

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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)	

REPLY COMMENTS OF COMPTTEL

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COMPTTEL, by its undersigned counsel, hereby submits these Reply Comments in response to the comments filed concerning the Commission’s *Eleventh Broadband Progress Notice of Inquiry* which seeks input on the availability of advanced telecommunications capability (aka “broadband”) to all Americans in a reasonable and timely fashion.¹

I. INTRODUCTION AND SUMMARY.

As the preeminent national industry association for competitive communications networks and service providers, COMPTTEL represents wireline and wireless providers in the broadband marketplace. Such providers include, for example, companies providing fiber-to-the-

¹ *Inquiry Concerning the Deployment of 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*, Eleventh Broadband Progress Notice of Inquiry, GN Docket No. 15-191, FCC 15-101 (rel. Aug. 7, 2015) (“*Eleventh Broadband Progress NOP*”).

home as the third residential wireline provider in their communities in competition to the incumbent cable provider and the telephone company. In addition, COMPTTEL has among its membership, companies that focus on the business broadband marketplace and offer services to small businesses, medium and large enterprises with multi-locations, as well as schools, libraries, and local, state, and federal government agencies, including service to public safety offices. COMPTTEL also represents companies that provide residential and business wireless service, transit providers that carry broadband and Internet traffic, and online video distributors (OVDs) which offer video programming over broadband Internet access services to consumers. Each of these members are providing and/or relying upon broadband capability, and the Commission's role in encouraging broadband deployment and protecting and promoting broadband competition is key to ensuring that residential and business customers will have choice for their broadband provider, and the services they may choose to take over those broadband connections.

COMPTTEL will focus its Reply Comments on promoting the availability of competitive broadband networks and services, particularly focusing on two areas the Commission should address—special access and video reforms.² The Senate Report states that the goal of section 706 is “to promote and encourage advanced telecommunications networks, capable of enabling

² While these are actions that will have a significant impact, they are not the only areas that the Commission should address to promote broadband deployment and adoption. *See, e.g.*, COMPTTEL Reply Comments, Connect America Fund, Universal Service Reform—Mobility Fund, WC Docket No. 10-90, (promoting the availability of fixed and mobile networks in rural areas through universal service reform, including the implementation of Mobility Fund Phase II) (Sept. 8, 2014); and COMPTTEL Comments and Reply Comments, *Technology Transitions Policy Task Force*, GN Docket No. 13-5, (July 8, 2013 and Aug. 7, 2015, respectively) (promoting managed VoIP interconnection pursuant to the Act).

users to originate and receive affordable, high-quality voice, data, image, graphics, and video telecommunications services.”³ As the Commission itself has recognized in its last 706 Inquiry, “[c]ompetition has the potential to bring new broadband services, better service quality, greater selection, and lower prices.”⁴ Accordingly, the Commission must stay the course on developing and implementing pro-competition policies—as this is what will lead to more broadband choice, affordable prices, and higher broadband adoption rates—which will best serve U.S. consumers and businesses.

The FCC’s *Open Internet Order* provides a balanced, light-touch framework for preserving the Open Internet relied upon by hundreds of millions of Americans, as well as those millions of businesses that serve them using the Internet. The FCC’s action protects both innovators and investors. The rules have now been in place for three months without any sign of harm to investment in broadband infrastructure. Quite the contrary. Wireline and wireless broadband providers, including COMPTEL’s members, have continued to invest in their broadband networks and the services provided over the Internet. The rules benefit the entire Internet ecosystem and continued growth of this sector remains a catalyst for our economy.

As the Commission is well aware, the costs of deploying a broadband network are great. Wireline and wireless competitors use both their own networks and last mile access services,

³ Senate Report, S. Rep. No. 104-23, at 50 (1995).

⁴ *Inquiry Concerning the Deployment of 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*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, GN Docket No. 14-126, FCC 15-10, ¶ 150 (rel. Feb. 4, 2015).

including special access, from large incumbent local exchange carriers (“ILECs”) to serve customers. However, broadband deployment is being deterred by the ILECs anticompetitive lock-up agreements for special access services and unreasonable special access rates—for still-tariffed services as well as IP services no longer subject to ex ante regulation. By expeditiously reforming special access, the Commission will be unleashing further broadband deployment—wireline and wireless networks that will benefit both residential and business customers.

To further promote the availability of competitive wireline broadband in the residential marketplace, there are a number of additional impediments the Commission must address, including access to video programming at reasonable and non-discriminatory rates, terms and conditions. It also should promote competition for video navigation devices, and protect and promote an Open Internet and reasonable interconnection practices to encourage over-the-top video competition which will further promote broadband deployment and adoption of broadband service by consumers.

II. BROADBAND COMPETITION DRIVES INNOVATION AND INVESTMENT, AND CONSUMERS AND BUSINESSES ARE BEST SERVED BY ROBUST BROADBAND COMPETITION.

