

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

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| In the Matters of |) | |
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| 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 |

**COMMENTS OF
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I. Introduction and Summary

USTelecom is pleased to provide these comments in response to the Commission's *NOI*.¹ There is a new appreciation of the importance of broadband adoption and deployment for American prosperity, innovation and societal welfare. USTelecom members are at the heart of the effort to connect all Americans to broadband. Data analysis is fundamental to good policy-making and the section 706 report can be a powerful tool for this analysis. In order for the initiatives outlined in the *NOI* to ensure that unserved Americans can soon enjoy the benefits of broadband, it is important to understand this data and to appreciate the role that the private and public sectors have in reaching the goal of broadband access for all.

II. Is Broadband Deployment Reasonable and Timely?

A. Americans have enjoyed a rapid growth in the availability of broadband as demonstrated by the dramatic increased in adoption rates and deployment.

The central question that Congress tasked the Commission with answering in its section 706 report is “whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”² USTelecom believes that the facts support a resounding yes with respect to broadband deployment to the vast majority of Americans. There is much to be done to reach the ambitious goal of providing broadband capability to all Americans.³ But what remains to be done must not obscure how much

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*, Notice of Inquiry, GN Docket No. 09-137 (Aug. 7, 2009).

² 47 U.S.C. § 1302(b).

³ As we note in our discussion, satellite broadband already has a nationwide footprint. When satellite is not specifically mentioned, USTelecom's comments focus on the availability of terrestrial broadband service.

has already been achieved. And we must be mindful that much of that success has been achieved through private investment, lest in our efforts to reach our goal of 100 per cent availability of broadband to all Americans, we weaken the very framework on which our future success necessarily rests.

Let us look at where we are today. With respect to broadband availability, the vast majority of Americans can choose from among multiple broadband platform providers. Approximately four-fifths of households in the United States have access to both a wireline and cable broadband service provider and over 90% of households in the United States have access to at least one of these platforms, with ever increasing competition between them.⁴ Moreover, mobile wireless broadband is available to more than 95% of households in the United States from at least one provider and deployment is increasing amid robust competition for customers.⁵ Satellite broadband is available to any household in the country within view of the satellite, *i.e.*, a footprint that spans almost the entire United States.

⁴ The National Cable and Telecommunications Association states that cable modem service was available to 92% of households in the United States as of year end 2008; *see*, <http://www.ncta.com/StatsGroup/Availability.aspx> (visited September 4, 2009). The Commission estimates that, as of June 2008, DSL was available to 83% of households in the United States. *See* Federal Communications Commission, High-Speed Services for Internet Access: Status as of June 30, 2008 (“FCC High-Speed Internet as of June 30, 2008”) (July 2009), at p. 4. This is an estimate of the percentage of residential end-user premises with broadband availability, not percentage of zip codes. Today, DSL or fiber is likely available to more than 83% of households.

⁵ *See* Michael J. Copps, then-Acting Chairman, Federal Communications Commission, Bringing Broadband to Rural America (“Copps, FCC, Bridging Broadband to Rural America”) (May 22, 2009) at p. 12 (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291012A1.pdf) (visited September 4, 2009). Wireless broadband providers are planning to upgrade existing third generation mobile broadband networks to higher-speed fourth generation technologies. Verizon and AT&T plan to deploy Long Term Evolution (LTE) technology over the next several years. *See* <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26819> (visited June 1, 2009) and <http://investor.verizon.com/news/view.aspx?NewsID=983> (visited June 1, 2009). Clearwire, which was recently spun off from Sprint, projects that its fourth generation wireless broadband services using new mobile WiMAX technology will be available to 120 million people by 2010.⁵ *See* Clearwire Corporation, United States Securities and Exchange Commission Form 10-K (filed March 26, 2009), at pp. 2-3.

