

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matters of	)	
	)	
Inquiry Concerning the Deployment of	)	GN Docket No. 09-137
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	)	
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51

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**COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL**

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## EXECUTIVE SUMMARY

The Federal Communications Commission (“FCC” or “Commission”) released a Notice of Inquiry (“NOI”) last month,<sup>1</sup> in which it seeks comment on whether broadband is being deployed to all Americans in a reasonable and timely fashion. The Commission states that it intends to incorporate into the record of this section 706 proceeding the comments and materials that it received in response to the *National Broadband Plan NOI*.<sup>2</sup> Therefore, because the New Jersey Division of Rate Counsel (“Rate Counsel”) submitted detailed initial and reply comments in response to the *National Broadband Plan NOI*, and because these previously filed comments address many of the questions about which the FCC seeks comment in this *NOI*, Rate Counsel’s comments in this proceeding are brief.

Many Americans continue to lack access to affordable broadband. Therefore, Rate Counsel fully supports the Commission’s intention to assess the nation’s broadband progress based on the significantly more comprehensive broadband data now available, and “on a clean slate.”<sup>3</sup> It is critically important to assess broadband progress based on numerous attributes such as price, geography, technology, speed (and other performance characteristics), demographics, and suppliers. Rate Counsel fully supports the Commission’s plan to rely on comprehensive broadband data as “the foundation of [its]

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<sup>1</sup> / In the Matters of 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, GN Docket No. 09-137, A National Broadband Plan for Our Future, GN Docket No. 09-51, Notice of Inquiry, FCC 09-65, released August 7, 2009.

<sup>2</sup> / *NOI*, at para. 14; *see also* fn. 125.

<sup>3</sup> / *NOI*, at para. 2.

assessment of whether broadband is being deployed to all Americans in a reasonable and timely fashion.”<sup>4</sup>

Even where consumers have broadband access, the market is typically dominated by a duopoly consisting of the incumbent local exchange carrier (“ILEC”), which may offer fiber-based broadband (e.g., FiOS and U-verse) and digital subscriber line (“DSL”) service and the incumbent cable television provider, which may offer service based on cable modems. As Rate Counsel has discussed in detail in numerous other pleadings submitted to the Commission, a duopoly does not constitute effective competition. Therefore, Rate Counsel urges the Commission not only to assess the nation’s progress in deploying broadband but also the nation’s progress in achieving the broadband rates, terms, conditions, and service quality that would prevail in a competitive market. Where competition does not yet exist, Commission oversight is essential to ensure that consumers receive reasonable service at affordable rates.

The FCC’s short-term focus should be on ensuring that the mass market has access to affordable broadband, and, toward that end, the FCC should re-allocate universal service funding from wireline support to broadband support. In the longer term, the FCC should seek to ensure that consumers’ broadband options keep pace with other countries and, more important, with consumers’ needs for evolving broadband-dependent applications.

Broadband should be defined initially as service offered at speeds of at least 3 mbps downstream and 1 mbps upstream, with a longer term goal of symmetric speed capacities of at least 5 mbps in each direction to enable users to “originate and receive

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<sup>4</sup> / *NOI*, at para. 12. *See also id.*, at paras. 18 through 31 for a discussion of the various improved data collection, broadband metrics, and mapping efforts underway.

high-quality voice, data, graphics, and video telecommunications using any technology.”<sup>5</sup>

In order to achieve the immediate goal of ubiquitous affordable broadband, the short-term definition of broadband service should relate to the way in which the NTIA and RUS apply the definition to decide where to allocate broadband grant monies.<sup>6</sup> Specifically, in determining where to provide grants, those communities that have *no* broadband access should be given priority for grants over those communities that already have access to *slow* broadband speeds (between 200 kbps and 3 mbps).<sup>7</sup>

As the Commission observed, the ARRA has brought “increased intensity to the national goal of ubiquitous broadband deployment.”<sup>8</sup> The level of public input sought by the Commission on broadband for the United States is unprecedented. Rate Counsel is optimistic that the Commission’s comprehensive and concerted efforts to gather data and public input will lead to programs that yield affordable and ubiquitous broadband for all.

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<sup>5</sup> / 47 U.S.C. § 1302(d)(1).

<sup>6</sup> / *National Broadband Plan NOI*, at para. 18.

<sup>7</sup> / Under the new Form 477 reporting requirements, the first tier is greater than 200 kbps but less than 768 kbps; the second tier is equal to or greater than 768 kbps but less than 1.5 mbps; and the third tier is between 1.5 mbps and 3.0 mbps.