COMPTTEL, like USTelecom, recommends that the Commission should refine its approach to this inquiry to include the removal of barriers to infrastructure investment and “take concrete steps to create and sustain a regulatory environment that provides clear incentives for investment, including the removal of barriers and the promotion of facilities-based competition.”⁵ But, as history has demonstrated, that environment is one of competitive

⁵ US Telecom Comments, GN Docket No. 15-19, at 3 (Sept. 15, 2015).

policies—not the protectionist approach USTelecom seeks—as pro-competitive policies will lead to more investment and competition, benefitting consumers and the economy far more.

In particular, the Commission needs to stimulate broadband deployment by competitive providers, which in turn stimulates deployment by incumbents. Competition also creates innovation, which raises the standard of broadband regardless of how the Commission defines it. As Chairman Wheeler has stated: “The underpinning of broadband policy today is that competition is the most effective tool for driving innovation, investment, and consumer and economic benefits.”⁶

A significant benefit of the Telecommunications Act of 1996 (the “Act”) is that it was built upon the fundamental bipartisan principles of connected networks and competitive markets. Since 1996, an estimated \$1.4 trillion in investment has been made in the communications industry. In 2008, competitive carriers and cable operators spent almost \$17 billion—nearly 40% of the total wireline investments in the U.S.⁷ By 2012, they had increased their investments to 43% of total U.S. wireline expenditures.⁸ COMPTTEL members alone have made billions in

⁶ Prepared Remarks of FCC Chairman Tom Wheeler “The Facts and Future of Broadband Competition” 1776 Headquarters, Washington, D.C., (Sept. 4, 2014), *available at* <https://www.fcc.gov/document/chairman-remarks-facts-and-future-broadband-competition> (“*Wheeler 1776 Remarks*”).

⁷ *See* Written Statement of Mark Iannuzzi, President, TelNet Worldwide, Inc. on Behalf of COMPTTEL, United States House of Representatives, Committee on Energy and Commerce Subcommittee on Communications and Technology, Hearing on “The Evolution of Wired Communications Networks,” at 3-4, (Oct. 23, 2013), *available at* <http://docs.house.gov/meetings/IF/IF16/20131023/101418/HHRG-113-IF16-Wstate-IannuzziM-20131023.pdf> (“*Iannuzzi Testimony*”).

⁸ *Id.* (citing Susan M. Gately and Helen E. Golding, S.M. Gately Consulting LLC, *The Benefits of a Competitive Business Broadband Market*, at 16 (April 2013), *available at*

capital investments, improving the quality of life for all Americans through technological innovation, new services, affordable prices, and greater choice.⁹ Economists have found that competition causes both competitive carriers *and incumbents* to increase investment, employ more workers and foster innovation in new technologies.¹⁰

Competition not only promotes investment in broadband infrastructure, but also innovation in services that are delivered over that infrastructure. Indeed, the evolution from narrowband services, to broadband services, to high-speed broadband services, was created by competition. The investment, innovation, and competitive choice provided by competitors has, in turn, spurred investment in broadband deployment by incumbents, while increasing adoption of broadband by customers. For example, confronted by deployment of DSL by competitors in the mid-1990s, incumbents upgraded to DSL. Following the introduction of Ethernet services provisioned over fiber and copper by competitive carriers to businesses of all sizes, incumbent carriers responded with their own Ethernet offerings.¹¹

As Chairman Wheeler has stated:

It was the absence of competition that historically forced the imposition of strict government regulation in telecommunications. One of the consequences of such a regulated monopoly was the thwarting of the kind of innovation that competition

<http://thebroadbandcoalition.com/storage/benefits-of-broadband-competition.pdf> (“*The Benefits of a Competitive Business Broadband Market*”).

⁹ See Letter from Chip Pickering to The Honorable Greg Walden, Chairman, Subcommittee on Communications and Technology, U.S. House Committee on Energy and Commerce, (July 22, 2105), available at http://www.comptel.org/Files/filings/2015/7-22-15_COMPTEL%20SFTR%20letter%20House%20C&T%20Bband%20Investment%20Hearing.pdf.

¹⁰ See *The Benefits of a Competitive Business Broadband Market* at iv.

¹¹ See *Iannuzzi Testimony*, at 4-5.

stimulates. Today, we are buffeted by constant innovation precisely because of the policy decisions to promote competition made by the FCC and Justice Department since the 1970s and 1980s.¹²

New technologies and services have been introduced and widely adopted, many of which were in their infancy or not even in existence when the Act was passed. These developments demonstrate that the pro-competitive policies enacted in 1996 have succeeded in promoting significant investment and advancing the deployment of networks and services over the last 19 years. Competitors are entrepreneurial companies that continue to innovate and offer a wide array of broadband voice, video, Internet and data offerings, using both wireline (copper/fiber) and wireless networks to reach their customers. Among the state-of-the art solutions they deliver are managed services, cloud computing, and unique applications that are developed and deployed via next-generation, IP-based managed networks.

