ICT Investment (billions of US$)" chart. *See also* NCTA Broadband Plan Comments at 9 (table on cable industry infrastructure expenditures).

[39] *See* Swanson.

[40] *Id*.

[41] *See* Robert D. Atkinson, *Policies to Increase Broadband Adoption at Home*, The Information Technology and Innovation Foundation, at 1 (Nov. 2009) (citing Federal Communications Commission, *September Commission Meeting on the National Broadband Plan* (Sept. 29, 2009), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2009/db0929/DOC-293742A1.pdf) ("FCC September Broadband Presentation").

[42] For example, a study conducted by New York City found that virtually every household in the city is currently being passed by one service provider and 89 percent of households are passed by at least two providers. However, there is only a 52 percent adoption rate in the city, and the broadband adoption gap between low-income versus moderate- to high-income households was found to be approximately 28 percent. *See* Comments of the City of New

to drive ubiquitous broadband availability and adoption in the U.S., the government must look beyond the Broadband Study to craft an approach that makes sense for the U.S. broadband marketplace. Such an approach begins with a carefully calibrated National Broadband Plan that seeks to combine targeted government action with the power of a competitive market to ensure both ubiquitous broadband deployment *and* adoption, particularly for those living in unserved and underserved areas.[43]

For example, government can and should promote broadband deployment through the use of targeted measures and by exercising exclusive regulatory authority over the inherently interstate broadband market.[44] In contrast, government efforts to impose detailed regulatory regimes, such as the kinds advocated in the Broadband Study have tended to inhibit deployment by prompting litigation and regulatory arbitrage, undermining investment incentives and deterring entry. The Commission should therefore resist the call of the Broadband Study to impose detailed prescriptive regulation on the ways in which competing platform providers operate their next-generation networks.[45] Instead, the National Broadband Plan should look to dedicate government resources to tackle specific market failures – like the three to six million

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York, In the Matter of the American Recovery and Reinvestment Act of 2009 Broadband Initiatives, Docket No. 090309298-9299-1, at 3-4 (filed Apr. 13, 2009). Relatedly, in a June 2009 report entitled "Home Broadband Adoption 2009," Pew found that home broadband adoption stood at 63 percent of adult Americans as of April 2009. *See* Horrigan at 3-4.

[43] In this regard, TIA commends the FCC's recent request for comment on broadband adoption issues. *See* Comment Sought on Broadband Adoption (NBP Public Notice #16), *Public Notice*, DA 09-2403 (rel. Nov. 11, 2009).

[44] Such measures include "technology-neutral subsidies and tax breaks to favor research and deployment; the adoption of policies favoring trade and liberalizing the cross-border flow of capital and labor; the elimination of impediments to investment (including regulatory disparities that indirectly favor one technology over another); the modernization of spectrum policy to ensure the highest value public interest use of spectrum; and the remedy of clear market failures." TIA Broadband Plan Comments at 6. The important roles of private sector investment and R&D were both acknowledged in the recent FCC September Broadband Presentation. FCC September Broadband Presentation at 14, 137-140 (citing TIA position on the need for the U.S. government to make "long-term communications research a funding priority to sustain the advancement of information and communications technology as a vital area of long-term economic and societal growth.").

[45] *See* Broadband Study PN, Questions 4, 6.

households that lack any access to high-speed Internet access services[46] – and not try to micromanage larger markets that clearly are working.