With respect to broadband adoption, household adoption stood at 63% as of April 2009.⁶ This adoption rate, when compared with those of other technologies, is unprecedented. Subscribership grew from 1 million in 1999 to at least 79.1 million in June 2008.⁷ In recent years, the portion of new subscriber additions attributable to new technologies, such as mobile wireless broadband and fiber to the premises has steadily grown. See Figure 1. The United States achieved 50% broadband household penetration in less than nine years.⁸ For broadband to exceed 50% penetration in less than nine years is remarkable, especially when compared to other communications and information technologies. After its invention by Alexander Graham Bell in 1876, the first telephone exchange appeared in 1878 and the first automatic switch went into commercial use in 1892. After the Bell patents expired in 1894, thousands of companies entered the market to provide local exchanges. Yet the telephone did not achieve 50% household penetration until sometime between 1940 and 1950—about a half a century after the patent expiration.⁹ Cable television service took over thirty-five years to achieve 50%

⁶ See John Horrigan, PEW Internet & American Life Project, Home Broadband Adoption 2009 (“PEW Home Broadband 2009”) (June 2009) at p. 3. It is more precise to evaluate the number of households subscribing to broadband than connections as a percentage of population because the latter fails to account for household sizes. This is one of several methodological flaws in the approach used by OECD to “rank” relative broadband usage across nations. See, Phoenix Center Policy Paper No. 29, *The Broadband Performance Index: A Policy-Relevant Method of Comparing Broadband Adoption Among Countries* (July 2007) (demonstrating that if every home and business in every OECD country were subscribed to broadband, the United States would still rank 20th under its methodology because households in the United States are larger than in most OECD countries).

⁷ See FCC High-Speed Internet Access as of June 30, 2008 at Table 4. The figure represents “High-Speed Services” with 200 kbps in at least one direction.

⁸ See PEW Home Broadband 2009 at p. 13. According to PEW, broadband achieved 50% penetration sometime between March of 2007 and May of 2008.

⁹ Federal Communications Commission, Statistical Trends in Telephony July 1998, Table 16.3, page 87 at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend298.pdf (visited September 4, 2009).

household penetration in the United States;¹⁰ personal computers took 20 years; color televisions took 20 years; and wireless telephones took 16 years.¹¹ See Figure 2.

Figure 1: Growth in Broadband Subscribers

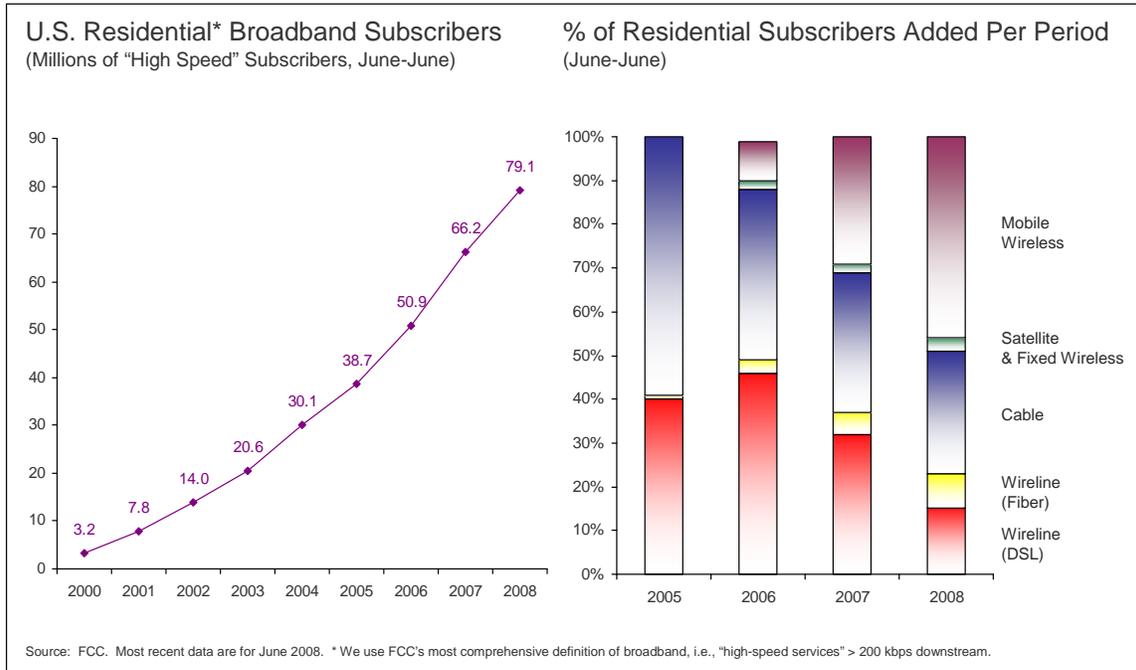


Figure 2: Broadband Adoption Compared to Other Communications Technologies

¹⁰ United States Department of Commerce, Census Bureau, Statistical Abstracts of the United States (2008, 2000, 1994, 1985, 1980, 1976) available at http://www.census.gov/compendia/statab/past_years.html (visited September 4, 2009)