But USTelecom seeks a regulatory environment devoid of the policies that stimulates competition. For example, USTelecom alleges that recent decisions by the Commission, such as its *Open Internet Order* and *Technology Transitions Order*, have increased barriers to broadband investment and innovation.¹³ Yet, even the CEOs of its major members have made statements to the contrary. Verizon's CEO has said of the reclassification adopted in the *Open Internet Order*, to date it has had no impact on Verizon's business and that Verizon has "invested \$17 billion to \$18 billion over the last decade and [it is] going to continue to do that now."¹⁴ The CEO of

¹² *Wheeler 1776 Remarks*, at 3.

¹³ USTelecom Comments, GN Docket No. 15-191, at 2 (Sept. 15, 2015). USTelecom also filed a petition seeking to advance its argument for further forbearance from its ILEC obligations. COMPTTEL responded and incorporates that response in its entirety herein. COMPTTEL's Opposition to USTelecom's Petition for Forbearance, WC Docket No. 14-192 (Dec. 5, 2014).

¹⁴ Remarks of Lowell McAdam, Chairman and CEO, Verizon Comm'ns, Inc., Goldman Sachs Communacopia Conference, at 13-14 (Sept. 17, 2015).

AT&T even touts pro-competitive regulations as stimulating investment, acknowledging that "... business investment increases with thoughtful, responsible regulation. And when companies invest—whether in expansion or improved services for consumers and businesses—they create jobs. It is a simple, powerful formula."¹⁵

Moreover, the facts do not support USTelecom's assertions. In defense of its supposition, USTelecom cites to an article in which the author claims the changed regulatory landscape, namely the *Open Internet* decision, has led to a decline in investment by some ISPs.¹⁶ But, to the extent there were declines in capex by certain ISPs, the companies themselves do not attribute it to anything related to the FCC's policies. For example, on a July 2015 call reporting on the company's second quarter 2015 results, when asked directly what was driving the downtick in spending, AT&T CFO attributed the decline to its Project VIP initiative being completed and "not for lack of anything but for success. That's what's driving [AT&T's] changes . . . [AT&T is] going to continue to invest in capacity."¹⁷ Moreover, this decline was consistent with what the company stated in its filing to the Securities and Exchange Commission in November 2014 *prior to the Open Internet Order*.¹⁸ Likewise, before the *Open Internet Order*

¹⁵ See BusinessWire, "AT&T to Invest Approximately US\$3 Billion in Mexico to Extend Mobile Internet to 100 Million Consumers & Businesses by Year-End 2018," June 25, 2015, *available at* <http://www.businesswire.com/news/home/20150625006155/en/ATT-Invest-Approximately-US3-Billion-Mexico-Extend#.VgXd1MuFO75>.

¹⁶ USTelecom Comments, GN Docket No. 15-191, at 2 (Sept. 15, 2015).

¹⁷ See AT&T Earnings Report: Q2 2015 Conference Call Transcript, The Street Transcripts, July 26, 2015, *available at* <http://www.thestreet.com/story/13230810/6/att-t-earnings-report-q2-2015-conference-call-transcript.html>.

¹⁸ AT&T Inc. Form 8-K, Nov. 7, 2014 *available at* <http://www.sec.gov/Archives/edgar/data/732717/000073271714000126/form8k.htm> (*stating* "AT&T continues to expect capital expenditures during 2014 to be in the \$21 billion range.

was adopted, Verizon’s CFO stated that he has been “consistent with the fact” that the Verizon will spend more capex in wireless and curtail capex in wireline, noting that it is “getting to end the of [its] commitment to build around FiOS.”¹⁹ Also telling is the fact that the capex of Comcast—the nation’s largest ISP—is up in the first half of 2015.²⁰ Clearly, the pro-competitive policy landscape is not deterring investment. Moreover, companies have continued to propose and close mergers involving broadband networks delivering broadband Internet access service, and large incumbent LECs, including AT&T, have accepted CAF Phase II funding which requires them to build broadband networks. More importantly, competitive carriers and those that deliver services over the Internet have continued to invest and will continue to do so. Thus, the “evidence” offered by USTelecom that investment is hurt by the Commission’s pro-competition policies should be summarily dismissed as overwrought rhetoric from incumbents that seek protection from competition.

Indeed, while AT&T has changed its tune since its merger with a Bell Operating Company, in 2001 before Congress, the then AT&T General Counsel and Executive Vice President provided sound advice on how the Commission should accelerate the deployment of broadband:

What is the best way to accelerate the deployment of broadband or indeed any new technology? The Bells say relieve them of competitive pressures and they

AT&T expects 2014 to be the peak investment year for Project VIP and anticipates that the Wireless and Wireline segments’ spend to be proportionally consistent to 2013. AT&T expects 2015 capital expenditures for its existing businesses to be in the \$18 billion range.”).

¹⁹ 4Q 2014 Quarter Earnings Conference Call Webcast Jan. 22, 2015, *available at* <http://www.verizon.com/about/investors/quarterly-reports/4q-2014-quarter-earnings-conference-call-webcast/>.

