

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

In the Matter of)	
)	
Inquiry Concerning the Deployment of)	GN Docket No. 15-191
Advanced Telecommunications Capability)	
to All Americans in a Reasonable and Timely)	
Fashion, and Possible Steps to Accelerate)	
Such Deployment Pursuant to Section 706)	
of the Telecommunications Act of 1996,)	
as Amended by the Broadband Data)	
Improvement Act)	

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA) submits these comments in response to the *Notice of Inquiry* for the Commission’s annual broadband progress report.¹ While the annual report required under Section 706 has the potential to provide a useful analysis of the state of broadband in America, in recent years it has become a results-oriented exercise in which the Commission frequently moves the goal posts to ensure a negative finding on the reasonableness and timeliness of deployment. Unfortunately, the *Notice of Inquiry* suggests Commission is likely to continue this trend with the Eleventh Broadband Progress Report.

While the *Notice of Inquiry* focuses on the minutia of broadband measurement and implies that more detailed reporting will somehow improve deployment, the item is utterly silent on the real reasons for continuing deployment gaps, including the wasteful spending on the Connect America Fund program for price cap telephone companies, the insufficient level of

¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, GN Docket No. 15-191, Eleventh Broadband Progress Notice of Inquiry, FCC 15-101 (rel. Aug. 7, 2015) (*Notice of Inquiry*).

support devoted to tribal areas and other remote areas that currently have no meaningful prospect of being served, and the ongoing need to take long overdue action to address pole attachment concerns.

Instead of identifying actions that will bring broadband to unserved areas, the *Notice of Inquiry* proposes to add even more complexity to a report that already includes arbitrary metrics that seem designed to preclude a meaningful assessment of the marketplace and the services that consumers actually purchase and use. The Commission’s consideration of additional detail in the determination of what constitutes “advanced telecommunications capability” pursuant to Section 706(b) of the Communications Act would not shed any new light on the state of broadband in America but would rather serve primarily to exclude broadband options used by consumers. Similarly, proposals to find that “reasonable and timely” deployment requires the availability of multiple providers or multiple technologies stretch the language of Section 706 well beyond what is plausible or warranted. The Commission should reject these proposals and refocus on conducting a useful inquiry into the state of the broadband marketplace and on taking meaningful steps to achieve the congressional goal of universal availability of broadband service to all Americans.

I. THE COMMISSION SHOULD BE DOING MORE TO BRING BROADBAND TO UNSERVED AREAS

In the *2015 Broadband Progress Report*, the Commission concluded that “advanced telecommunications capability” has not been deployed on a “reasonable and timely” basis because 55 million Americans do not have access to broadband service capable of 25 Mbps downstream and 3 Mbps upstream.² As NCTA subsequently explained, barring a change in

² *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry, 30 FCC Rcd 1375, 1377-78, ¶¶ 3-4 (2015 *Broadband Progress Report*).

course and contrary to its goals, the Commission to date is on a path that will lead to a similar conclusion for years to come.³ First, by raising the threshold speed to 25 Mbps down/3 Mbps up while simultaneously offering \$10 billion in Connect America Fund subsidies for telephone companies to deploy service at 10 Mbps down/1 Mbps up, millions of households likely will lack access to “advanced telecommunications capability” for at least the next six years and potentially far longer.⁴ Indeed, these government-subsidized monopolists have a strong incentive to do the bare minimum (i.e., to provide no more than 10/1 and to do so with the least investment possible) because the subsidies will deter any privately-funded company from competing in these areas and these speeds that the Commission fails to recognize as “advanced telecommunications capability” are likely to create a need for additional subsidies in the future. Competitive bidding for these subsidies rather than offering the telephone companies exclusive access to billions of dollars in support would have resulted in better, faster broadband speeds at competitive prices.⁵

Compounding this situation, the Remote Areas Fund (RAF) has yet to be implemented, nor has any meaningful support been provided for deployment in tribal areas, thereby leaving

³ Comments of the National Cable & Telecommunications Association, GN Docket No. 14-126 (filed Mar. 6, 2015) (NCTA 2015 Comments).