<sup>8</sup> / *NOI*, at fn. 43.

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**COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL**

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**I. INTRODUCTION**

**A. INTEREST OF THE RATEPAYER ADVOCATE IN THE INSTANT PROCEEDING.**

With its Notice of Inquiry (“NOI”) released last month,<sup>9</sup> as required by section 706 of the Telecommunications Act of 1996, as amended,<sup>10</sup> the Federal Communications Commission (“FCC” or “Commission”) seeks comment on whether broadband<sup>11</sup> is being

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<sup>9</sup> / In the Matters of 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, GN Docket No. 09-137, A National Broadband Plan for Our Future, GN Docket No. 09-51, Notice of Inquiry, FCC 09-65, released August 7, 2009.

<sup>10</sup> / 47 U.S.C. § 1302(b). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, title VII, Sec. 706, 110 Stat. 56, 153 (1996) (1996 Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (BDIA), is now codified in Title 47, Chapter 12 of the United States Code. See 47 U.S.C. § 1301 et. seq. Prior to the BDIA, section 706 was reproduced in the notes to section 157 of the Communications Act of 1934, as amended (the Act). 47 U.S.C. § 157 nt. (2008).

<sup>11</sup> / The FCC uses the term “broadband” synonymously with “advanced telecommunications capability.” *NOI*, at fn 2. In a separate pleading cycle, the FCC seeks comment on defining “broadband” for the purposes of its development of a National Broadband Plan and related purposes. Public Notice DA

deployed to all Americans in a reasonable and timely fashion. Last month, in a separate Notice of Inquiry, the FCC sought comment to inform the development of a national broadband plan (“National Broadband Plan NOI”).<sup>12</sup> In response to the *National Broadband Plan NOI*, the New Jersey Division of Rate Counsel (“Rate Counsel”) submitted initial comments on June 8, 2009, and also, with the National Association of State Utility Consumer Advocates (“NASUCA”) submitted joint reply comments on July 21, 2009. Furthermore, Rate Counsel has participated in numerous other FCC proceedings that concern broadband policies.<sup>13</sup>

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel’s continued participation and interest in implementation of the Telecommunications Act of 1996<sup>14</sup> and the American Recovery and Reinvestment Act of 2009 (“ARRA”).<sup>15</sup> The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will “promote efficiency, reduce regulatory delay, and foster

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09-1842, “Comment Sought on Defining ‘Broadband,’ NBP Public Notice #1,” GN Docket Nos. 09-47, 09-51, 09-137, released August 20, 2009. Initial comments were filed August 31, 2009, and reply comments are due September 8, 2009.

<sup>12</sup> / In the Matter of a National Broadband Plan for Our Future, GN Docket No. 09-51, *Notice of Inquiry*, released April 8, 2009 (“National Broadband Plan NOI”), at para. 1.

<sup>13</sup> / See, e.g., Table 1 in Rate Counsel’s initial comments submitted in GN Docket No. 09-51.

<sup>14</sup> / Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“1996 Act”). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as “the 1996 Act,” or “the Act,” and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

<sup>15</sup> / American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (“ARRA”). The Recovery Act was signed into law on February 17, 2009.

productivity and innovation” and “produce a wider selection of services at competitive market-based prices.”<sup>16</sup> The FCC’s decisions regarding broadband service will affect New Jersey’s economy, welfare, and ability to compete in a global economy. The availability of affordable broadband service at reasonable speeds to all consumers has been a long-standing goal of Rate Counsel, and the ability of the nation to achieve this goal bears directly on New Jersey consumers’ ability to participate fully in today’s information-dependent society.

## **B. SCOPE OF THE PROCEEDING**

### **Rate Counsel supports the Commission’s “clean slate” section 706 analysis.**

Rate Counsel fully supports the Commission’s intention to assess the nation’s broadband progress based on the significantly more comprehensive broadband data now available, and “on a clean slate.”<sup>17</sup> It is critically important to assess broadband progress based on numerous attributes such as price, geography, technology, speed (and other performance characteristics), demographics, and suppliers. Rate Counsel also fully supports the Commission’s plan to rely on comprehensive broadband data as “the foundation of [its] assessment of whether broadband is being deployed to all Americans in a reasonable and timely fashion.”<sup>18</sup>

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<sup>16</sup>/ N.J.S.A. 48:2-21.16(a)(4) and 48:2-21.16(b)(1) and (3).