²⁰ Comcast Reports 2nd Quarter 2015 Results, July 23, 2015, *available at* <http://www.cmcsa.com/releasedetail.cfm?ReleaseID=923465>.

will roll out new services faster. We say competition is the better guarantor that new technology will reach all Americans. There is a trust me approach, with all the dangers that entails. The other approach says to trust market forces, and trust competition, because time and again that has proven the correct course. The government trusted competition when it broke up the Bell system in 1984. The result is vibrant competition.²¹

III. SPECIAL ACCESS REFORM IS ESSENTIAL TO PROMOTE WIRELINE AND WIRELESS BROADBAND COMPETITION, AND THE COMMISSION SHOULD STAY THE PRO-COMPETITION COURSE AND COMPLETE THIS PROCEEDING EXPEDITIOUSLY.

While there has been substantial investment in networks over the last twenty years, there remains much more to be done to encourage additional network deployment. As the Commission has recognized, competition policies have been essential to laying the foundation for a broadband future, and wholesale policies in particular have played a vital role in unlocking competitive investment in the business broadband market, which is critical to the overall economy.²² In the context of broadband business services, in particular, Commission policies ensuring reasonably priced access to wholesale inputs and interconnection on reasonable and nondiscriminatory terms is necessary to advance the core goals of Section 706 to promote competition and spur broadband investment.

²¹ Statement of James W. Cicconi, General Counsel and Executive Vice President, AT&T Corporation, "[The Internet Freedom and Broadband Deployment Act of 2001: Hearing before the Committee on Energy and Commerce, House of Representatives, One Hundred Seventh Congress, first session, on H.R. 1542, April 12, 2001](https://archive.org/stream/internetfreedom00statgoog/internetfreedom00statgoog_djvu.txt)", pp. 39-40 available at https://archive.org/stream/internetfreedom00statgoog/internetfreedom00statgoog_djvu.txt.

²² "Residential broadband competition—as important as it is—is not the only type of competition we must foster to lay the foundation for America's broadband future. Ensuring robust competition not only for American households but also for American businesses requires particular attention to the role of wholesale markets, through which providers of broadband services secure critical inputs from one another." Federal Communications Commission, Connection America: The National Broadband Plan at 47 ("*National Broadband Plan*"), available at <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

As the Commission recognized in its *Technology Transitions Order*, “competitive carriers often rely on a combination of their own facilities and the purchase of last-mile facilities and services from the incumbent carriers, such as unbundled network elements and special access services to provide business services.”²³ It further noted the benefits stating “the organizations these carriers serve benefit from this competition in their purchase of communications services, which helps them serve their customers better and more efficiently.”²⁴ Indeed, the Commission recognized that competitive local exchange carriers are the principal source of competition to ILECs in the enterprise market.²⁵

Competitive LECs provide broadband services that are vital inputs for small and medium business and enterprise users, including mobile carriers. The Commission recognizes the critical role that wholesale access to last-mile inputs plays in promoting competition and has emphasized the technology transitions should not be used as an excuse to limit competition that exists.²⁶

Accordingly, the Commission adopted a requirement that ILECs offer reasonably comparable wholesale IP last mile access to competitors upon discontinuance of its TDM service, pending the Commission’s review of the special access proceeding wherein the Commission is undertaking the most comprehensive data analysis to date by any FCC, to determine the state of competition for last mile access.

²³ *Technology Transitions, Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, GN Docket No. 13-5, FCC 15-97, Report And Order, Order On Reconsideration, and Further Notice of Proposed Rulemaking, ¶ 6 (rel. Aug. 7, 2015).

²⁴ *Id.*

²⁵ *Id.* ¶ 137.

²⁶ *Id.* (internal citations and quotes removed).

The lack of reform regarding special access services—and granting of forbearances for certain Ethernet special access services—has been a severe hindrance to broadband competition. Special access is a critical input to broadband competition. These dedicated telecommunication services—both TDM and IP—are essential inputs for competitive providers that offer wireline and wireless broadband services in competition with incumbents. Wireline carriers rely on special access as a link that enables it to connect the customer’s location to the competitor’s own network, enabling the competitor to offer broadband services, such as Internet access, and interoffice networking, to the customer. Competitive wireless carriers rely on special access services for the backhaul links that connect cell sites to the network.²⁷ In order to ensure competition—and consequently growth and innovation—in the broadband market, the Commission must address the unjust and unreasonable rates, terms and conditions the incumbents impose on purchasers of special access services.

