

interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to over 20 million customers.

In the *Notice*, the Commission seeks “tailored comment on defining ‘broadband’ for purposes of the Commission’s development of a National Broadband Plan (Plan) pursuant to the American Recovery and Reinvestment Act of 2009 (Recovery Act), and for related purposes.”² In particular, the *Notice* identifies three aspects of this definitional issue upon which further comment is sought: (1) the general form, characteristics, and performance indicators that should be included in the definition; (2) the thresholds that should be assigned to these indicators today; and (3) how the definition should be reevaluated over time.³

The question of how to define the term “broadband” is not a new one for the Commission. The Commission adopted a new definition just last year in connection with changes to the Form 477 broadband reporting process.⁴ In that order, the Commission found that services with download speeds of more than 768 kbps and upload speeds of more than 200 kbps will be defined as “broadband” services.⁵ Subsequently Congress passed the Recovery Act and gave the Commission a consultative role with respect to the interpretation of certain statutory terms, including the term “broadband,” to be used by NTIA and RUS in their broadband funding programs.⁶ All three agencies sought comment on these definitions and NTIA and RUS

² *Id.*

³ *Id.* at 2.

⁴ *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Service to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnection Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691 (2008).

⁵ *Id.* at 9700-01, ¶ 20.

⁶ American Recovery and Reinvestment Act, Pub. L. No. 111-5 (2009) (Recovery Act), § 6001(a); Public Notice, *Comment Period Established Regarding The Commission’s Consultative Role In The Broadband Provisions Of The Recovery Act*, GN Docket No. 09-40, DA 09-668 (rel. Mar. 24, 2009).

ultimately adopted the current FCC definition of “broadband” as updated last year.⁷ The Commission again asked for comment on the definition of “broadband” in the *Notice of Inquiry* regarding the Plan.⁸

THE COMMISSION SHOULD USE ITS EXISTING DEFINITION OF BROADBAND

NCTA agrees with the Commission that establishing a single definition of the term “broadband” for regulatory and policy purposes is a crucial issue. It has immediate implications with respect to the development of the Plan, as well as for any subsequent data collection and reporting efforts that are needed to measure progress in achieving the goals and benchmarks identified in the Plan. It also may have a variety of other significant consequences, *e.g.*, the definition of “broadband” could be very important if the Commission decides to use universal service support to subsidize broadband facilities and services.

As important as the definition of “broadband” is, however, the Commission should recognize the limited nature of such an effort. In earlier comments on the Plan, many parties attempted to incorporate *substantive* requirements regarding speed, price, or “openness” into their proposed definition of “broadband.”⁹ The Commission should not use the process of defining “broadband” as a vehicle for imposing substantive obligations on providers of broadband services. Rather, as Congress did in defining terms like “cable service,” “telecommunications service,” and “information service,” the Commission should adopt a more

⁷ See Department of Agriculture, Rural Utilities Service, Broadband Initiatives Program, RIN: 0572-ZA01; Department of Commerce, National Telecommunications and Information Administration, Broadband Technology Opportunities Program, RIN: 0660-ZA28, Notice of Funds Availability, 74 Fed. Reg. 33104 (July 9, 2009) (*RUS/NTIA NOFA*); Department of Commerce, National Telecommunications and Information Administration, State Broadband Data and Development Grant Program, RIN No. 0660-ZA29, Notice of Funds Availability, 74 Fed. Reg. 32545 (July 8, 2009) (*NTIA Mapping NOFA*).

⁸ *A National Broadband Plan For Our Future*, GN Docket No. 09-51, Notice of Inquiry, 24 FCC Rcd 4342 (2009).

⁹ See, *e.g.*, Comments of Free Press, GN Docket No. 09-51 (filed June 8, 2009) at 227 (latency should be part of broadband definition); Comments of Microsoft, GN Docket No. 09-51 (filed June 8, 2009) at 5 (caps on consumption should be part of broadband definition).

generic definition that focuses on the core functionality of the service.¹⁰ It should address separately what obligations, if any, should be imposed on providers of the service.

Following this approach, NCTA previously argued that, for purposes of the Plan, consumers have “access to broadband capability” whenever they have the opportunity to purchase services and equipment that enable them to access the Internet at any time and use the types of applications that are most commonly used today, such as e-mail and web browsing.¹¹ It is this basic “always on” functionality that is most relevant for definitional purposes, more so than the presence or absence of the various detailed characteristics (*e.g.*, latency, jitter, symmetry, mobility) mentioned in the Commission in the *Notice*.¹²

Undoubtedly these factors all affect the quality and usefulness of a particular service for a particular customer, but their presence or absence is not the defining characteristic of “broadband” service. For example, some parties have advocated that “broadband” be defined as a service with symmetrical upload and download speeds to ensure that consumers are able to upload video.¹³ In response, NCTA explained that most broadband networks, including cable networks, are typically engineered to provide higher speeds for downloads than for uploads based on consumer preferences and behavior.¹⁴ The fact that the network is designed to deliver higher download speeds than upload speeds does not necessarily mean that upload speeds are insufficient for the applications, services, and content consumers may want to use. The fact that

¹⁰ See 47 U.S.C. §§ 153(46) (telecommunications service); 153(20) (information service); 522(6) (cable service).

