Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning the Deployment of	)	
Advanced Telecommunications Capability to All	)	
Americans in a Reasonable and Timely Fashion,	)	GN Docket No. 07-45
and Possible Steps to Accelerate Such Deployment	)	
Pursuant to Section 706 of the	)	
Telecommunications Act of 1996	)	

OPPOSITION TO PETITION FOR RECONSIDERATION

The National Cable & Telecommunications Association (NCTA) hereby submits its opposition to the Petition for Reconsideration ("Petition") filed by Consumers Union, Consumer Federation of America, and Free Press ("Petitioners") in the above-captioned proceeding. Petitioners request that the Commission reconsider its conclusion in the *Fifth Report* in this docket that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.[1] In particular, Petitioners argue that the Commission failed to take certain facts and arguments into account in reaching its conclusion. As shown below, Petitioners arguments are without merit.

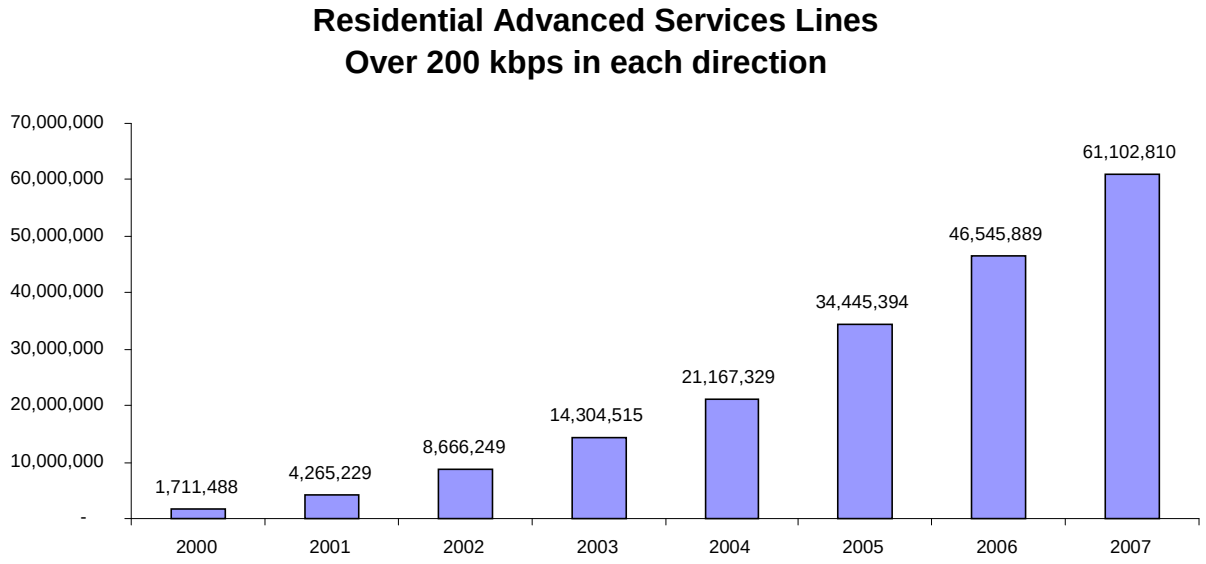
INTRODUCTION

The Commission's *Fifth Report* correctly concluded that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. It could have reached no other conclusion. As Commissioner McDowell has observed: "[W]e should not lose sight of the fact that broadband has had the fastest penetration rate of any technology in modern

[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*, Fifth Report, 23 FCC Rcd 9615, 9616 ¶ 1 (2008) ("*Fifth Report*").

history. That is to say, broadband has been deployed faster than: electricity, radios, TVs, VCRs, DVD players, PCs and every other technology in American history."[2]

In its five reports to Congress, the Commission has concluded that broadband deployment has been moving ahead on a "reasonable and timely" basis. The reports have shown that both residential and business "advanced services lines" – those with speeds of 200 kbps in each direction – have grown from under 2.6 million lines in 2000 to 69.5 million lines in June 2007 as reported in the *Fifth Report*.[3] Considering only residential advanced services lines, the Commission found that, as of June 2007, residential advanced services lines had increased to over 61 million, more than 30 times the residential lines reported as of June, 2000.[4]



Source: *Fifth Report*, Appendix B, Table 4

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[2] Remarks of FCC Commissioner Robert M. McDowell, Catholic University School of Law Symposium, March 15, 2007, at 10, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-271555A1.pdf. ("*McDowell Catholic University Remarks*")

[3] *Fifth Report*, 23 FCC Rcd at 9663 (Appendix B, Table 2).

[4] *Id*. at 9665 (Appendix B, Table 4).

Therefore, based on the data before it, the Commission was correct to conclude that "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." Petitioners raise several arguments questioning that conclusion. None has merit.