<sup>17</sup>/ *NOI*, at para. 2. In addition, as Commissioner Copps recognized in his statement accompanying the *NOI*, the previous “706” inquiries lacked meaningful analysis. Commissioner Copps stated: “I am thrilled to see a Notice of Inquiry for the 706 Report that has real meaning—that is thoughtful, forward-looking, and a complement to the process this Commission has underway to develop a national broadband plan. During every 706 Report process since I have been at the Commission, I have stressed that we needed to recognize this problem, diagnose it, and then come up with a solution to reverse our nation’s slide into technological and communications mediocrity.”

<sup>18</sup>/ *NOI*, at para. 12. *See also id.*, at paras. 18 through 31 for a discussion of the various improved data collection, broadband metrics, and mapping efforts underway.

The Commission states that it intends to incorporate into the record of this section 706 proceeding, among other things, the comments and materials that it received in response to the *National Broadband Plan NOI*.<sup>19</sup> Therefore, because, as stated above, Rate Counsel submitted detailed initial and reply comments in response to the *National Broadband Plan NOI*, and because these previously filed comments address many of the questions about which the FCC seeks comment in this *NOI*, Rate Counsel's comments in this proceeding are brief.

## II. OVERARCHING ISSUES

### **Market forces alone will not guarantee that all Americans receive timely access to affordable broadband service.**

Although substantial progress has occurred since the Commission issued its first "Section 706" report in 1999, many consumers continue to lack access to broadband service. Furthermore, even where consumers have broadband access, the market is typically dominated by a duopoly consisting of the incumbent local exchange carrier ("ILEC"), which may offer fiber-based broadband (e.g., FiOS and U-verse) and digital subscriber line ("DSL") service and the incumbent cable television provider, which may offer service based on cable modems. As Rate Counsel has discussed in detail in numerous other pleadings submitted to the Commission, a duopoly does not constitute effective competition. Therefore, Rate Counsel urges the Commission not only to assess the nation's progress in deploying broadband but also the nation's progress in achieving the broadband rates, terms, conditions, and service quality that would prevail in a

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<sup>19</sup> / *NOI*, at para. 14; *see also* fn. 125.

competitive market. Where competition does not yet exist, Commission oversight is essential to ensure that consumers receive reasonable service at affordable rates.

### III. SPECIFIC ISSUES FOR COMMENT

#### **What is advanced telecommunications capability or broadband?**

The FCC seeks comment on defining advanced telecommunications.<sup>20</sup> Rate Counsel recommends that the terms “advanced telecommunications capability,” “broadband,” and “high-speed” services should have a unified definition in the section 706 report.<sup>21</sup> The FCC also refers to the questions that it raised in its *National Broadband Plan NOI*.<sup>22</sup> In its *National Broadband Plan NOI*, the FCC seeks comment on how “broadband capability [should] be defined going forward, and what it means to have access to it”<sup>23</sup> and seeks comment on whether the definition of broadband should be linked to speed, technology, “experiential” metrics, or something else and whether that definition should be static or whether speed tiers should adjust as technology change.<sup>24</sup> Rate Counsel agrees with the FCC’s observation in its *National Broadband Plan NOI* that: “With technology developing at such a rapid pace, it is important that we do not lose sight of the potential for monumental shifts in technological platforms that would render definitions obsolete or indeed harmful to developments that might otherwise take place in the market” and, as such, the definition of broadband should be “sufficiently flexible to adapt.”<sup>25</sup>

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<sup>20</sup> . *NOI*, at paras. 34-41.

<sup>21</sup> / *NOI*, at para. 35.

<sup>22</sup> / *NOI*, at para. 35.

<sup>23</sup> / *National Broadband Plan NOI*, at para. 13; see also *id.*, at para. 15.

<sup>24</sup> / *Id.*, at paras. 17-18.

<sup>25</sup> / *Id.*, at para. 22.

Rate Counsel also concurs with the FCC that “[o]ur goal must be for every American citizen and every American business to have access to *robust* broadband services.”<sup>26</sup> What constitutes “robust” service, however is not straightforward. In earlier modes of telecommunications technology, lines could be more easily drawn. There was a bright line between the multi-party service that was once present in localities throughout the country and single-line local service; similarly a clear distinction can be made between service offered out of electromechanical switches (lacking touch tone and custom calling features) and that offered out of digital switches (with access to caller identification, call waiting, etc.). The elimination of party-line service and the replacement of electromechanical switches provided an unambiguous change to the other side of a type of telecommunications divide.