¹¹ Consumer Electronics Association, Household Product Penetration, 2008-9.

| Communications Technology | Years To 50% U.S. Household Penetration |
|---------------------------|---|
| Broadband | 9 |
| Wireless Phones | 16 |
| Personal Computers | 20 |
| Color Television | 20 |
| Cable Television | 35 |
| Telephones | ~50+ |

In fact, because of the depth of private sector investment and the parallel development of various broadband platforms, the United States has one of the most competitive broadband platform markets in the world. One area of distinction for the United States is the platform competition among wireline and cable broadband providers. As of mid-year 2008, cable modem service was available to 92% of households in the United States.¹² The technology with the next highest availability rate in the United States is DSL, which was available to 83% of households.¹³ In the Europe Union, as of year-end 2007, DSL was available to 92.5% of households.¹⁴ The technology with the next highest availability rate in the European Union is cable modem, which was available

¹² See FCC High-Speed Internet as of June 30, 2008 at p. 4 and Table 14 (stating that cable modem service is available to 96% of residential end-user premises to which cable systems can provide cable television service). Cable television is not available to all households. Therefore, for an estimate of availability to all households, see National Cable & Telecommunications Association at <http://www.ncta.com/StatsGroup/Availability.aspx> (last visited September 2, 2009) (stating that cable high-speed Internet availability to households in the United States is 92%).

¹³ See FCC High-Speed Internet as of June 30, 2008 at p. 4 and Table 14 (stating that DSL service is available to 83% of residential end-user premises to which ILECs offer local telephone service).

¹⁴ See Commission of the European Communities, Progress Report on the Single European Electronic Communications Market (14th Report), Commission Staff Working Document, Volume 1, Part 2, document SEC(2009) 376/2 (“European Commission Staff Working Document”) (July 30, 2009) at p. 23. Union-wide and nationwide availability are computed by adding together the reported rural availability rate and the reported rural gap with national coverage.

to only 40% of households – 53% availability in urban areas and only 4% availability in rural areas.¹⁵ The most current data on availability for the European Union is for year-end 2007. For practical comparison purposes, the data for availability in the United States for year-end 2007 is similar to mid-year 2008.¹⁶ The wider availability of multiple platforms is significant because it entails broader competitive incentives to upgrade networks to more powerful technologies, such as the wireline deployment of fiber and the cable industry deployment of DOCSIS 3.0.

The portion of subscribers relying on the two different wired platforms further illustrates the relative competitive balance among broadband platforms in the United States compared to the European Union, another indicator of competition. In the United States, as of mid-year 2008, 55% of fixed broadband subscribers used cable modem and 43% used DSL or fiber.¹⁷ In the European Union, as of year-end 2008, 81% of subscribers used DSL or fiber and only 15% used cable modem.¹⁸

Japan and South Korea have been recognized for their deployment of fiber. However, the deployment of alternative platform competition, particularly cable modem, has developed differently in both countries. It appears that Japan has a relatively weak cable modem presence while the South Korean cable industry appears to be more

¹⁵ See *Id.* at pp. 22-23.

¹⁶ See Federal Communications Commission, *High-Speed Services for Internet Access: Status as of December 31, 2007 (January 2009)* at p. 3 and Table 14 (stating that cable modem service is available to 96% of residential end-user premises to which cable systems can provide cable television service and DSL is available to 82% of residential end-user premises to which ILECs offer local telephone service). There is, of course, variation within Europe, with high cable availability in a handful of countries, e.g., the Netherlands (92%), Belgium (88%), Portugal (85%), Hungary (73%), and Luxembourg (71%). Nonetheless, cable availability remains low for the Union as a whole (40%) and for some of the largest member countries, e.g., France (26%), Germany (47%), Spain (51%), and the UK (48%).

¹⁷ See FCC *High-Speed Internet as of June 30, 2008* at Table 3 (Total broadband subscribers with 200 kilobits per second in at least one direction is 67.6 million. This excludes 11.5 million residential mobile broadband subscribers for comparison with the European Union data, which also exclude mobile wireless. DSL and fiber subscribers were 29.2 million. Cable modem subscribers were 36.9 million.).