⁴ *Id.* at 5-6. To date, the Commission has failed to consistently distinguish between its use of the terms “broadband” and “advanced telecommunications capability.” For example, while the *Notice of Inquiry* clearly states that “we no longer equate the term “broadband” with the statutory term “advanced telecommunications capability,” *Notice of Inquiry* at ¶ 1, n.3, that distinction is often lost and the assertion is made that 25/3 is the standard for what the FCC considers broadband. *See id.*, Statement of Chairman Tom Wheeler (“Earlier this year, the Commission defined broadband as connections with throughput speeds of at least 25 Mbps downstream and 3 Mbps upstream.”); Statement of Commissioner Jessica Rosenworcel (“And while we keep in place our current 25 Megabit standard for broadband, we also ask about faster speeds in the future.”). If the Commission is going to use speed thresholds that vary depending on the particular purpose of the proceeding, it should take care to use the correct terminology so as to avoid confusion and misunderstanding by the public.

⁵ *See, e.g., A Milestone in Expanding Broadband to Rural America*, Blog post by Carol Matthey, Deputy Chief, Wireline Competition Bureau, Federal Communications Commission (Aug. 28, 2015) (“Our Rural Broadband Experiments program demonstrated that competitive auctions can draw interest from a variety of providers willing to provide faster broadband at lower cost”); *Notes from the Sandbox - The Rural Broadband Experiment Auction Results*, Blog post by Jonathan Chambers, Chief, Office of Strategic Planning and Policy Analysis, Federal Communications Commission, <http://www.fcc.gov/blog/notes-sandbox-rural-broadband-experiment-auction-results> (Dec. 24, 2014) (“[W]hen we compared the bids to the amount of support calculated by the FCC's cost model, the total requested in the auction in the aggregate is less than half the model-based support for those census blocks.”).

millions more households on the wrong side of the digital divide for the foreseeable future.⁶ In their statements as part of the *2015 Broadband Progress Report*, all three of the majority commissioners expressed dismay at the state of deployment in these areas,⁷ and it is now incumbent on the Commission to take action to address these concerns by using the over \$2 billion in universal service contributions that is sitting unspent (and growing each quarter) in a reserve fund held by USAC just for this purpose.⁸

Even if the Commission is hesitant to implement these broader initiatives, there are some simple steps it can take to promote broadband deployment. For example, the Commission has long recognized that high pole attachment costs are a barrier to greater broadband deployment and in 2011 it took steps to reduce the rates paid by telecommunications carriers so that they generally would be equal to the rates paid by cable operators.⁹ NCTA and COMPTTEL subsequently filed a short petition for reconsideration of that order proposing a simple rule change that would more effectively accomplish the Commission's goal of equalizing and reducing the rates paid by telecommunications carriers.¹⁰ Four years (and two pleading cycles)

⁶ NCTA 2015 Comments at 7 (“Notwithstanding the Commission’s thorough understanding of how best to bring broadband to the most remote parts of the nation, the Commission has yet to spend a single dollar to support deployment in areas that will be covered by the RAF.”).

⁷ *2015 Broadband Progress Report*, Statement of Chairman Tom Wheeler, 30 FCC Rcd at 1480 (“There is a large, and unacceptable, disparity in broadband access between urban Americans and Americans in rural areas and Tribal lands.”); *id.* at 1482, Statement of Commissioner Mignon Clyburn (“Today, however, that persistent gap affects too many households especially those who are low-income Americans, living on Tribal lands and in rural communities. This is unacceptable. And we must do more.”); *id.* at 1484, Statement of Commission Jessica Rosenworcel (“At the same time, the report highlights places where we have more work to do, namely in rural and Tribal areas.”).

⁸ See Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for Fourth Quarter 2015(July 31, 2015) at 11 (projecting reserve fund of \$2.66 billion by the end of 2015); Universal Service Administrative Company, 2014 Annual Report at 21 (showing \$2.17 billion in cash for High Cost program at the end of 2014).