In sharp contrast, within the broadband-served community, there is a significant spectrum of capabilities, with a wide and evolving array of broadband speeds and attributes available throughout the country and world. Although certainly there is a divide between those with and those without broadband access, referring simply to the digital “have” and “have-nots” simplifies a complex situation where consumers have access to a wide range of broadband options, ranging from DSL to fiber-based capacity.

The definition of broadband should be pegged to specific minimum download and upload speeds, so that the definition may evolve as the technology evolves. Absent such a definition, policy analyses and discussions will be less meaningful as the nation seeks to measure progress in establishing a national broadband network with affordable service for all.

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<sup>26</sup> / *Id.*, at para. 5 (emphasis added).

In terms of reasonable technological expectations for residential and small business consumers in the early 21<sup>st</sup> century, broadband should be defined initially as service offered at speeds of at least 3 mbps downstream and 1 mbps upstream, and with a longer term goal of symmetric speed capacities of at least 5 mbps in each direction to enable users to “originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”<sup>27</sup>

In order to achieve the immediate goal of ubiquitous affordable broadband, the short-term definition of broadband service should relate to the way in which the NTIA and RUS apply the definition to decide where to allocate broadband grant monies.<sup>28</sup> Specifically, in determining where to provide grants, those communities that have *no* broadband access should be given priority for grants over those communities that already have access to *slow* broadband speeds (between 200 kbps and 3 mbps).<sup>29</sup> The FCC’s short-term focus should be on ensuring that the mass market has access to affordable broadband, and, toward that end, the FCC should re-allocate universal service funding from wireline support to broadband support. In the longer term, the FCC should seek to ensure that consumers’ broadband options keep pace with other countries and, more importantly, with consumers’ needs for evolving broadband-dependent applications.<sup>30</sup> The complexity of defining broadband is evidenced by the wide diversity of positions

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<sup>27</sup> / 47 U.S.C. § 1302(d)(1).

<sup>28</sup> / *National Broadband Plan NOI*, at para. 18.

<sup>29</sup> / Under the new Form 477 reporting requirements, the first tier is greater than 200 kbps but less than 768 kbps; the second tier is equal to or greater than 768 kbps but less than 1.5 mbps; and the third tier is between 1.5 mbps and 3.0 mbps.

<sup>30</sup> / See, “Speed Matters, Affordable High Speed Internet for America, A report on Internet Speeds in All 50 States, Communications Workers of America, August 2009.

represented in the initial comments submitted recently to the FCC that address the question of establishing a broadband definition.<sup>31</sup>

The establishment of a minimum threshold for speed is critically important to prevent future waves of “digital divides” where some communities’ broadband access is vastly superior to other communities’ broadband access. Rate Counsel is encouraged that the FCC has taken steps to improve its ability to monitor the speed of broadband that is deployed throughout the country, which, in turn will enable it to periodically revisit the definition of broadband. Last year, the FCC released its Report and Order and Further Notice of Proposed Rulemaking in the broadband data gathering docket, WC Docket No. 07-38 (“Form 477 Order”).<sup>32</sup> In the *Form 477 Order*, the Commission updated the reporting categories for broadband service, replacing the five tiers that describe the maximum connection speed<sup>33</sup> to eight speed tiers.<sup>34</sup> Additionally, in recognition of the growing importance of upload speeds as well as download speeds, the Commission requires service providers to categorize subscribers based on both download and upload speeds. The Commission declined to create a system that would automatically adjust the

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<sup>31</sup> / Public Notice DA 09-1842, “Comment Sought on Defining ‘Broadband,’ NBP Public Notice #1,” GN Docket Nos. 09-47, 09-51, 09-137, released August 20, 2009. See comments filed August 31, 2009.

<sup>32</sup> / *In the Matter of 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*, WC Docket No. 07-38, *Report And Order And Further Notice Of Proposed Rulemaking*, 23 FCC Rcd 9691 (2008) (“Form 477 Order”).

<sup>33</sup> / The previous five tiers included: 200 kbps to 2.5 mbps, 2.5 mbps to 10 mbps, 10 mbps to 25 mbps, 25 mbps to 100 mbps, and greater than 100 mbps.