Nevertheless, if there is one element the Commission should take from the Broadband Study, it is the impressive commitment by the South Korean government to implement systematic and extensive demand side programs.[47] In the U.S., demand-side efforts should include, at a minimum, universal service support subsidizing adoption by low-income users and laptops and other broadband-capable devices (such as extending the existing Lifeline and Link-Up programs to subsidize broadband Internet access services for low-income Americans).[48] The Commission also should look at funding for computer and "digital literacy" projects and funding for programs that bundle the purchase of a PC and broadband subscription at discounted rates for students, rural, low-income and vulnerable populations.[49]

III. COMMISSION ACTION BASED ON THE BROADBAND STUDY WOULD NOT MEET THE REQUIREMENTS OF FEDERAL LAW

As detailed above, the Broadband Study standing alone is wholly insufficient as a foundation for potential new Commission regulation. More important, the Broadband Study does not meet the rigorous standards and requirements established by the federal DQA[50] and applicable regulations and guidelines. The Commission, therefore, must provide an opportunity for the public to "seek and obtain correction of information . . . that does not comply with the [DQA] guidelines."[51]

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[46] FCC September Broadband Presentation at 51.

[47] Broadband Study at 171-172.

[48] *See* TIA Broadband Plan Comments at 9-10, 26.

[49] *Id*. at 7.

[50] Section 515 of the Treasury and Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153 (2000), *reprinted at* 44 U.S.C.A. § 3516, Historical and Statutory Notes ("DQA").

[51] *Id.*, section 515(b)(2). *See also* Broadband Study PN, Questions 5, 6.

The DQA requires the Office of Management and Budget ("OMB") and covered Federal agencies to develop government-wide standards "for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the provisions of [the PRA]."[52] The logical corollary to this requirement is that agencies may not rely on data that lacks quality, objectivity, utility and integrity. Indeed, OMB has made clear that an agency's use of information in the context of adopting new regulations falls squarely within the parameters of the DQA.[53] Over the years, FCC Commissioners too have recognized the importance of high quality, objective data as the basis for Commission action.[54]

In accordance with the DQA, OMB and the Commission have issued guidelines elaborating on the fundamental data standards of quality, objectivity, utility, and integrity. OMB states that the DQA requires assurance that information, "as a matter of substance, is accurate, reliable, and unbiased."[55] OMB guidelines "call for an additional level of quality" for situations involving scientific or statistical information; such data must be developed "using sound

[52] *Id.*, section 515(a).

[53] OMB defines "dissemination" to include the distribution of "information prepared by an outside party in a manner that reasonably suggests that the agency agrees with the information." *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, 67 Fed. Reg. 8452, 8454 (OMB 2002) ("*Information Quality Guidelines*"). The term "information" means "any communication or representation of knowledge such as facts or data, in any medium or form." *Id.* at 8460. Thus, reliance on information for rulemaking purposes constitutes "dissemination." *See generally*, *Final Information Quality Bulletin for Peer Review*, 70 Fed. Reg. 2664, 2667 (OMB 2005) ("*Peer Review Guidelines*") (explaining, by way of example, that use of information "as the basis for an agency's factual determination that a particular behavior causes a disease" would constitute "dissemination").

[54] *See* Written Statement of Julius Genachowski Chairman Federal Communications Commission, Before the Committee on Energy and Commerce, Subcommittee on Communications, Technology, and the Internet, US House of Representatives, at 9 (Sept. 12, 2009) ("The American people deserve an FCC that . . . is data driven in its decision-making."); Response of Robert M. McDowell, Commissioner, FCC to Questions for FCC Members from the Hon. John D. Dingell, Chairman, House Committee on Energy and Commerce *et al.*, at 13 (Feb. 7, 2007) ("Peer review is another method of ensuring that Commission data and analyses are accurate."); Response of Jonathan S. Adelstein, Commissioner, FCC to Questions for FCC Members from the Hon. John D. Dingell, Chairman, House Committee on Energy and Commerce *et al.*, at 21 (Feb. 7, 2007) ("Policy debates and decision-making at the FCC increasingly turns on quantitative data and analyses. As a result, *the agency should invite peer review of FCC studies that will be used as the basis for policy changes*.") (emphasis added).