⁹ *Implementation of Section 224 of the Act*, WC Docket No. 07-245, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5297, ¶ 131 (2011) (*2011 Pole Attachment Order*), *affirmed American Electric Power v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

¹⁰ See Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association, COMPTTEL and tw telecom, Inc., WC Docket No. 07-245 (filed June 8, 2011) (NCTA/COMPTTEL Petition).

later, with overwhelming support from all segments of the broadband industry,¹¹ a growing record of harm stemming from proposed rate increases by electric utilities,¹² and an explicit Commission promise to prevent such rate increases,¹³ it is past time for the Commission to grant this petition.

¹¹ See, e.g., Letter from A.J. Burton, Frontier Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 (filed Aug. 7, 2015) (Frontier Letter) at 1 (“Frontier and ITTA explained that they join the overwhelming support for the Petition”); Letter from Yaron Dori, Counsel for TDS Telecom to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 (filed July 30, 2015) at 2 (“TDS Telecom endorses this solution, as have many other parties that have filed comments on the Petition.”); Letter from Joshua Bobeck, Counsel for Lightower Fiber Networks to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 (filed July 30, 2015) at 6 (“[T]he Commission should swiftly grant the petition for reconsideration and should adopt the changes in the telecom rate formula recommended by Petitioners.”); Comments of the American Cable Association, WC Docket No. 07-245 (filed June 4, 2015) (ACA Comments) at 2 (“ACA urges the Commission to grant expeditiously the relief sought by the Petitioners.”); Comments of ITTA-The Voice of Mid-Size Communications Companies, WC Docket No. 07-245 (filed June 4, 2015) at 5 (“ITTA implores the Commission to grant the relief requested by the Petitioners consistent with achieving these public interest benefits.”); Comments of PCIA-The Wireless Infrastructure Association, WC Docket No. 07-245 (filed June 4, 2015) at 4 (“PCIA supports the Petition and urges the Commission to act expeditiously thereon.”); Comments of COMPTEL and Level 3, WC Docket No. 07-245 (filed June 4, 2015) at 4 (“COMPTEL and Level 3 request that the Commission expeditiously adopt the changes and clarifications requested in their Petition for Reconsideration.”); Comments of Verizon, WC Docket No. 07-245 (filed June 4, 2015) (Verizon Comments) at 7 (“The Commission should continue the reform that it began with its 2011 Pole Attachment Order by adopting the rule revisions proposed by the Petitioners”).

¹² See, e.g., Frontier Letter at 1 (“Frontier explained that it has experienced first-hand the competitive distortions and the artificial rate disparities predicted in the Petition.”); Reply Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245 (filed June 15, 2015) at 11-12 (“NCTA has learned of additional rate increase proposals since the initial comments were filed last week. For example, a number of cable operators in Pennsylvania have received notice from one utility that is proposing a telecommunications rate that is more than double the cable rate.”); Comments of the National Cable & Telecommunications Association at 6 (“Recent experience demonstrates that prompt action by the Commission is critical. For example, Vyve Broadband, a small cable operator that serves predominantly rural areas, recently received notice from one electric utility that its telecommunications attachment rate was increasing to a level that is 81 percent higher than its cable attachment rate.”); Comcast Comments at 5-6 (“Comcast recently received notice from American Electric Power (“AEP”) of a new and higher telecom pole rate. Specifically, AEP alleges that it has rebutted the Commission’s attaching party presumption and established an annual telecom pole rate of \$21.65 – a 72 percent increase over the cable pole rate of \$12.54.”); ACA Comments at 4 (“ACA has been informed by numerous members that they have received notice recently from pole owners about application of the higher telecommunications rate if they are providing BIAS.”); Verizon Comments at 4 (“Verizon has encountered the rate disparities predicted. During the past several years, Verizon has confronted efforts by power companies to use the 66-percent cost allocator for urban areas with average attaching entity numbers lower than 3, including the 2.6 number used in the Petitioners’ illustration.”).