¹⁸ See European Commission Staff Working Document at p. 18.

developed.¹⁹ As of year-end 2008, 86% of Japanese broadband subscribers used fiber or DSL and 14% used cable modem, while in South Korea 67% of broadband subscriber used fiber or DSL and 33% used cable modem.²⁰

Finally, the migration from third to fourth generation mobile broadband wireless in the United States is occurring in one of the most structurally competitive wireless markets in the world. More than 95% of the United States population has a choice of three or more mobile networks and more than 90% of the population has a choice of four or more mobile networks.²¹ As of the end of 2008, the top four mobile carriers in the United States have a market share of 86% of subscribers and the largest had a share of 28.5%. In a comparative study, in 23 of 26 OECD countries, the top four carriers had 100% of the market; in 13 of the 26 OECD countries the top three carriers have 100% of the market.²² As noted above, mobile wireless broadband, from at least one of several providers, is available to more than 95% of United States households.²³ In contrast, according to the European Commission staff, “the deployment of mobile/wireless networks in the EU is uneven. Even in the case of UMTS networks (where coverage ranges from 30% in the case of Estonia to 90% in the case of Denmark, Luxembourg and

¹⁹ See Robert Atkinson, Daniel Correa, and Julie Hedlund, The Information Technology and Innovation Foundation, *Explaining International Broadband* (May 2008) at D2 (“Japan’s cable TV industry is highly fragmented, which makes it difficult for providers to upgrade their networks for two-way (broadband) service.”) and F3 (describing the history of the South Korean cable modem industry).

²⁰ See Organisation for Economic Cooperation and Development (OECD) *Broadband Statistics* (December 2008) at Table 1d available at <http://www.oecd.org/dataoecd/21/35/39574709.xls> (visited September 2, 2009).

²¹ See Thirteenth Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC DA 09-54 at p. 6 (rel. January 16, 2009).

²² Letter of Christopher Guttman-McCabe, CTIA – The Wireless Association, to Marlene Dortch, FCC (May 12, 2009) at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520216419 (visited September 2, 2009).

²³ See Copps, FCC, *Bridging Broadband to Rural America* at p. 12.

the United Kingdom), coverage does not yet compare to DSL, which has an average of 90% population coverage in most countries.”²⁴

B. Private investment is the cornerstone of reasonable and timely broadband deployment.

The substantial growth in domestic broadband adoption and deployment is due to robust private investment. Encouraged by the pro-competition and pro-investment environment of recent years, private capital investment by broadband network providers has grown consistently since 2003.²⁵ By some estimates, cumulative capital expenditures by broadband providers from 2000-2008 were over half a trillion dollars.²⁶ In 2008 alone, broadband providers invested at least \$64 billion to deploy and upgrade their networks.²⁷ Despite the deep recession, significant private investment in broadband infrastructure continues today. For example, AT&T is expected to invest 18 billion dollars in 2009 alone.²⁸ Yankee group projects an average annual industry capital investment of greater than \$60 billion for the next five years.²⁹ While private investment is likely to decline slightly in the immediate future as a result of the economic climate, competitive deployment and upgrades of broadband networks will continue to drive this significant private investment. See Figure 3. This substantial private investment over the

²⁴ See European Commission Staff Working Document at p. 24.

²⁵ See United States Department of Commerce, National Telecommunications and Information Administration (NTIA), *Networked Nation: Broadband in America 2007* (January 2008) at pp. 32-34.

²⁶ See *Id.* at 32-34. The NTIA data include payments for wireless spectrum licenses. Wireless capital expenditures for 2000-2002 were derived by taking the difference of cumulative capital expenditures published by the Federal Communications Commission in its Tenth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (FCC-05-173) (released September 30, 2005), Table 1 at p. 80.

²⁷ Yankee Group Research, Inc. © Copyright 1997-2009. All rights reserved. Yankee Group estimates that broadband providers invested \$64.2 billion in 2008, up from \$62.5 billion in 2007. Data are in nominal dollars and include wired and wireless telecommunications carriers and cable providers. Wireless spectrum license payments are not included.