[55] *Information Quality Guidelines*, 67 Fed. Reg. at 8460.

statistical and research methods."[56] The *FCC Guidelines* reflect these same standards:

> In a substantive sense objectivity means that, where appropriate, data should have full, unbiased, reliable, accurate, transparent documents. . . . In a scientific, financial, or statistical context, substantive objectivity means that the original and supporting data shall be generated, and the analytic results shall be developed, using sound statistical, and research methods.[57]

Moreover, where the information will have a clear and substantial impact on important public policies or private sector decisions, the information must be "capable of being substantially reproduced."[58] The *FCC Guidelines* go on to provide that: "For information judged to have more influence or important impact, the degree of imprecision that is tolerated is reduced."[59]

Even more recently, OMB adopted *Peer Review Guidelines* requiring covered Federal agencies to subject to peer review information that "will have or does have a clear and substantial impact on important public policies or private sector decisions," unless such review is prohibited by law.[60] While the details of peer review generally are left to the agency's discretion, the agency's peer review process must be calibrated to the specific context,[61] and must occur prior to the information's use as the basis for regulation.[62] Reviewers must "prepare a report that describes the nature of their review and their findings and conclusions," which the agency shall make available online. Peer review is not completed until "the agency considers

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[56] *Id.* at 8459.

[57] Implementation of Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554, *Information Quality Guidelines*, 17 FCC Rcd 19890, 19896 ¶ 11 (2002) ("*FCC Guidelines*").

[58] *Information Quality Guidelines*, 67 Fed. Reg. at 8460.

[59] *FCC Guidelines*, 17 FCC Rcd at 19896-97 ¶ 13.

[60] *Peer Review Guidelines*, 70 Fed. Reg. at 2667, 2675.

[61] *Id.* at 2675.

[62] *See id.* at 2668.

and addresses the reviewers' comments."[63]

Even more stringent requirements apply where – as here – the information at issue is novel, controversial, or precedent-setting, or has significant interagency interest (*i.e.*, where the information is "highly influential").[64] Agencies relying on "highly influential" assessments must ensure balance and independence among any panel of reviewers,[65] excluding any agency employees not retained for the sole purpose of conducting peer reviews.[66] After the peer reviewers issue their assessment, the agency must explain in writing all actions it "has undertaken or will undertake" in response and why it believes those actions will be sufficient to address concerns raised by the review.[67] Finally, while agencies may sometimes rely on previous peer reviews conducted by third-parties in the case of "influential" information,[68] the Guidelines require "highly influential" information to be reviewed under the agency's supervision.[69]

There can be no dispute that the Broadband Study fails to satisfy the DQA standards of quality, objectivity, utility, and integrity. As discussed above, commenters in this proceeding have provided compelling evidence that the study includes methodological flaws and fails to account for critical data.[70] Thus, consistent with its obligations under the DQA and OMB's *Peer*

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[63] *Id.* at 2670.

[64] *Id.* at 2671.

[65] *Id.*

[66] *Id.* at 2676.

[67] *See id.*

[68] *Id.* at 2675.

[69] *Id.*

[70] *See, e.g.*, Cooper at 2 ("It is hardly unexpected that a correlation can be found between certain 'open access' policies and Internet adoption or broadband deployment in a given nation. … However, correlation is not the same as causation, particularly in a complex marketplace involving many intervening factors affecting investment and innovation."); Ford at 2 ("Accordingly, policymakers would be remiss to accord the Berkman Study any probative weight, particularly with regard to the positive or negative effects of unbundling policies in a post-POTS [plain old telephone service] world."). *See also* Broadband Study PN, Question 6.

Review Guidelines, the FCC should subject the Broadband Study to a peer review process in order to "seek and obtain correction of information . . . that does not comply with the [DQA] guidelines."[71]

IV. CONCLUSION

TIA encourages the Commission to consider the Broadband Study consistent with the recommendations set out above.

Respectfully submitted,

TELECOMMUNICATIONS INDUSTRY ASSOCIATION

By: */s/ Danielle Coffey*

Danielle Coffey
Vice President, Government Affairs

Rebecca Schwartz
Director, Regulatory and
Government Affairs

10 G Street, NE
Suite 550
Washington, D.C. 20002
(202) 346-3240

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[71] DQA, section 515(b)(2).