Special access services are inherently critical to the broadband market because only the incumbent has the ubiquitous networks that reach virtually all business locations. Competitors, on the other hand, would have to duplicate the entire ILEC network. While many competitors have been building their own networks since the 1996 Act, the economics of replicating *all* portions of the incumbent network infrastructure have not changed, as the most significant costs of providing service lie with the physical infrastructure, not with higher layers that electronically define and control traffic flow. Thus, competitors purchase special access circuits directly from the incumbent (or indirectly through competitive providers that rely on special access circuits

²⁷ See also Comments of Competitive Carriers Association, GN Docket No. 15-191 at 18-19 (Sept. 15, 2015).

from the incumbent) to supplement the reach of their own networks as necessary to serve their customers. Without the ability to supplement their reach, competitors' incentive to build their own network where economical would be diminished.

As demonstrated by recent filings, competitors' ability to build even where otherwise economical is thwarted by the unjust and unreasonable rates, terms and conditions the incumbents impose on special access services. For example, XO has explained how shortfall penalties attached to special access purchases have had a "chilling effect" on XO's fiber deployment plans, causing it not to construct to building locations that otherwise met its criteria. The impact has a domino effect, as XO explains, had it "been able to justify the build to the target buildings, the construction would have created future opportunity for XO to bring fiber to additional buildings that would have passed by the new construction as less marginal costs."²⁸ Thus, it is not recent Commission decisions in the *Open Internet Order* or *Tech Transitions Order* that have deterred facilities-based competition, as US Telecom suggests. It is the anti-competitive practices incumbents—which of course have every incentive to deter competition of any sort—that deters construction of competitive networks and hence more effective competition. Relief from the incumbents' unjust and unreasonable rates, terms and condition—that only serve to provide them an exorbitant return on investments—would free up resources for

²⁸ Letter of Thomas Cohen, Counsel for XO Communications, Inc. to Marlene Dortch, WC Docket No. 05-25 (Sept. 23, 2015).

competitors like XO and Level 3 to invest in network plant²⁹ and relieve Sprint from the “staggering” costs it faces in transitioning to Ethernet backhaul.³⁰

As the Commission has concluded, the “nation’s *regulatory policies* for wholesale access affect the competitiveness of markets for retail broadband services provided to small businesses, mobile customers and enterprise customers.”³¹ The Commission found that where wholesale access rights and pricing mechanisms are inconsistent—such as is the case for special access services—the Commission’s longstanding competition policy objective and the ability of carriers to obtain the necessary inputs to compete are undermined.³² Competitive reform in the special access market will promote a “virtuous cycle” of investment and development, because—as the Commission has also found—competition spurs network innovations, which drive end-user demand for more advanced broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband.³³ Accordingly, the Commission must address the anticompetitive lock-up agreements of the ILECs and complete its special access proceeding expeditiously in order to remedy the unreasonable rates they charge. By doing so, the Commission will unleash broadband deployment for competitive wireline and wireless networks that serve both residential and business customers.

²⁹ See Letter of Thomas Jones, Counsel for Level 3 Communications, LLC to Marlene Dortch, WC Docket No. 05-25, (Sept. 23, 2015).

³⁰ See Letter of Paul Margie, Counsel to Sprint Corporation, to Marlene Dortch, WC Docket No. 05-25, at 6 (Sept. 23, 2015).

³¹ *National Broadband Plan*, at 47, available at <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

³² *Id.* at 47-48.

³³ *Preserving the Open Internet, et al*, Report and Order, GN Docket No. 09-191, *et al*, FCC 10-201, ¶ 14 (2001).

IV. RESIDENTIAL WIRELINE BROADBAND COMPETITION IS INTERTWINED WITH THE ABILITY TO OFFER LINEAR VIDEO SERVICE.

A. Competitors Face Significant Barriers to Obtaining Video Programming at Non-discriminatory and Reasonable Rates Which Impacts Their Ability to Compete on Linear Video Offerings and To Invest in Expanding and Upgrading Their Broadband Networks.

In order to be competitive in the residential broadband marketplace, competitive wireline providers must offer broadband and linear video services. The Commission has long recognized that residential consumers continue to prefer to purchase both broadband and linear video services together in a bundled product.³⁴ As such, competitive networks must provide competitive linear video services—not just broadband services, in order to compete head-to-head with other wireline providers in the residential marketplace—and to achieve higher broadband adoption rates by consumers.

As the Commission is well aware, obtaining the rights to provide video content is critical to offering linear video;³⁵ however, content costs continue to rise significantly. In recent comments on the state of competition in the MVPD marketplace,³⁶ ACA submits a research paper entitled, “High and Increasing Video Programming Fees Threaten Broadband Deployment” (ACA Research Paper).³⁷ The ACA Research Paper states that “[o]ver the last

³⁴ See, e.g., *National Broadband Plan*, at 38. Indeed, when smaller carriers are able to offer video and broadband services together, data shows that broadband adoption increases by 24%. COMPTTEL, ITTA, NTCA letter to Chairman Thune on Video Reform, June 22, 2015, available at <http://www.ntca.org/images/stories/Documents/videohearingletter.pdf>.

³⁵ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, FCC 15-41 at ¶ 39 (rel. April 2, 2015).

³⁶ See *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 15-158, Public Notice, DA 15-784 (rel. July 2, 2015).