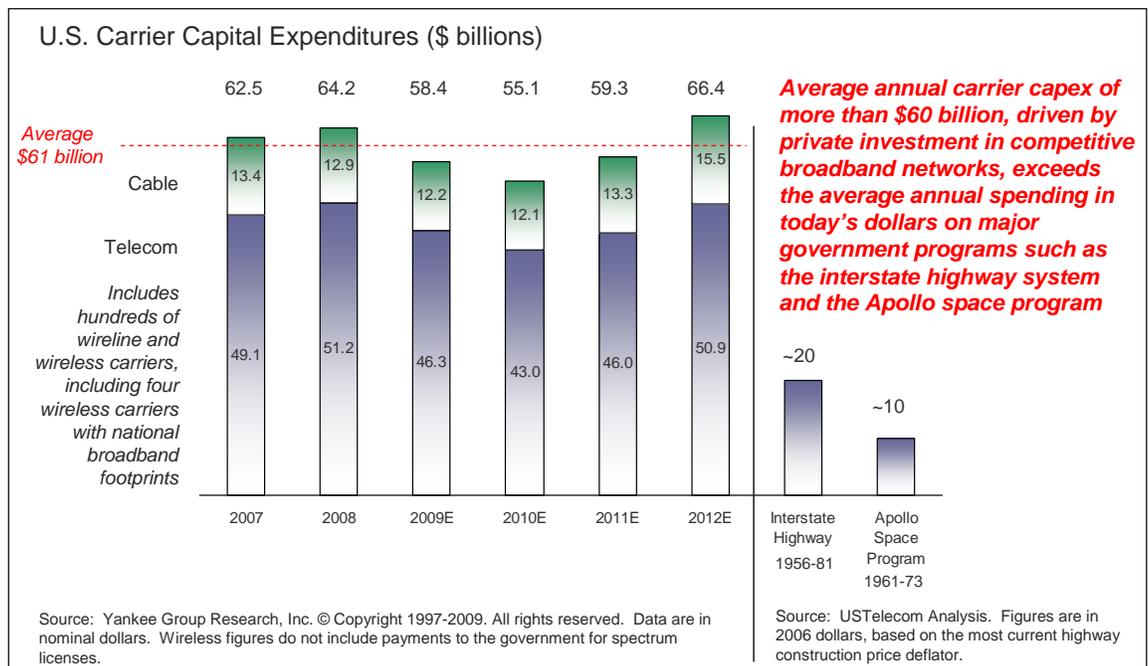
²⁸ Jeffery Bartash, Dow Jones Newswires, “*US Telcos Ready to Spend, Suppliers to Benefit*,” (Aug. 25, 2009) available at <http://www.totaltele.com/view.aspx?ID=448319>, (visited August 30, 2009).

²⁹ Yankee Group Research, Inc. © Copyright 1997-2009. All rights reserved.

next five years will far exceed the current funding of 7.2 billion dollars being made available through the NTIA and RUS BIP and BTOP programs. Even if this stimulus funding were to continue yearly at the rate of 7.2 billion dollars, private investment over the next five years would be more than eight times such five-year government funding.

While wisely targeted government spending can stimulate private investment and provide support in the case of market failure, it cannot substitute for the tremendous network investment necessary to continue the expansion of broadband services throughout the United States. See Figure 3, comparing annual *private sector* broadband investment to the average annual investment government in large public infrastructure and technology projects, such as the Interstate Highway System and the Apollo space program. Therefore, policies that encourage private investment are essential in order to continue to build the infrastructure necessary to deploy broadband infrastructure to deliver broadband service to all Americans at a timely and reasonable rate.

Figure 3: Broadband Spending vs. Government Infrastructure Programs



C. **More needs to be done to ensure the timely and reasonable deployment of broadband to Americans in rural and other uneconomic areas.**

USTelecom believes that the evidence described above supports a finding that advanced communications services are being deployed in a timely and reasonable fashion to most Americans. But that is not to say that more will not and should not be done. The President has made a commitment to full broadband deployment. Congress has put in place legislation to empower NTIA and RUS³⁰ to jumpstart further broadband deployment in rural underserved and unserved areas and other locations in which reasonable and timely deployment of terrestrial broadband may not yet be occurring because it is uneconomic to do so. A national broadband map will soon help us to determine with greater granularity where we should target these efforts. The Commission is fully engaged in creating a National Broadband Plan and benchmarking progress towards it. States also are redoubling efforts to map existing broadband deployments and create new broadband deployment programs.

