JOHN D. DINGELL
15TH DISTRICT, MICHIGAN

CHAIRMAN EMERITUS
COMMITTEE ON
ENERGY AND COMMERCE
CO-CHAIR
HOUSE GREAT LAKES
TASK FORCE
MEMBER
MIGRATORY BIRD
CONSERVATION COMMISSION

Congress of the United States
House of Representatives
Washington, DC 20515–2215

WASHINGTON OFFICE:
ROOM 2328
RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–2215
(202) 225–4071

DISTRICT OFFICES:
19855 WEST OUTER DRIVE
SUITE 103–E
DEARBORN, MI 48124
(313) 278–2936

23 EAST FRONT STREET
SUITE 103
MONROE, MI 48161
(734) 243–1849

301 WEST MICHIGAN AVENUE
SUITE 305
YPSILANTI, MI 48197
(734) 481–1100

May 27, 2010

The Honorable Julius Genachowski
Chairman
U.S. Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Genachowski:

I write to you with respect to the May 6, 2010, announcement by the Federal Communications Commission ("the Commission") that it will commence a proceeding to classify broadband access services as a telecommunications service subject to the provisions of Title II of the Communications Act of 1934 (47 U.S.C. 201 *et seq.*).

As you are aware, I support calls for appropriate and reasonable authority for the Commission to address and prevent consumer abuses with respect to the Internet, as well as encourage private sector investment and innovation. More specifically, I have long supported an open Internet and have voted in favor of network neutrality in the past. I continue to believe that keeping the Internet open and accessible is an important goal that will promote civic discourse through the proliferation of new media, as well as contribute to economic growth and prosperity.

As you are also aware, as Ranking Minority Member of the House Committee on Energy and Commerce, I was intimately involved in the drafting of the Telecommunications Act of 1996 and its consideration by the Committee and full House of Representatives, and stood next to President Clinton in the Library of Congress at its enactment. Moreover, as Chairman of the Committee prior to 1994, I authored related predecessor legislation.

For both legal and policy reasons, however, I have strong reservations about the course the Commission is presently taking with respect to the regulation of broadband access services. I have arrived at this conclusion both as a supporter of the principle of network neutrality and as one who remembers what the Congress intended when it created the distinction between "telecommunications services" and "information services" in the 1996 Act. With that history and experience in mind, I would appreciate your response to the following questions:

1. In its 1998 *Report to Congress*, the Commission, then under the leadership of Chairman William Kennard, concluded, "when an entity offers transmission

incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information' it does not offer telecommunications. Rather, it offers an 'information service' even though it uses telecommunications to do so." This statement indicates the Commission's conclusion that the terms "telecommunications service" and "information service" are mutually exclusive. Now it appears that the Commission is embarking on an effort not simply to find anew the existence of two separate services, but actually to disaggregate into two parts what for the last several years has been viewed by consumers as a single service and further, then to subject the transmission component to Title II of the Communications Act. Do you disagree with the conclusion reached by the Commission in its 1998 report? If so, is that because you believe the Commission's original conclusion was erroneous, or rather because you believe the underlying technological facts (as distinguished from the legal situation created by the D.C. circuit court's recent decision in *Comcast vs. FCC*) have changed since 1998? If the latter, please explain what technological facts have changed so as to warrant a departure from the Kennard Commission's vision.

2. In its 2002 *Cable Modem Order*, the Commission applied the conclusions of its 1998 report referenced above and held that broadband transmission service provided via cable modem was an information service, not a telecommunications service. The Supreme Court sustained that approach in its 2005 *Brand X* decisions. Subsequently, the Commission extended that conclusion to other modes of broadband transmission, including DSL, wireless, and broadband over power lines. Do you believe the underlying technologies or relevant facts associated with those technologies have changed since 2005, so as to warrant abandoning that approach? If so, please explain why.