¹³ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (rel. Mar. 12, 2015) at ¶ 482 (“To be clear, it is not the Commission’s intent to see any increase in the rates for pole attachments paid by cable operators that also provide broadband Internet access service, and we caution utilities against relying on this decision to that end. This Order does not itself require any party to increase the pole attachment rates it charges attachers providing broadband Internet access service, and we would consider such outcomes unacceptable as a policy matter.”).

The bottom line is that while the annual Section 706 report provides an excellent opportunity for the Commission and the public to identify gaps in broadband deployment, that reporting process ultimately is meaningless if the Commission does not also take timely steps to fill those gaps. Going forward, the Commission should devote fewer resources to measuring broadband and more attention to promoting its deployment and adoption.

II. THE COMMISSION SHOULD UNDERTAKE A MEANINGFUL ANALYSIS OF THE STATE OF BROADBAND IN THE UNITED STATES

A. The Report Should Reflect the Considerable Value that Consumers Receive from Services that Do Not Meet the 25/3 Threshold

As NCTA explained in connection with the Tenth Broadband Progress Report, the factual and legal basis for the Commission’s decision to establish the 25/3 threshold in defining “advanced telecommunications capability” is highly questionable. The decision was legally suspect because it adopted a forward-looking, aspirational standard when the statute calls for a report that judges the progress of the broadband services consumers currently use.¹⁴ And it was factually suspect because it was premised on unrealistic and unsubstantiated assumptions about the broadband needs of American consumers.¹⁵

From NCTA’s perspective, a progress report that is grounded in the real world supply and demand for broadband is far more relevant than one that establishes aspirational standards that do not reflect the services that consumers choose to purchase. Such a report would be grounded in facts regarding the wide range of options available to consumers through numerous different technologies, the limited bandwidth needed to run the most popular applications, and

¹⁴ See Letter from Matthew Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-126 (filed Jan. 22, 2015) at 2 (“Courts and the Commission have consistently interpreted this mandate as focusing on services that can support ‘current,’ ‘regular[]’ uses of broadband.”).

¹⁵ *Id.* at 3 (“Notably, no party provides any justification for adopting an upload speed benchmark of 3 Mbps. And the two parties that specifically urge the Commission to adopt a download speed benchmark of 25 Mbps – Netflix and Public Knowledge – both offer examples of applications that go well beyond the ‘current’ and ‘regular[]’ uses that ordinarily inform the Commission’s inquiry under Section 706.”).

the substantial variety of use cases across the American population, rather than simplistically assuming that all consumers are above average in their demand for broadband service and that services purchased by millions of consumers are somehow irrelevant.¹⁶ And it would devote more attention to analyzing the availability of speeds that enable critical tasks like applying for a job or doing research for a homework project and less attention to nascent functions like 4K video streaming.¹⁷ Accordingly, even if the Commission adopts the proposal in the *Notice of Inquiry* to retain the 25/3 threshold, it still should ensure that the analysis in the Eleventh Broadband Progress Report does a thorough job of addressing the full range of broadband services available to and used by consumers, and not just the subset of services that the Commission deems to be advanced telecommunications capability.

B. The Report Should Continue To Focus On Broadband Speed As the Dispositive Factor In Determining Whether Service Is “Available” For Purposes of Section 706

The *Notice of Inquiry* seeks comment on proposals that would continue the Commission’s recent trend of including additional characteristics in what it considers advanced telecommunications capability, thereby providing even more obstacles to reaching the conclusion that such capability is being deployed on a reasonable and timely basis. Specifically, in addition to considering whether a service meets the new 25/3 Mbps speed threshold, the *Notice of Inquiry* also suggests a service would not be considered advanced telecommunications

¹⁶ *Id.* at 4 (“In light of these findings, the adoption of a 25 Mbps/3 Mbps benchmark would improperly substitute the speculative judgment of the Commission for the actual, demonstrated preferences of consumers in the marketplace, and would be entirely out of step with current consumer conceptions of ‘broadband.’”).