As we explain more fully below, cataloguing and benchmarking these efforts should be a component of the section 706 report, if we are to have a full and accurate

³⁰ Unfortunately some of the rules incorporated in the first NoFA (Notice of Funding Availability) issued by RUS and NTIA implementing the broadband infrastructure stimulus aspects of ARRA missed the mark—so much so that they discouraged many very well qualified and well managed private providers of telecom service from extending broadband service through sustainable projects. Positive changes that could be made in subsequent NoFAs to encourage high quality projects to extend broadband facilities to unserved areas include eliminating or modifying restrictions on the sale or lease of award-funded facilities, eliminating the rural/remote distinction in the RUS Broadband Initiatives Program (BIP), eliminating the program income restriction, constraining the oversight obligations to only those necessary, and modifying the “infection rule.” Finally, the non-discrimination and interconnection requirements should be modified in four ways—the RUS *requirements* should be changed into *priorities* per the statute, the FCC’s Broadband Policy Statement should be accepted as fulfillment of NTIA’s non-discrimination and interconnection requirements and the RUS priority, the duration of such requirements should be limited to a term significantly less than the economic life of the facilities financed, and the requirements should not be applied to contractors and subcontractors as long as such parties are not engaged in the actual ongoing operation of the facilities financed.

assessment of whether broadband is being deployed to all Americans in a timely and reasonable way. We need to look more inclusively at all broadband deployment efforts that are directed to and are bringing broadband to *all* Americans. Insofar as it is achievable, having in one place a comprehensive description of governmental deployment programs, not-for-profit institutional projects, state and local government broadband programs, and public-private partnerships will most completely tell the story of broadband deployment in the United States. By adding these data, the Commission can most thoroughly use its section 706 report to take the pulse of the nation's broadband health.

III. What Actions Can the Commission Take To Accelerate Broadband Deployment?

A. Reforming the inter-carrier compensation system is essential to increasing private broadband investment and deployment.

Removal of disincentives for investment have spurred construction of broadband facilities in most areas of the nation, and additional Commission actions providing regulatory certainty will further encourage providers to use private capital to enhance and extend broadband facilities. As noted in then-Acting Chairman Copps' Report to Congress "Bringing Broadband to Rural America,"³¹ resolution of several Commission proceedings will be helpful in encouraging private capital to invest in broadband facilities in markets today viewed as marginal. These pending proceedings identified by the then-Acting Chairman include universal service reform, network openness, spectrum access, middle mile/special access reform, inter-carrier compensation, access to poles and rights of way, tower siting, and video programming proceedings.

³¹See, Acting-Chairman Copps Rural Report to Congress at pp. 54-71.

Thus, there is much that the Commission can do to build an investment climate that will encourage private investment in broadband infrastructure. Most notably, the Commission must itself timely and reasonably conclude its long deliberations on intercarrier compensation and universal service reform. As USTelecom stated in its July 29, 2008 *ex parte*:

The uncertainty of the current regulations governing intercarrier compensation is a significant hurdle to raising the capital necessary to expand and improve our country's broadband infrastructure and to the ubiquitous broadband that is our goal. After eight long years of review, the time has come for the Commission to modernize this system to reflect today's broadband and competitive realities. Given the importance of broadband deployment and adoption to job creation, investment, innovation, and small businesses, the benefits of reform will be felt broadly across our economy and our society.³²

The current system by which companies pay each other for handling calls is archaic. Outmoded regulatory classifications result in similar functions being priced very differently. This promotes arbitrage rather than sound investment. Equally destructive of broadband deployment is the failure of the current system to take into account rapidly declining access revenue support for carrier of last resort service in high cost areas. These are the areas most in need of redoubled efforts to build and operate modern broadband networks, yet without reform, the cycle of declining access revenues will inhibit broadband investment where it is most needed.

³² Letter from Walter B. McCormick, Jr. to Julius Genachowski (July 29, 2009) at 3. The letter was filed in the following dockets: *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 and *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No.96-45.

The Commission has the tools it needs to begin to rebuild this archaic system in a rational manner and create a glide path to a modernized system of unified, cost-based rates and explicit support targeted to where it is most needed to maintain service and support broadband growth. Last year, four Commissioners, including two sitting FCC Commissioners, saw

a tentative but growing measure of consensus on a number of issues, including: moving intrastate access rates to interstate access levels over a reasonable period of time; not unduly burdening consumers with increases in their rates untethered to reductions in access charges; addressing phantom traffic and traffic stimulation; implementing an alternative cost recovery mechanism in certain circumstances; eliminating the identical support rule and moving over time towards support based on a company's own costs; emphasizing the importance of broadband to the future of universal service...

With this consensus, the Commission has the building blocks to create stable compensation and support structures. These are the twin pillars on which private capital, in partnership with government efforts, can build new broadband infrastructure, particularly in rural areas. It is critical that the Commission complete reform as part of its broadband plan and that it take the first steps without further delay.

