MASSACHUSETTS
40 main st, suite 301
florence, ma 01062
tel 413.585.1533
fax 413.585.8904

WASHINGTON
501 third street nw, suite 875
washington, dc 20001
tel 202.265.1490
fax 202.265.1489

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www.freepress.net

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Chairman Henry A. Waxman
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Chairman Rick Boucher
Subcommittee on Communications, Technology and the Internet
2187 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Joe Barton
Committee on Energy and Commerce
2109 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Cliff Stearns
Subcommittee on Communications, Technology and the Internet
2370 Rayburn House Office Building
Washington, D.C. 20515

Dear Representatives,

We write to bring to your attention the trial pricing practices conducted by multiple broadband Internet access providers, including Time Warner Cable, AT&T and others. These companies are testing pricing tiers under which customers must pay overage fees for exceeding a monthly Internet "usage allowance." We agree with the thousands of Americans who have signed petitions, contacted their representatives, and held rallies opposing the new charges. This letter will explain how these pricing schemes can negatively impact consumers and long-term online innovation exactly when we need the opposite for economic growth. These practices continue in broadband markets across the country, and they deserve additional scrutiny before they move beyond their trial phases.

As these practices are currently being conducted, the usage limits appear to be arbitrarily low, and the overage charges appear arbitrarily high, when compared to the behavior of other providers and when considering the underlying costs of providing service. Monthly usage limits offered in the trials by Time Warner Cable[1] and AT&T are already insufficient for many individual users, and even more so for residential service shared by a family.[2] And, when users exceed these arbitrary allowances, they are charged an equally arbitrary incremental price for additional broadband use, commonly around $1 or $2 per GB. Yet, other broadband providers like Verizon and Cablevision seem to be able to compete and even flourish without limits or overage fees.[3] The wireless broadband networks are even more restricted than the wired network trials. All four major national wireless carriers limit the "unlimited" use of mobile broadband at either 5 or 10 GB. Overage fees above the wireless usage allowances are similarly

[1] Time Warner Cable proposed a 150 GB cap for $75/month in its much-discussed extension of the trial to Rochester, NY and other cities. This extension was shelved after overwhelming consumer protest, as well as vociferous opposition from Representative Eric Massa and Senator Charles Schumer, both of New York. Time Warner Cable has stated that the trials are on hold "while the customer education process continues." "Time Warner Cable Charts a New Course on Consumption Based Billing" (Apr. 16, 2009), *available at* http://www.timewarnercable.com/corporate/announcements/cbb.html.

[2] For example, Time Warner Cable's 40 GB limit is about 22 hours of Netflix HD streaming – roughly 4.5 days of viewing at the Nielsen average of 5 hours of television viewing per person per day. Alana Semuels, "Television viewing at all-time high," *Los Angeles Times* (Feb. 24, 2009), *available at* http://www.latimes.com/business/la-fi-tvwatching24-2009feb24,0,6282287.story.

[3] Karl Bode, "Cablevision: Metered Billing Confuses Customers," *DSLReports.com* (Apr. 7, 2009), *available at* http://www.dslreports.com/shownews/Cablevision-Metered-Billing-Confuses-Customers-101779.

disproportionate, ranging from $50 to $480 per GB.[4] Arbitrarily low Internet usage limits and arbitrarily high overage fees for both wired and wireless seem to suggest the possibility of market failure and anticompetitive, anti-consumer activity.

Although no provider has disclosed useful cost information, despite substantial public pressure,[5] available public data suggests that the usage fees are well above the marginal cost of providing Internet service.[6] In financial filings, broadband providers have disclosed to investors that the marginal cost of Internet usage is low and continuing to decrease. For example, Time Warner Cable's recent Securities & Exchange Commission filings reported decreased per-subscriber costs in 2008, thanks to decreased connectivity costs.[7] The price of electronics and the other costs of transport continue to decline, not increase. And, although some pundits claim that the coming "exaflood" will increase broadband cost and demand, the data from noted scholars like Andrew Odlyzko suggests that exaflood fears are widely overblown.[8]

Imposing arbitrarily low usage limits and arbitrarily high usage fees on Internet access may have substantial negative impacts on competition, innovation, and long-term economic growth. These price-gouging schemes will discourage consumers from using high-bandwidth Internet applications – especially video, damaging the nascent market for Internet delivery of video, a market that increasingly competes with traditional cable television services.[9] Popular high-bandwidth services such as YouTube, Flickr and online gaming might never have flourished if each use resulted in an additional charge. Worse, vertically integrated companies may seek to exempt their own content offerings from the limit, employing Deep Packet Inspection technology to identify affiliated and non-affiliated content, invading Internet users' privacy and creating additional anti-competitive effects.