¹¹ Comments of the National Cable & Telecommunications Association, GN Docket No. 09-51 (filed June 8, 2009) at 6.

¹² *Notice* at 2-3.

¹³ See, *e.g.*, Comments of Google, GN Docket No. 09-51 (filed June 8, 2009) at 21; Comments of NASUCA, GN Docket No. 09-51 (filed June 8, 2009) at 15-16.

¹⁴ Reply Comments of the National Cable & Telecommunications Association, GN Docket No. 09-51 (filed July 21, 2009) at 6.

there are a variety of services and capabilities available to meet the varied needs of consumers is one of the great strengths of the broadband marketplace. Rather than adopting a restrictive definition that includes substantive obligations, the Commission should be encouraging the widest assortment and differentiation of technologies and capabilities so that consumers can choose the services that best meet their needs.

If the Commission incorporates specific speed metrics as part of the definition of “broadband,” it should continue to use its recently updated definition and tier designations as adopted for the Form 477 and incorporated by NTIA in its recent mapping Notice of Funds Availability.¹⁵ Such an approach offers numerous advantages. First, it will enable the Commission to compare a consistent set of data across time. The desire for continual improvement in national broadband performance is a worthy goal, but a constantly evolving definition of “broadband” is not necessary or helpful to achieving that goal. Rather than changing the definition of “broadband” every year, the Commission should incorporate the existing definition and speed tiers into goals based on the percentage of households and businesses with access to service in a particular tier.

Second, using the existing definition and speed tiers will avoid the need for the Commission to make additional changes to the Form 477 reporting process. The changes the Commission made to the Form 477 last year – adding new speed tiers and moving from zip code reporting to census tract reporting – placed significant new information collection burdens on the Commission and on broadband providers. The Office of Management and Budget (OMB) was sufficiently concerned about the burden imposed by the new requirements that it approved the

¹⁵ *NTIA Mapping NOFA*, 74 Fed. Reg. at 32548 (“Data transmission technology that provides two-way data transmission to and from the Internet with advertised speeds of at least 768 kilobits per second (kbps) downstream and at least 200 kbps upstream to end users, or providing sufficient capacity in a middle mile project to support the provision of broadband service to end users within the project area.”); *id.* at 32559 (adopting speed tiers).

collection of this data for only one year.¹⁶ Moreover, notwithstanding the diligent efforts of Commission staff, the Commission has yet to issue a report summarizing the year-end 2008 data submitted by broadband providers in March 2009. Adopting yet another new definition of “broadband” that requires providers and the Commission to revise the Form 477 process yet again could lead to a repeat of these problems in the future.

Third, as NCTA has explained previously, it would be extremely helpful for the government to use a consistent set of definitions across agencies.¹⁷ For example, NTIA is in the process of developing a nationwide broadband map as required by the Broadband Data Improvement Act. If the Commission adopts a different definition of broadband than the one that NTIA is using in creating the map, it will be difficult to reconcile any reports issued by the Commission with the map created by NTIA. Presumably Congress required NTIA to consult with the Commission on definitions precisely to avoid this sort of disconnect.

For these same reasons, the Commission should continue to look at maximum advertised speed rather than some measure of “actual” speed. In the *Notice*, the Commission observes that advertised speeds “generally differ from actual rates, are not uniformly measured, and have different constraints over different technologies.”¹⁸ As the Commission suggests, the speed of any particular broadband connection varies for a number of reasons, some that are controlled by the provider (*e.g.*, the distance between a DSL customer and the closest central office or remote terminal) and some that are not (*e.g.*, the network backbone equipment and routing, the type of computers and routers used in the home). Because of this variability, it is extremely difficult to

¹⁶ See Notice of Office of Management and Budget Act, OMB Control No. 3060-0816 (Jan. 30, 2009), available at <http://www.reginfo.gov/public/do/DownloadNOA?requestID=215359>. After the September 1, 2009 filing is complete, the Commission must obtain new approval from OMB to continue the Form 477 collection.

¹⁷ Comments of the National Cable & Telecommunications Association, GN Docket No. 09-29 (filed Mar. 25, 2009) at 7-8.

¹⁸ *Notice* at 2.

develop a single figure that consistently and reliably describes the “actual” speed of all types of broadband connections for all purposes. In light of these challenges, the Commission should not change the current system at this time.¹⁹ In the future, the Commission should work with the Internet engineering community to develop an approach that would produce consistent, reliable, and accurate results.

CONCLUSION

The Commission should not lose sight of the forest for the trees. Attempting to incorporate all of the potential considerations of a broadband customer into the definition of “broadband” is unnecessary and could prove counterproductive. The better approach is for the Commission to define broadband in a simple, straightforward manner – using its previously adopted definition – and establish a set of goals and metrics that build on this definitional framework.

Respectfully submitted,

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¹⁹ We note that there are a number of “speed test” tools in the marketplace that enable consumers to test their own connections. Although there are limits to the reliability and accuracy of these tools, they do serve to provide additional data to consumers about their broadband connections. As part of the broadband mapping exercise that NTIA is performing, state mapping entities may use these speed tests or similar third-party sources to gather information on the “typical” speed of broadband connections which eliminates any need for immediate FCC action on this issue.