³⁷ ACA Comments, MB Docket No. 15-158 (Aug. 21, 2015).

eight years, total programming fees for the US multichannel video industry have more than doubled.”³⁸ Moreover, “[o]n an annual basis, per subscriber programming fees have increased an average of 9.4% a year between 2010 and 2015.” For smaller MVPDs, the paper notes that an increase in fees has been even greater—10.6%—even excluding regional sports networks and retransmission consent fees.³⁹ Likewise, ATVA et al. recently noted that retransmission consent fees grew 8,600% between 2005 and 2012.⁴⁰ Just last week, it was reported that SNL Kagan released data showing that “the average amount paid per pay-TV subscriber for broadcast retransmission has increased 40 percent just in the last year.”⁴¹ This same report notes that [b]roadcast stations are, of course, looking to sustain these quickening fee increases.”⁴²

The ACA Research Paper also predicts that programming fees will continue to grow rapidly in the future,⁴³ and it states that increasing pricing on subscribers is likely to be constrained due to direct competition and the availability of OVDs.⁴⁴ The ACA Research Paper

³⁸ ACA Comments, MB Docket No. 15-158, High and Increasing Video Programming Fees Threaten Broadband Deployment Research Paper, at 5 (“ACA Research Paper”).

³⁹ *Id.*

⁴⁰ ATVA et. al Ex Parte Notice, MB Docket No. 10-71 (July 17, 2015) (*citing* Broadcast Investor Deals & Finance: Retrans projections update: \$10.3B by 2021, SNL Kagan, June 30, 2015 (“SNL Kagan June 30, 2015”)).

⁴¹ Daniel Frankel, FierceTelecom, “Nexstar makes \$4.1B hostile bid for Media General as broadcast consolidation binge kicks into overdrive,” Sept. 28, 2015, *available at* http://www.fiercecable.com/story/nexstar-makes-41b-hostile-bid-media-general-broadcast-consolidation-binge-k/2015-09-28?utm_medium=nl&utm_source=internal.

⁴² *Id.*

⁴³ ACA Research Paper at 5. Similarly, SNL Kagan estimates that TV broadcasters’ retransmission consent fees will reach \$10.3 billion by 2021 compared to the projected level of \$6.3 billion in 2015. SNL Kagan June 30, 2015.

⁴⁴ *Id.* at 6.

goes on to find that due to the increase in programming fees, the business case for new broadband deployment will be “less tenable” for rural expansion, new fiber deployments, and incumbent telco deployments in the near future. COMPTTEL’s members already are experiencing this prediction. They are offering linear video service at a loss which necessarily impacts their ability to expand and upgrade their broadband networks. They are providing video simply to complete the bundle and support the provision of competitive broadband services.

COMPTTEL’s members are not the only broadband providers that are facing this predicament. NTCA-The Rural Broadband Association states that “video services remain vital to the deployment and adoption of broadband services.”⁴⁵ Video programming prices and practices “make it particularly difficult, however for small rural carriers to offer content in competitive retail packages that reflect what their subscribers want and can afford.”⁴⁶ Similarly, WTA-Advocates for Rural Broadband states that:

WTA members have been disappointed because their substantial broadband network upgrades and their capabilities to provide high-quality video signals have had virtually no positive effect on their efforts to compete profitably (or even at a break-even basis) in the video market. Rather, their broadband investment efforts have been virtually entirely counteracted and overridden by the fact that they have been unable to obtain the video programming desired by their rural customers at affordable prices and on reasonable terms.⁴⁷

⁴⁵ NTCA-The Rural Broadband Association Comments, MB Docket No. 15-158, at 1 (Aug. 21, 2015).

⁴⁶ *Id.* at 3.

⁴⁷ WTA-Advocates for Rural Broadband Comments, MB Docket No. 15-158, at 2 (Aug. 21, 2015).

Indeed, even for the largest telephone companies, such as AT&T, the provision of video services is often a loss leader, and was a significant reason for AT&T's acquisition of DirecTV.⁴⁸

Similarly, CenturyLink asserts that the Commission must reign in escalating retransmission consent fees in order to promote consumer choice in video delivery services.⁴⁹

In order to promote more competitive broadband choice, including the deployment of new networks, the Commission must promote video competition. The Commission's own data concerning the availability of wireline broadband network options for residential broadband Internet access service suggests that only 12 percent of households have three or more choices; 27 percent of households have just two provider choices (typically the incumbent cable provider and incumbent telco); and 45 percent of households have only one single provider—in other words, no competitive choice.⁵⁰ To effectively promote residential wireline broadband competition, the Commission will need to address the availability of video programming so that

⁴⁸ See Statement of Randall Stephenson, Chairman, CEO, and President, AT&T, Inc., *The AT&T/DIRECTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond: Examining the Comcast-Time Warner Cable Merger And The Impact On Consumers: Hearing Before the S. Judiciary Comm., Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 113th Cong. at 3 (June 24, 2014), available at <http://www.judiciary.senate.gov/download/06-24-14-stephenson-testimony>; see also *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, MB Docket No. 14-90, FCC 15-94, at ¶ 3 (rel. July 28, 2015) (“With fewer than 6 million subscribers, AT&T’s video product is hampered by higher costs of procuring programming—limiting its ability to both offer lower consumer prices and expand its high-speed broadband footprint.”) (“*AT&T/DTV Order*”).