B. Reforming the current pole attachment regime would spur broadband deployment and establish parity.

Rights-of-way costs can add substantially to broadband deployment costs.³³

Specifically, the current regulatory scheme governing pole attachments is in need of

³³ See, e.g. *Wireline Competition Bureau Seeks Comment on Level 3 Communications' Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed by the New York State Thruway Authority are Preempted Under Section 253*, Public Notice, DA 09-1878 (released Aug. 25, 2009).

particular revision to reflect the broadband era. Under the current regulatory scheme, different providers pay substantially different rates for identical broadband attachments depending on how they fit into old-world regulatory silos. Thus, cable companies pay low rates set by regulation; a separate regulatory regime sets higher rates for CLEC attachments; and incumbent carriers, to which neither regulatory scheme applies, pay, on average, much higher rates. This rate disparity skews competition and handicaps broadband deployment. USTelecom filed a petition seeking Commission action on pole attachments in 2005. After seeking public comment on the petition,³⁴ the Commission issued a 2008 NPRM in response to the USTelecom petition. The Commission's *Pole Attachment* NPRM³⁵ recognized that rate parity for pole attachments among competing providers of broadband services is essential to ensuring that consumers receive all the benefits of competition in this critical sector of the economy. In order to increase competition by putting competing broadband providers on a more equal competitive footing, and to spur the deployment of broadband, the Commission should move quickly to issue an Order accomplishing the goals of its 2008 *Pole Attachment NPRM* and USTelecom's 2005 Petition.

C. **A mix of incentives for private investment and targeted support may be necessary to ensure ubiquitous deployment of broadband services to rural and other uneconomic areas.**

As noted above, markets and private industry investment are providing competitive broadband to most of the nation. While there are areas that are too challenging to serve solely through private investment even with an optimal regulatory

³⁴ *In the Matter of the Petition of The United States Telecom Association For a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures*, Public Notice, Report No. 2737 (released Nov. 2, 2005).

³⁵ *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2008).

environment, such areas can be minimized and the need for government support can be most efficiently directed by regulatory policies that provide certainty and do not discourage such investment.

However, even with an optimal regulatory environment, there are some areas of the nation, particularly high cost rural areas that do not present a viable business case for private investment in high speed broadband facilities. Such areas require additional financial incentives for investment. There are several avenues for such incentives to be provided, including low cost loans, grants, tax incentives and universal service type mechanisms.

Leveraging the initiative and expertise of established private broadband providers is clearly preferable to direct investment by the government in constructing and operating broadband facilities in areas that are otherwise not economical to serve. Government should not and need not be in the business of operating businesses providing broadband service. For example, the experience of over half a century of the Rural Utilities Service (RUS) telecom infrastructure loan program demonstrates the viability of the private enterprise model. RUS borrowers have been able to use low cost funding to move from step to digital to packet switching, from party-line telephone service to VoIP and other sophisticated broadband offerings, all with a spotless repayment record and with improved universal availability of the funded service.

Government financing of private deployment of broadband facilities not only creates jobs and economic development, it strengthens telecom entities that can provide government with an additional return on its investment through payment of taxes. Moreover, as technology and other conditions governing the feasibility of providing

broadband improve, providing incentives for private companies to build out these networks (as opposed to government entities) does not risk crowding out potential private investment. Such risk was recognized in a recent report of the European Commission counseling caution in providing state subsidies for constructing additional broadband networks where services are already being provided. As this report concludes, “it must be ensured that State aid does not crowd out market initiative.”³⁶

USTelecom continues to support the RUS telecom loan programs as an important vehicle to bring broadband facilities to challenging areas by leveraging private investment. Both the Title II infrastructure loan program (which initially funded plant used for voice service but now is utilized by borrowers to primarily build and upgrade broadband facilities) as well as the Title VI broadband loan program are helpful in providing debt capital to upgrade broadband facilities.³⁷ However, in recent years, it has been demonstrated that it is very difficult to prove financial feasibility sufficient for the government to risk extending debt capital to many, if not most, unserved areas. While the changes included in last year’s Farm Bill related to the eligibility of certain projects for RUS broadband program funds aspire to target loans to unserved areas, it is yet to be seen whether a sufficient volume of feasible loan proposals will be submitted that can make full use of the generous support Congress has provided for this valuable program. Loans are helpful when the availability of low cost capital acts as an impediment to deployment, but cannot overcome a carrier’s inability to invest in areas that are simply

³⁶European Commission Report, “Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks,” at para. 5, available at http://ec.europa.eu/competition/consultations/2009_broadband_guidelines/guidelines_en.pdf

³⁷See Rural Electrification Act of 1936, as amended, 7 U.S.C. 901-950bb.

uneconomic to serve. Thus, although loans can be helpful for some rural broadband projects, grants are the key to meeting the goals of universal broadband availability.