I. THE COMMISSION DID NOT "MISINTERPRET" SECTION 706's REQUIREMENTS

Petitioners first claim that the Commission misinterpreted section 706 by not focusing on the deployment of the capability of consumers to *originate* "high quality" video (which it says would be the ability of a user "to originate a standard-definition quality television signal"), which they assert requires "approximately 2 to 4 Mbps of upload speed."[5] This argument is riddled with false premises.

First, contrary to Petitioners' claims, Congress clearly left it to the FCC to determine what levels of service would constitute "advanced telecommunications capability" in general and "high-quality voice, data, graphics and video telecommunications" in particular. Plainly Congress did not expect the Commission to make a negative finding on "reasonable and timely" deployment any time the capability to receive, let alone originate, a new broadband application – such as standard or high-definition video – is not deployed soon after it is introduced. Nor did Congress envision or require the FCC to use the capability to originate or receive standard definition TV as the baseline for measuring whether advanced telecommunications service providers were providing "high quality" video.

The Commission has recognized as much from the time of its first section 706 Report:

[5] Petition at 7.

> We have initially chosen 200 kbps because it is enough to provide the most popular forms of broadband – to change web pages as fast as one can flip through the pages of a book and *to transmit full-motion video*.[6]

Over time the Commission has recognized that what might have constituted "advanced telecommunications capability" when Congress adopted section 706 will change over time. In particular, in its first report to Congress, it noted:

> [A]s technologies evolve, the concept of broadband will evolve with it: we may consider today's "broadband" to be narrowband when tomorrow's technologies are deployed and consumer demand for higher bandwidth appears on a large scale. For example, we may find in future reports that evolution in technologies, retail offerings, and demand among consumers has raised the minimum speed for broadband from 200 kbps to, for example, a certain number of megabits per second (Mbps).[7]

And the Commission has been true to that promise. In the Commission's *Fourth Report*, it made clear that 200 kbps service was considered "first generation" broadband.[8] It observed that:

> Our section 706 reports to Congress, including this one, focus on the timely deployment of first-generation broadband. The Commission recognizes, however, that the success of first-generation broadband deployment and adoption is creating demand for ever faster broadband networks and connections as well as for networks that support low latency applications. Indeed, as this report describes, most broadband providers are offering service well in excess of the minimum speed of 200 kbps – typically in the 1 megabit per second (Mbps) range or faster – although, given the asymmetric use of most residential subscribers, fast upload rates do not appear to be as necessary as fast download rates.
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> While this *Fourth Report* focuses on first-generation broadband deployment, future section 706 reports will collect data and report on next-generation as well

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6 *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*, Report, 14 FCC Rcd 2398, 2406 ¶ 20 (1999).

7 *Id*. at 2407-08 ¶ 25.

8 *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*, Fourth Report, 19 FCC Rcd 20540, 20552 (2004).

> as first-generation broadband. Now that first-generation broadband is available to the vast majority of U.S. households, it will become important to monitor the migration to next-generation networks and services.[9]

For the *Fifth Report*, the Commission requires that filers report the percentage of their total broadband connections that are faster than 200 kbps into one of five ranges (or tiers) of speed: (1) greater than 200 kbps but less than 2.5 megabits per second (mbps); (2) greater than or equal to 2.5 mbps but less than 10 mbps; (3) greater than or equal to 10 mbps but less than 25 mbps; (4) greater than or equal to 25 mbps but less than 100 mbps; and (5) greater than or equal to 100 mbps.[10] The same day that it adopted the *Fifth Report*, the Commission modified its Form 477 data collection in order to allow it "to gather more detailed information about availability of and subscription to broadband services such as by adding additional broadband speed tiers."[11] Under the new rules, among other things, the Commission revised and expanded the speed levels on the Form 477 and it will require broadband providers to report the number of subscribers on the basis of census tracts, rather than zip codes. In addition, for each census tract and speed tier, companies must report the percentage of broadband connections that are provided to residential customers. Although it will continue to collect data on services between 200kbps and 768kbps, services in this category no longer will be considered "broadband" services.[12]

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[9] *Id.*

[10] *Fifth Report*, 23 FCC Rcd 9616-17 ¶ 3.

[11] *Id.* at 9618 ¶ 6.

[12] Specifically, the reporting tiers applicable to the reporting of both download and upload transfer rates under the new Form 477 collection are: (1) greater than 200 kbps but less than 768 kbps; (2) equal to or greater than 768 kbps but less than 1.5 mbps; (3) equal to or greater than 1.5 mbps but less than 3.0 mbps; (4) equal to or greater than 3.0 mbps but less than 6.0 mbps, (5) equal to or greater than 6.0 mbps but less than 10.0 mbps; (6) equal to or greater than 10.0 mbps but less than 25.0 mbps; (7) equal to or greater than 25.0 mbps but less than 100.0 mbps; and (8) equal to or greater than 100 mbps. *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, Report and Order, 23 FCC Rcd 9691, 9699-9702 ¶¶ 19-21 (2008).