⁴⁹ CenturyLink Comments, MB Docket No. 15-158, at 3 (Aug. 21, 2015).

⁵⁰ *Inquiry Concerning the Deployment of 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*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, GN Docket No. 14-126, FCC 15-10, at ¶ 83 (rel. Feb. 4, 2015).

broadband providers can compete head-to-head on linear video service in order to attract consumers to their broadband service. COMPTTEL is pleased that the Commission is reviewing some aspects of access to programming, including retransmission consent and good faith negotiations and is considering an Order to eliminate the Commission’s outdated program exclusivity rules.⁵¹

In retransmission consent negotiations, there are a number of practices that are anticompetitive and should be a *per se* violation of good faith negotiations, including for example, failure of broadcasters to deliver a renewal proposal within six months of contract expiration; using blackouts during marquee events/special programming and otherwise withholding programming to gain leverage in negotiations; forced tying/tiering of programming; and forcing MVPDs to comply with FCC policies that have been eliminated (such as the programming exclusivity rules once the Commission’s pending Order is adopted). There is wide support for these findings in the Commission’s proceedings.⁵² Moreover, the Commission should promote transparency of rates so that new entrants/competitors are not disadvantaged in the marketplace—this is especially so for retransmission consent fees—where we believe it is

⁵¹ See Tom Wheeler, “Upgrading Media Rules to Better Serve Consumers in Today’s Video Marketplace,” FCC Blog, available at <https://www.fcc.gov/blog/upgrading-media-rules-better-serve-consumers-today-s-video-marketplace> (Aug. 12, 2015); see also *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking, MB Docket No. 15-216, FCC 15-109 (rel. Sept. 2, 2015).

⁵² See, e.g., NTCA’s Comments at 11-14; WTA’s Comments at 7-9 (discussing the harmful effects of program tying and tiering requirements); Letter from Micah M. Caldwell, ITTA, MB Docket No. 10-71 (Aug. 7, 2015); Letter from Mike Chappell, American Television Alliance, MB Docket No. 10-71 (July 22, 2015); Letter from Ross J. Lieberman, American Cable Association, MB Docket No. 10-71 (July 24, 2015); and Letter from Sam Feder, Jenner & Block on behalf of Cablevision, MB Docket No. 10-71 (July 31, 2015).

often the case the new entrants are paying more for programming than large incumbent cable operators. As such, COMPTTEL supports NTCA's proposal:

To facilitate transparency and enable competitive forces to police behavior in the marketplace, broadcasters utilizing public airwaves should, as a condition of their license, be required to publically disclose, in an accessible manner, the lowest fee they will charge, prior to any volume discount.⁵³

Moreover, non-discriminatory pricing of video programming is critical to promoting competition among MVPDs. The transparency of rates charged by programmers to MVPDs would go a long way toward ensuring that programmers are offering such rates to MVPD competitors on a non-discriminatory basis.

Chairman Wheeler has made competition the central theme of this Commission:

So let's be clear. We're not going to let up on protecting and promoting broadband competition.

As I have made plain on innumerable occasions, competition is paramount. It is the best assurance of industry dynamism, that opportunities for improvements in quality and reductions in cost will be pursued assiduously, and that the benefits will be shared with consumers.

Suffice it to say, continuing to protect and encourage a competitive marketplace is the foundational requirement of the modern FCC.⁵⁴

COMPTTEL could not agree more that protecting and promoting broadband competition is absolutely necessary to ensure investment, innovation, and consumer benefits. Residential wireline broadband competition is intertwined with the availability of video programming, and the Commission must address the long-standing issues with the availability of video

⁵³ NTCA Comments, MB Docket No. 15-158, at 10.

⁵⁴ Prepared Remarks of FCC Chairman Tom Wheeler, The Brookings Institution, at 4 (June 26, 2015).

programming at reasonable and non-discriminatory rates, terms, and conditions in order to promote broadband competition.

B. The Availability Of Video Navigation Devices Is Critical To The Delivery Of Competitive MVPD Services By New Entrants.