If using the Internet costs consumers too much money, demand for broadband will certainly be reduced. This may impact the effectiveness of the Broadband Technology Opportunities Program, which was established to promote the adoption of broadband services and generate job creation and economic growth. In the context of stimulus funds, pricing practices that discourage use and increase average prices arbitrarily above costs directly contradict the statutory requirements that new networks be affordable and enjoy maximum utilization. Ultimately, high usage fees, that on average increase consumer costs, may reduce broadband penetration even as our nation continues to fall behind our global competitors. Though we respect the right of Internet service providers to earn a return on their investment, we must ensure fair consumer practices that also respect the broader economic value of a robust broadband infrastructure.

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[4] Certainly, the costs of operating wireless networks are higher than the cost of operating wired networks; but, particularly given wireless providers' claims that their services are substitutes for wired networks for purposes of seeking broadband stimulus funds, it seems unlikely that the underlying costs are 25-480 times higher, the ratio of the relative overage fees.

[5] Saul Hansell, "Time Warner Cable Profits Will Grow With Broadband Caps," *New York Times – Bits Blog* (Apr. 8, 2009), *available at* http://bits.blogs.nytimes.com/2009/04/08/time-warner-cable-profits-on-broadband-are-great-and-will-grow-because-of-caps/ ("I tried to explore the marginal costs with Mr. Hobbs. When someone decides to spend a day doing nothing but downloading every Jerry Lewis movie from BitTorrent, Time Warner doesn't have to write a bigger check to anyone. Rather, as best as I can figure it, the costs are all about building the network equipment and buying long-haul bandwidth for peak capacity.").

[6] *See, e.g.*, Saul Hansell, "Internet Providers Try to Charge More as Costs Fall," *New York Times* (Apr. 19, 2009), *available at* http://www.nytimes.com/2009/04/20/business/20isp.html.

[7] Time Warner Cable Inc., Quarterly Report 10-Q (period ending Sept. 30, 2008), *available at* http://files.shareholder.com/downloads/TWC/480611335x0xS950144-08-8127/1377013/filing.pdf.

[8] Nate Anderson, "Exaflood still MIA according to latest Internet traffic data," *Ars Technica* (Dec. 2, 2008), *available at* http://arstechnica.com/old/content/2008/12/exaflood-still-mia-according-to-latest-internet-traffic-data.ars.

[9] Consider Time Warner Cable CEO Glenn Britt's recent statement to investors: "[P]eople will choose not to buy subscription video if they can get the same stuff for free. … I think the cable network business will suffer mightily if this trend continues." *Time Warner Cable, Inc. Q4 2008 Earnings Call* (Feb. 4, 2009), *available at* http://seekingalpha.com/article/118521-time-warner-cable-inc-q4-2008-earnings-call-transcript?page=8.

When the prices in ostensibly competitive markets bear little or no relation to the costs, market forces are not working, calling into question the success of deregulatory moves by the Federal Communications Commission over the past decade. Additional measures may be needed to promote competition. We urge you to investigate ongoing metered pricing practices to determine the impact on consumers, innovation and competition on the Internet. We also urge you to consider whether above-cost metered pricing for broadband constitutes an unfair business practice. The burden of proof to demonstrate that prices are just and reasonable must fall to companies. They should disclose to administrative agencies such as the FCC and the FTC, and to the consumer, more detailed information about the marginal costs of Internet usage to prove that the charges are not merely price gouging in an insufficiently competitive broadband market.

We offer a few specific questions for your consideration:

1. Will there be any exemptions from overage charges for any Internet applications or services? Will there be any exemptions for Internet services that the Internet service provider or its affiliates offer or benefit from? Will there be any exemptions for other application or service providers who pay the Internet service provider to allow their services to be used over the Internet for free?
2. Are consumers permitted to view unlimited free video-on-demand content from a bundled cable television offering, despite limits on their ability to view competing online video products over the Internet?
3. Why are claims in 2009 of a pressing need to switch to metered billing different than claims made by cable companies in 2002, especially since the cost of the underlying technology has fallen for several decades and appears likely to continue falling at a steady rate? What evidence does the Internet service provider have to support this "new" need?
4. What are the provider's ongoing costs to provide Internet service on a per-household basis? What is the service provider's marginal cost for additional consumer use of the Internet, and how does this compare to the incremental price paid by the consumer?
5. What amount and percentage of capacity in the last mile of the service provider's network is allocated to Internet access service, as opposed to cable television or other non-Internet services? What amount and percentage of revenue and of profit does the service provider derive from its residential Internet access services, considering wired and wireless services separately?
6. In a robust network, substantial use of the Internet by consumers should have near zero marginal cost. What are the median and mean contention ratios in each of the neighborhoods where the service provider charges for metered use of the Internet?

We look forward to your continued leadership in preserving the Internet as a source of innovation, economic growth and consumer value.

Sincerely,

Ben Scott
Policy Director
Free Press