¹⁷ NCTA 2015 Comments at 4 (“While the Commission has spent its time worrying about whether broadband customers are able to stream nascent 4K programming, it has virtually ignored those who have no broadband whatsoever.”).

capability unless it also satisfies standards for latency and consistency of performance and is offered at a sufficiently low price with a sufficiently large usage allowance.¹⁸

The theory underlying these proposals is that service that falls short on any one of these criteria may be inadequate to meet the needs of consumers and therefore should not be counted as part of the Section 706 reporting process.¹⁹ For a variety of reasons, this theory is suspect. Congress adopted a specific definition of the term “advanced telecommunications capability” that focuses on the technical characteristics of the network (“high-speed, switched, broadband”) and the services it enables (“high-quality voice, data, graphics, and video telecommunications”). Nothing in that definition suggests the price of the service or the existence or size of a usage allowance is relevant.

Moreover, it will not always be the case that the absence of one of these factors precludes a customer from fully using the service. For years, millions of consumers have used mobile broadband providers, which typically have usage allotments but allow customers who want to use more to pay more, and satellite broadband providers, which tend to have larger usage allotments but higher latency, to meet their broadband needs. Notably, very few, if any, ISPs impose static data caps that limit the total amount of data consumers can use; rather, ISPs that have implemented usage allotments continue to allow consumers who want to use more to pay for extra usage. Thus, in the real world, no ISP currently offers broadband Internet service with a usage allotment or latency that render the service effectively unusable.

¹⁸ *Notice of Inquiry* at ¶ 20.

¹⁹ *Id.* at ¶ 35 (latency); ¶ 42 (consistency). The *Notice of Inquiry* does not even attempt to explain why pricing and usage allowances are relevant to the assessment required under Section 706, but the Commission previously has suggested that “[p]rice is relevant to whether the service is in fact ‘available.’ Consumers take into account how much of their income they want to spend on a particular good or service.” *2015 Broadband Progress Report*, 30 FCC Rcd at 1411, ¶ 65, n.267. Similarly, it has stated that “to the extent that usage allowances affect the usability of a service, they could also be relevant to whether a service meets the definition of advanced telecommunications capability.” *Id.* at 1434-35, ¶ 101.

Furthermore, even if the Commission's theory for including these factors was correct, practical considerations suggest that the Commission should continue to look at physical plant location and downstream and upstream speed as the principal factors in determining whether a service qualifies. For example, while the *Notice of Inquiry* is correct that the 2014 Measuring Broadband America Report identified various metrics for reporting consistency of performance of the participating ISPs,²⁰ the metrics in the report were not selected based on any type of analysis and are entirely arbitrary. While those metrics may be acceptable for use in comparing performance across providers, there is no basis for concluding that the same metrics represent an appropriate measure of the level of consistency that is required to satisfy the definition of advanced telecommunications capability. Moreover, as the *Notice of Inquiry* acknowledges, the Commission does not gather data on consistency of performance at a meaningful level,²¹ and it would not be feasible to do so for the hundreds of ISPs that do not participate in the Measuring Broadband America program.

None of this is meant to suggest that these additional factors should be ignored completely by the Commission. As noted, the Commission has been exploring issues surrounding the measurement of latency and consistency in the Measuring Broadband America context and that is an appropriate forum in which to do so. Similarly, the Commission collects information regarding pricing and usage allowances as part of its urban rate survey and that is appropriate as well. And, of course, all ISPs are required to disclose to consumers information about factors such as latency and usage allotments to allow consumers to make informed decisions about whether such factors are important to their purchasing decisions. The simple point we are making here is that just because an issue is relevant to consumers (or the

²⁰ *Notice of Inquiry* at ¶ 43.

²¹ *Id.*

Commission) does not necessarily mean that it should be part of the assessment Congress specified under Section 706.