<sup>34</sup> / The new speed tiers 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. *Form 477 Order*, at para. 20.

speed tiers to reflect improving technology,<sup>35</sup> but instead stated that it would review the speed tiers every two years and make any adjustments necessary.<sup>36</sup> Rate Counsel recommends that the analyses and findings undertaken by the Commission based on its collection of the revised Form 477 inform and serve as the basis for the definition of broadband that the FCC adopts.<sup>37</sup>

The definition of broadband should be dynamic, “with speed tiers that adjust with changes in technology.”<sup>38</sup> Rate Counsel concurs with the FCC that “it is important that we do not lose sight of the potential for monumental shifts in technological platforms that would render definitions obsolete or indeed harmful to developments that might otherwise take place in the market.”<sup>39</sup> Rate Counsel recommends that the Commission re-visit its broadband definition once each year until such time as technological advancements appear to be reaching a plateau.

**Broadband is not being deployed to all Americans in a reasonable and timely fashion.**

In its *NOI*, the Commission cites its Section 706 First Report, stating that availability “refers to a consumer’s ability to purchase a capability that has been deployed” and asks if “this description form[s] the basis of an adequate definition of availability” as well as “what it means for broadband to be ‘availab[le].’”<sup>40</sup> At the most basic level, the answers to two of the specific issues outlined in the *NOI* are self-evident.

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<sup>35</sup> / *Id.*, at para. 22.

<sup>36</sup> / *Id.*, at para. 21.

<sup>37</sup> / The first filings under the revised Form 477 guidelines were due to be filed by March 16, 2009. DA 09-573, “Wireline Competition Bureau Announces New Tutorial to Assist Form 477 Filers; Over 2100 Filings Have Been Submitted as Complete to Date,” WC Docket No. 07-38, released March 11, 2009.

<sup>38</sup> / *National Broadband Plan NOI*, at para. 18.

<sup>39</sup> / *Id.*, at para. 22.

<sup>40</sup> / *NOI*, para. 42, footnotes omitted.

The *NOI* asks whether broadband is available to all Americans and whether the current level of broadband deployment is reasonable and timely.<sup>41</sup> In order to jumpstart broadband deployment and adoption, in February, 2009 Congress set aside \$4.7 billion for the Broadband Technology and Opportunities Program (“BTOP”). Section 6001(b) of the ARRA notes that the purpose of the BTOP is to:

- (1) provide access to broadband service to consumers residing in unserved areas of the United States;
- (2) provide improved access to broadband service to consumers residing in underserved areas of the United States;
- (3) provide broadband education, awareness, training, access, equipment, and support . . .

Congress has tasked the Commission with developing a National Broadband Plan which should “seek to ensure that all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal.”<sup>42</sup>

**Rate Counsel urges the Commission to release Form 477 data on a timely basis.**

In its *NOI*, the Commission states that “the current section 706 inquiry will benefit from—indeed, be driven by—improved broadband data.”<sup>43</sup> Broadband providers submitted the first set of Form 477 data under the new rules in March, 2009. According to the Commission, Staff is “in the process of analyzing the first round of Form 477

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<sup>41</sup> / *NOI*, at para. 33. The clear import of the *NOI* is that, as the FCC and Congress have found, broadband deployment and broadband adoption in the United States lag behind many other countries, a concern that has been echoed by many, including for example, NASUCA and Free Press. With the scrutiny that the FCC, Congress, and many stakeholders are devoting to the nation’s broadband infrastructure, it is difficult to comprehend how the FCC could answer the overarching question of whether broadband is being deployed to all Americans in a reasonable and timely basis with anything but an unequivocal no.

<sup>42</sup> / ARRA, §6001(k)(2).

<sup>43</sup> / *NOI*, at para. 12.

filings under these new rules, which were due March 16, 2009,” the “next Form 477 data filings are due on September 1, 2009,” and the FCC “expect[s] that analysis of the first set of revised Form 477 data will be included in the Section 706 Sixth Report.”<sup>44</sup> Rate Counsel urges the Commission to release that data as soon as possible so that interested parties can analyze the data as part of this Section 706 inquiry. The current round of comments will not be informed by access to the data submitted under the new rules. The Commission should ensure that the data is released on a timely basis and should review *ex parte* submissions that utilize the new data. In addition, the Commission should consider seeking comments that specifically address the results of the new Form 477 data before the February 3, 2010 deadline for the Section 706 Report.<sup>45</sup> Despite the fact that the *NOI* references the new data requirements and submissions several times in the *NOI*, the Commission has given no indication that it intends to rely upon stakeholders’ analyses of the data for its conclusions in the Section 706 Report.