In adopting these new requirements, the Commission emphasized that "as technologies and services evolve, upload speeds are an increasingly significant aspect of broadband services, and increased granularity in reporting both download and upload speed data will assist us in understanding the broadband services market."[13] Commissioner Copps in particular observed that "broadband must be an evolving definition."[14]

While the Commission will now be able to monitor the availability of broadband capability associated with a full range of technologies and services, it is up to the Commission to determine at a particular point in time what constitutes the relevant speed benchmark(s) and whether those capabilities are being deployed in a "reasonable and timely fashion." It has done so in this instance and Petitioners have not provided any grounds to question that conclusion.

Even assuming Petitioners were correct that the capability to receive and originate standard definition video was the touchstone of "advanced telecommunications capability" (which it is not), the evidence to date shows that this type of capability is being deployed in a reasonable and timely fashion. Video downloads are ubiquitous. Petitioners themselves cite Verizon's FiOS service as providing the requisite capability and many cable providers are now or soon will be providing broadband service that will accommodate the reception and origination of what Petitioners call "high quality" (*i.e.*, standard definition TV) content. In April, Comcast launched DOCSIS 3.0 "wideband service" in Minneapolis-St. Paul, initially offering speeds of up to 50 Mbps downstream and 5 Mbps upstream, and it "expects to deliver even faster speeds of

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[13] *Id*. at 9700 ¶ 19, and n.64 (citing comments by Petitioners in this proceeding to the effect that "the current download speed tiers do not reflect the market for broadband services, and that measuring upload speed of services would allow them to be evaluated on their potential for originating high-quality video").

[14] *Id.* at 9765 (Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part).

up to 100 Mbps to its customers over the next two years."[15] "Comcast has set a goal of deploying wideband cable-modem service in 20% of its footprint by year-end, while Time Warner Cable is aiming for a DOCSIS 3.0-based service rollout in early 2009."[16] Cox Communications expects to start deploying DOCSIS 3.0-based wideband services by the end of the third quarter of 2008,[17] and Cablevision announced that its "WiFi project, as announced, includes the capacity to do DOCSIS 3.0."[18]

Therefore, to the extent Petitioners insist that all Americans must have the ability to originate standard definition video with uploads speeds of 2 to 4 Mbps" before the Commission can find that deployment has been reasonable and timely,[19] neither the statute nor the facts support that proposition. The Commission is charged with determining whether the deployment is "reasonable" as well as "timely." It certainly is reasonable to have an evolving standard as the Commission has adopted. To require that deployment of capability to originate the most advanced content, itself just appearing on the scene, would not be "reasonable." And, to the extent such capability is included in the Section 706 mandate, even Petitioners grudgingly

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[15] Comcast Press Release, *Comcast Increases Upstream Speeds for Its High-Speed Internet Customers For No Additional Charge*, June 12, 2008, http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=765.

[16] Todd Spangler, *"Wideband" Service Gearing Up*, Multichannel News, Sept. 13, 2008. ("Major cable operators have given the green light to next-generation DOCSIS 3.0 equipment after final rounds of testing, with at least one stockpiling modems for a broad launch of 'wideband' service later this month.") http://www.multichannel.com/article/CA6596000.html?industryid=47194.

[17] Broadband DSL Reports.com, *Cox: DOCSIS 3.0 Upgrades By Third Quarter*, June 25, 2008, http://www.dslreports.com/shownews/Cox-DOCSIS-30-Upgrades-By-Third-Quarter-95585.

[18] Light Reading's Cable Digital News, *Cablevision Begins Wideband Assault*, July 31, 2008, http://www.lightreading.com/document.asp?doc_id=160511&site=cdn.

[19] Petition at 7.

concede, that both telephone and cable companies are beginning to deploy such capabilities in what has to be considered a "reasonable and timely fashion."[20]

II. THE COMMISSION GAVE APPROPRIATE WEIGHT TO ALL BROADBAND TECHNOLOGIES

Despite that concession, Petitioners next argue that the Commission "overstates the deployment of alternative technologies and ignores evidence of a broadband duopoly."[21] First, the Commission did examine other technologies and provided a detailed examination of their role in the broadband marketplace.[22] But even if it had not discussed any other technologies, the Commission's conclusion that broadband deployment was proceeding in a reasonable and timely fashion would still hold.