C. The Report Should Not Interpret “Reasonable and Timely” Deployment to Require the Availability of Multiple Providers or Technologies

In prior reports, the Commission has based its assessment of whether broadband deployment is reasonable and timely on how much of the country is served by at least one fixed broadband provider offering service that exceeds the relevant speed threshold. In the *Notice of Inquiry*, the Commission seeks comment on two possible changes to that approach. Specifically, it asks whether it should consider an area served only if it is served by (1) both a fixed broadband provider and a mobile broadband provider; or (2) multiple broadband providers, presumably without regard to technology.²² For the reasons explained below, both proposals should be rejected.

As an initial matter, neither proposal can be reconciled with the clear language used by Congress in the statute. As noted above, the definition of advanced telecommunications capability focuses on the technical characteristics of the network and the services it enables. Nothing in the language of the statute suggests that the number of providers is in any way relevant to the analysis, which is why the Commission has used the methodology it has for nearly two decades. Moreover, as noted by Commissioner O’Rielly, “the term is defined ‘without regard to any transmission media or technology.’”²³ Consequently, “as long as consumers have access to such capability, regardless of how it is provided, then the test is met.

²² *Notice of Inquiry* at ¶¶ 5-18, 51.

²³ *Id.*, O’Rielly Statement at 1.

Therefore, there is no statutory basis to break out mobile from fixed and require that both be available to reach a positive finding.”²⁴

Furthermore, the proposal to require the presence of both a fixed provider and a mobile provider is grounded in unsubstantiated assumptions regarding how customers use broadband services. The Commission asserts that “there are a number of factors that appear to indicate that mobile and fixed broadband are different services that address different consumer telecommunications needs and different components of the definition of advanced telecommunications capability.”²⁵ NCTA does not share this assessment. While fixed and mobile services obviously have different strengths, it is wrong to suggest that neither one can individually satisfy the needs of consumers or the definition of advanced telecommunications capability. Given the Commission’s recognition that a “significant portion of Americans subscribe only to fixed broadband, and a small portion of Americans subscribe only to mobile broadband,”²⁶ it naturally follows that, for a “signification portion” of consumers, only one type of service is necessary. In particular, the Commission’s casual dismissal of the possibility of customers relying solely on wireless broadband recalls similar statements the agency made in connection with wireless voice service, statements that were questionable when made and have now been proven to be completely wrong.²⁷

²⁴ *Id.* As NCTA has pointed out in prior years, there also is no statutory basis for the Commission’s previous determination that “reasonable and timely” deployment means that broadband is available to 100 percent of the population. *See, e.g.*, Petition for Reconsideration of the National Cable & Telecommunications Association, GN Docket No. 09-137 (filed Aug. 19, 2010) at 9. Given that the electric grid itself did not even reach all Americans after more than a century, the better interpretation is that “reasonable and timely” refers to progress in deployment over the prior year and not whether the goal of 100 percent coverage has been achieved. *Id.*

²⁵ *Notice of Inquiry* at ¶ 10.

²⁶ *See, e.g.*, *Notice of Inquiry* at ¶ 12. Based on the data sources cited by the Commission, between 34 and 45 percent of Americans rely solely on one type of service. *Id.*, nn. 28-29.

²⁷ *See, e.g.*, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622,

Finally, as explained above, the Commission’s own policies for disbursing CAF subsidies essentially guarantee that incumbent LEC beneficiaries will remain the sole wireline provider in subsidized areas. As such, meeting a multiple service provider criterion would effectively be precluded by the Commission’s own CAF policy and could again lead to a negative finding regarding broadband deployment. Such an outcome is nonsensical.

CONCLUSION

The annual Section 706 report can be a useful exercise for identifying gaps in broadband deployment. But the Commission should not lose sight of the fact that even the most well-researched and well-written report will not bring broadband to a single unserved household. Rather than adding new layers of complexity to the Section 706 report, the resources and attention of the Commission could be put to better use by implementing real solutions to problems that the Commission has left unresolved for years.

Respectfully submitted,

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8655, ¶ 59 (2010) (“[I]t appears that most mass market consumers use mobile wireless service to supplement their wireline service rather than as a substitute for their wireline service.”).