Rate Counsel is encouraged by the prospects for the opportunity to review more granular data and the enhanced ability the Commission may have to target its actions to accelerate deployment as part of its National Broadband Plan. The Commission seeks specific comment on whether, once mapping data is available, it should continue to rely upon subscribership data for its Section 706 Report.<sup>46</sup> While Rate Counsel agrees that subscribership data is a measure of adoption, and does not necessarily measure availability, the Commission’s task is not simply to answer the question of whether broadband service is available but to analyze whether the that deployment is “reasonable”

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<sup>44</sup> / *NOI*, at para. 21.

<sup>45</sup> / *See* FCC News Release, “FCC Starts with a Clean Slate for Next Broadband Report to Congress,” August 7, 2009 referencing the February 3, 2010 deadline.

<sup>46</sup> / *NOI*, at para. 45.

which implicates determinations of affordability, speeds, residential vs. business services, and a host of related issues. The dual use of infrastructure and subscribership data should inform the Commission’s efforts to determine whether broadband is “available.”<sup>47</sup>

State mapping projects may differ by state and the results will not be clear for some months to come. The most difficult problem to solve is an instance where maps may show availability but consumers are not subscribing to broadband. The Commission is then tasked with determining whether the lack of subscription by consumers is an issue of price, technological barriers, or other obstacles to adoption. Rate Counsel concurs with the Commission that subscribership data can be a “useful counterpoint” to infrastructure information in that it may “highlight gaps between availability and demand.”<sup>48</sup> It is these gaps where public policy can prove the most useful.

**The Commission should modify its Form 477 broadband data gathering program to include additional data required by the Congressional mandates contained in the ARRA and BDIA.**

The Commission states that it is required by the Broadband Data Improvement Act to compile a list of unserved areas and to determine the population, density, and average per capita income. As such, it is seeking comment with respect to the “geographic area” to use and notes that “NTIA and RUS adopt the smaller Census Blocks as the relevant geographic area, rather than Census Tracts” and the FCC further states that it seeks “comment on whether the Commission should similarly rely on Census Block data for our section 706 analysis to the extent such data are available.”<sup>49</sup> Rate

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<sup>47</sup> / See *NOI*, at paras. 44-45 seeking comment on whether the Commission should use state mapping data to determine availability or continue using subscribership data.

<sup>48</sup> / *NOI*, at para. 45.

<sup>49</sup> / *NOI*, at para. 54.

Counsel urges the Commission to reconsider its decision to adopt the Census Tract<sup>50</sup> as the relevant geographic area for Form 477 data, and instead require Census Block data.<sup>51</sup>

#### IV. CONCLUSION

As the Commission observed, the ARRA has brought “increased intensity to the national goal of ubiquitous broadband deployment.”<sup>52</sup> The level of public input sought by the Commission on broadband for the United States is unprecedented.<sup>53</sup> Rate Counsel is optimistic that the Commission’s comprehensive and concerted efforts to gather data and public input will lead to programs that yield affordable and ubiquitous broadband for all.

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<sup>50</sup> / In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip, WC Docket No. 07-38, *Report And Order And Further Notice Of Proposed Rulemaking*, FCC 08-89, released June 12, 2008, at para. 14.

<sup>51</sup> / Rate Counsel has advocated a more granular approach in Docket No. 07-38. See, for example, *In the Matter of Development of Nationwide Broadband Data to Evaluate the Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip*, WC Docket No. 07-38, Comments of the New Jersey Division of Rate Counsel, August 1, 2008, at 6 and footnote 21 stating: “Ideally, broadband data would be provided at the census block group level, particularly in rural areas where Census Tracts encompass large geographic regions in which broadband availability and subscriberhip could vary significantly from one end of the Census Tract to the other end.” See, also, *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip*, WC Docket No. 07-38, *Report And Order And Further Notice Of Proposed Rulemaking*, FCC 08-89, released June 12, 2008 (“Form 477 Order and FNPRM”), at para. 14 citing Consumers Union, et al., CPUC, and IL AG; Rate Counsel Reply, July 16, 2007 in WC Docket No. 07-38, at 4.

<sup>52</sup> / *NOI*, at fn. 43.

<sup>53</sup> / See, e.g., public staff workshops that the Commission is hosting in August and September 2009; see, also, “FCC Launches ‘Blogband’ to Chronicle National Broadband Plan, Also Launches Microblog on Twitter,” FCC Press Release, August 18, 2009.

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