The lack of access at competitive prices to advanced, innovative video navigation devices remains an impediment to new entrants in the video programming marketplace. The Commission must foster a competitive marketplace for video navigation devices. COMPTTEL is a member of the Consumer Video Choice Coalition which submitted comments in the Commission's proceeding on MVPD competition which COMPTTEL fully supports. In particular, those comments discussed how broadband competitors offering MVPD services (which as noted above is required to compete in the marketplace) would benefit from greater competition for video navigation devices:

Today, large MVPDs benefit from economies of scale. Set-top box manufacturers are incentivized to focus on orders from these larger MVPDs, while small MVPDs are left with high costs if they want to offer devices different from those of the major operators due to their smaller subscriber bases over which to spread costs. Robust retail competition would allow manufacturers to take advantages of economies of scale over a larger base of retail navigation device users—ultimately lowering costs of new entrants and other small network operators to acquire innovative navigation devices.⁵⁵

In addition, the promotion of competition and availability of video navigation devices potentially lowers the costs for consumers to switch providers and would further encourage video and broadband competition in the marketplace. Accordingly, COMPTTEL agrees with the Coalition that the Commission should act expeditiously and adopt the appropriate policies and rules that would unleash competition in the retail video navigation device market.

⁵⁵ Consumer Video Choice Coalition Comments, MB Docket No. 15-158, at 7 (Aug. 31, 2015).

C. There Is Significant Potential For Competition And Consumer Choice In The Availability Of Online Video, And The Commission Must Remain Diligent That Its Policies Promote The Distribution Of OVD Services.

The way Americans access video services continues to evolve. While many Americans continue to rely upon traditional broadcast television, cable, and satellite services, the growth of on demand, streaming and other OVD services, such as Hulu, Netflix, and Amazon Prime continues to grow. Moreover, some providers, such as Dish, have begun to offer a competitive linear service over the Internet. However, most consumers that use OVDs currently do so in conjunction with their MVPD service and/or over-the-air broadcast television.⁵⁶

COMPTEL believes that the development of OVD options is good for consumers, for video competition, and for broadband deployment and adoption.⁵⁷ However, as COMPTEL and others discussed in the Commission's Open Internet proceeding and in the Commission's review of the Comcast/TWC merger and AT&T/DirecTV merger, some broadband Internet access service providers have used their gatekeeper positions to allow their interconnection ports to congest, demanding tolls for such Internet traffic to be delivered to their consumers—even when resulting in their consumers not receiving the Internet speeds for which they paid.⁵⁸ If broadband

⁵⁶ Netflix Comments, MB Docket No. 15-158, at 2 (*citing* SNL Kagan which predicts that only 7.6 million of the 118.9 million television households in the U.S. rely exclusively on online video).

⁵⁷ Indeed, such developments potentially could decrease the need for broadband Internet access service providers to also offer a separate MVPD service to attract broadband subscribers. However, at this time approximately only 6% of U.S. TV households rely exclusively on over-the-top video. *Id.* at n.4 (*citing* SNL Kagan Survey).

⁵⁸ *See, e.g.*, Level 3 Letter, GN Docket, No. 14-28, at n.8 and 3-4 of the Attachment (Oct. 27, 2014).

Internet access service providers continue to block or degrade traffic to demand tolls, the development of video competition will be harmed. As Netflix states:

Such access fees can have an adverse effect on OVD competition. Whether applied to a proprietary or public CDN service, access fees raise the costs for online video services. These costs are passed through to the consumer as a price increase and/or a decrease in an OVD's content investment. BIAS providers with affiliated video services may be particularly motivated to raise the costs of competitive OVDs, as this makes the affiliated service more attractive.⁵⁹

COMPTEL commends the Commission for the steps it has taken so far to ensure that unreasonable Internet interconnection practices do not impede consumers' access to an Open Internet.⁶⁰ COMPTEL agrees with Netflix that settlement free interconnection practices are essential to realize the efficiencies of CDNs and transit providers that deliver traffic to BIAS providers' networks. Over-the-top video competition will have the opportunity to flourish where broadband Internet access service providers offer settlement free interconnection with CDNs and transit providers. The Commission should continue to encourage such arrangements in order to promote over-the-top video competition and consumer choice. Moreover, as more consumers use high-speed broadband to obtain OVD services, this will spur deployment of higher-speed broadband, including competitive networks.

⁵⁹ Netflix Comments, MB Docket No. 15-158, at 8.

⁶⁰ *Protecting and Promoting the Open Internet*, Report and Order and Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24 at ¶¶ 203-206 (rel. March 12, 2015) (establishing a case-by-case review for Internet interconnection and traffic exchange practices); *AT&T/DTV Order* at ¶ 219 (requiring AT&T to submit its Internet interconnection agreements and to disclose related performance metrics).

V. CONCLUSION

COMPTEL urges the Commission to focus on pro-competitive policies that will encourage deployment of competitive broadband networks that will serve to benefit both residential and business consumers. COMPTEL supports expeditious Commission action to address unreasonable rates terms and conditions in the special access market, including anticompetitive lock-up agreements that have the deleterious effect of deterring competitive network deployment. In order to further encourage residential broadband deployment, the Commission must acknowledge that access to video is a necessity and address the high barriers to video and broadband competition by ensuring access to video programming at reasonable rates, terms, and conditions. Moreover, promoting retail competition in the video navigation devices marketplace fostering over-the-top video competition will promote competitive broadband networks and video competition.

Respectfully submitted,

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