The Commission itself concluded that "as a nationwide average, we estimate that high-speed DSL connections were available to 82% of the households to whom incumbent LECs could provide local telephone service, and that high-speed cable modem service was available to 96% of the households to whom cable system operators could provide cable TV service."[23] The cable industry makes broadband service available to approximately 92% of the households in the United States. Furthermore, cable operators are delivering broadband service at 5 Megabits per second (Mbps) or greater to the vast majority of those households, about 90% or more. As of June 2008 approximately 36 million households subscribed to cable broadband service and approximately 29 million other households received broadband service via DSL, fiber, satellite,

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[20] Petition at 8 ("[T]he vast majority of Americans have access to just two services (cable modem and DSL) that could (under an extremely loose definition) possibly qualify as "advanced telecommunications capability.").

[21] *Id.*

[22] *Fifth Report*, 23 FCC Rcd at 9619-9629, ¶¶ 7-24.

[23] *Id.* at 9659 (Appendix B at 3).

or fixed wireless providers.[24] Given an average American household size of 2.6 inhabitants,[25] the above residential broadband connections were available to nearly 170 million people.

And, as noted above, the evidence showed that over 92% of U.S. households had access to broadband from either cable modem or DSL service. While the Commission's citation and analysis of other broadband technologies is instructive and useful to show the developing broadband marketplace, nothing in the statute, the legislative history, or Commission precedent requires the Commission to include a certain number of technologies in order to reach a conclusion that broadband is being deployed in a reasonable and timely fashion. It has done so here and, even if it erred in some of its discussion of the progress of other technologies, that has no bearing on the fundamental conclusion being challenged by Petitioners.

III. THE COMMISSION APPROPRIATELY CONSIDERED INTERNATIONAL BROADBAND DATA

Petitioners next take issue with the Commission's "fail[ure] to address the consumer groups' discussion of America's standing in the Organization for Economic Cooperation and Development's international broadband ranking." Again they argue their "justification of the OECD and other international rankings went unanswered by the Commission."[26] But that is

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[24] NCTA estimate using data from companies, SNL Kagan, and U.S. Census Bureau.

[25] U.S. Census Bureau; *2006 American Community Survey;* http://factfinder.census.gov/servlet/ACSSAFFFacts.

[26] Specifically, in response to the Commission's rebuttal to the OECD and other "international" rankings, Petitioners question the Commission's reliance on (1) "raw figures" such as the population and size of the United States; (2) geography and population density information; and (3) the presence of intermodel competition in the US market." But the Commission's emphasis on these factors was entirely reasonable as these factors have been cited by numerous sources who have effectively refuted those who would use – or misuse – OECD data for their own purposes. *See e.g., Everything You Hear About International Broadband Is Wrong;* Scott Wallsten; June 13, 2007, http://www.pff.org/issues-pubs/pops/pop14.13wallstenOECDbroadband.pdf; *McDowell Catholic University Remarks* at 2-3. Petitioners also take issue with what they characterize as the Commission's "failure to recognize that there is also significant intramodel competition occurring in countries outside of the United States" and "the benefits intramodel competition has brought to overseas markets." While intramodel competition may have been beneficial to markets overseas, the Commission has determined that intermodal competition is more likely to spur broadband deployment and has acted accordingly. That it did not address the comparative benefits of the two types of competition in this Report does not negate the fundamental conclusion that advanced telecommunications capability is being deployed in a reasonable and timely fashion."

hardly the case, even assuming they accurately characterized the Commission's analysis on these issues, which they did not.[27] The *Fifth Report* devoted an entire section to "International Broadband Comparisons," concluding that [w]hile the OECD ranking is commonly cited, a more fully developed picture of broadband markets would provide a more accurate and useful international comparison."[28] The Commission then proceeded to do that analysis. While Petitioners may not like the results, there is no question the Commission undertook the analysis and reached reasonable conclusions.

CONCLUSION

For the above reasons, the Commission should deny the Petition.

Respectfully submitted,

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[27] For example, Petitioners claim that "[i]n seeking to discount the OECD rankings, the Commission asserts that an important and *unique* characteristic of the U.S. broadband market is the presence of intermodal competition." Petition at 12 (emphasis added). They then go on to claim that the presence of intermodel competition is not "unique" and this somehow invalidates the Commission's conclusions. In fact, the Commission never said intermodal competition was "unique" to the U.S. market – what it said in the very paragraph cited by Petitioners was that "[a]nother important characteristic of the United States broadband market, relevant for comparisons with other countries, is the presence of multi-platform competition in the U.S." *Fifth Report*, 23 FCC Rcd at 9648 ¶ 69.

[28] *Id.* at 9647 ¶ 67.

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, do hereby certify that I caused one copy of the foregoing Opposition to Petition for Reconsideration of the National Cable & Telecommunications Association to be served by pre-paid first class mail, this 17th day of September 2008.

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