3. Your announcement of a new approach to classifying broadband transmission service and the accompanying explanation of Commission General Counsel Austin Schlick appear to rely heavily upon a dissent in the *Brand X* case written by Associate Justice Antonin Scalia. In that case, Justice Scalia was joined by only two of his colleagues. The six-justice majority in that case sustained the Commission's classification of broadband transmission as an information service, which in turn is subject to light regulation under Title I of the Communications Act of 1934. Please cite any other Commission decision or order that has relied so heavily upon a minority opinion in a Supreme Court case. Further, please share any evidence or indication you may have that any of the other six justices would reverse themselves and support classifying broadband transmission as a Title II telecommunications service.

4. In the 12 years since the Commission first articulated its intention to treat telecommunications services and information services as mutually exclusive, and in the seven years since the *Brand X* decision, no legislation has been introduced in the House of Representatives or Senate (let alone passed by either body) to change the Commission's 1998 interpretation of the distinction between

these two services or its 2005 placement of the various broadband modes in the latter category. In the 2009 case of *FCC vs. Fox Television Stations, Inc.*, the Supreme Court made clear that when an agency adopts a new policy that contravenes a previously established one, there are circumstances in which that agency must provide a "more detailed justification than what would suffice for a new policy created on a blank slate." One such circumstance involves serious reliance interests having been placed on the prior policy. Another is the development or discovery of "factual findings that contradict those which underlay its prior policy." In the absence of congressional action to change that policy after 12 years, what is your "more detailed justification" for changing course relative to regulation of broadband access services?

5. Under all the circumstances described above, would it not be better for the Commission to work with the Congress, the sole progenitor of the Commission's authorities, to secure the necessary statutory authorities to permit the appropriate and effective regulation of broadband, rather than following a tortured legal path premised on a minority opinion written by Justice Scalia?

These questions, as you may conclude, evince my grave concern that the Commission's current path with respect to the regulation of broadband is fraught with risk. I fear your "third way" risks reversal by the courts, especially given the scope of its efforts to expand the Commission's authority. It also puts at risk significant past and future investments, perhaps to the detriment of the Nation's economic recovery and continued technological leadership. More importantly, it may paralyze more holistic regulatory efforts to keep the Internet open to consumers, advance cybersecurity, protect consumer data privacy, and ensure universal access to and deployment of broadband.

On May 13, 2010, Energy and Commerce Subcommittee on Communications, Technology, and the Internet Chairman Boucher expressed a willingness to consider legislation to address the issues called into question as a result of the Supreme Court's decision in the case of *Comcast*. Committee on Energy and Commerce Chairman Waxman and Committee on Commerce, Science, and Transportation Chairman Rockefeller also have indicated an openness to legislation to provide the Commission with authority necessary to regulate broadband properly. These offers present the Congress and the Commission the opportunity to determine the appropriate authority the Commission needs, as well as the ability to do so in a manner that significantly reduces the risks inherent in the Commission's current course of action. I encourage the Commission to give serious consideration to abandoning the Title II classification effort it has set in motion, and instead seek the authority it needs by asking the Congress to enact a statute that delegates it. Following this course would be consistent with the proper and accepted role of administrative agencies and, more importantly, provide the Commission with a sound legal basis for pursuing policies listed above.

Thank you for your prompt attention to my concerns. Should you have any questions about this matter, please feel free to contact me directly or have a member of your staff contact Andrew Woelfling in my office at 202-225-4071.

With every good wish,

Sincerely,

John D. Dingell
Member of Congress

cc: The Honorable Henry A. Waxman, Chairman
Committee on Energy and Commerce

The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Rick Boucher, Chairman
Committee on Energy and Commerce
Subcommittee on Communications, Technology, and the Internet

The Honorable Cliff Stearns, Ranking Member
Committee on Energy and Commerce
Subcommittee on Communications, Technology, and the Internet

The Honorable Michael Copps, Commissioner
U.S. Federal Communications Commission

The Honorable Robert McDowell, Commissioner
U.S. Federal Communications Commission

The Honorable Mignon Clyburn, Commissioner
U.S. Federal Communications Commission

The Honorable Meredith Atwell Baker, Commissioner
U.S. Federal Communications Commission