Thus, there is a continuum of need for support to bring high speed broadband service to high cost areas that could potentially match the various options available for government assistance. Construction of facilities in some areas could be incented by more favorable tax treatment of broadband investment, other areas may need low cost government loans, and the most challenging areas to serve may require direct grants, whether through a project-oriented universal service mechanism or through programs akin to those created in the recently enacted broadband stimulus legislation.

Government should strive to integrate its programs that support broadband deployment. Some areas may require a combination of solutions to allow feasible deployment of high speed broadband facilities. In this regard, the Chairman's report on rural broadband addresses improving federal agency coordination and other coordination efforts. One way that the Commission could help to accomplish the goal of better coordination would be, as we discuss below, adding a section to the section 706 report, cataloguing and reporting on all federal agency broadband initiatives and programs, as well as all other efforts of which the Commission is aware.

IV. Is Broadband Available to All Americans?

The Commission's questions in this section focus on the issue of what we mean by availability. As the Commission points out, one measure of availability is subscribership, which is a proxy for adoption. Another measure is broadband infrastructure deployment, which is a proxy for access to broadband. Currently, the Commission uses subscribership as its measure of availability. With the advent of the

NTIA mapping project, it will become possible for the Commission to use that NTIA data to compile statistics on the geographic deployment of broad infrastructure and to use broadband infrastructure deployment to measure availability. If the Commission were to continue to maintain its current subscribership data and separately draw on the NTIA data, as a distinct measurement, it would have the capability to measure the difference between availability and adoption, which is a crucial distinction. USTelecom believes that the Commission should include measurements of both in the section 706 reports, but should use the NTIA data for the new category of infrastructure deployment, rather than asking for duplicative data from providers.³⁸ By maintaining its current practice of collecting and reporting on subscribership data, the Commission will be able to sustain the ability to make uniform comparisons over time. By adding the new infrastructure deployment data, the Commission can more accurately measure what we commonly think of as availability. This will also end any confusion about whether Americans have access to broadband and are choosing not to adopt it, or whether the lack of adoption relates directly to a dearth of available broadband providers.

V. What Actions Should the Commission Take to Improve Its Regular Broadband Data Collection Efforts?

A. The Commission should stay the course it has established with its current section 706 reporting requirements.

The Commission asks whether, in light of the many new and comprehensive broadband collection activities that it describes in the *NOI*, the Commission should take new actions to ensure that it has the data that will be needed to assess broadband

³⁸ The Commission should, of course, continue its current practice of maintaining the confidentiality of proprietary or confidential provider data, whether the data is obtained by the Commission or itself or from another government agency.

deployment efforts. USTelecom believes that it is critical to broadband deployment that the Commission not act precipitously in this regard. There has not yet been the opportunity to issue a section 706 report using the new census tract data that the Commission is now collecting and which the Commission, after a full record, determined will provide the necessary level of granularity. There must be an assessment period during which the Commission can analyze, in conjunction with other data collection efforts now underway what information the government currently has, how it can best share it, and whether further information is actually needed. Any new data requirement poses real burdens on the companies reporting. The Commission should be very sure, after assessing the new 706 census tract data, working with the NTIA mapping data, and creating the new consumer surveys required by the BDIA, that the added burdens of requiring any new or additional data are clearly outweighed by the benefits.

B. The Commission must maintain its current confidentiality practices and, as required by the Broadband Data Improvement Act (BDIA), extend these practices to any data it releases to other entities.

The Commission has, since it first adopted the Form 477 reporting requirement for broadband data, understood that it was compelling companies to provide competitively sensitive data.³⁹ The obligation to provide commercially sensitive data triggers protection under FOIA Exemption 4, and the Commission has correctly protected Form 477 data from disclosure under this exemption.⁴⁰ In order to determine the contours of the Commission's obligation to keep section 477 data confidential and to understand the level of aggregation required, it is useful to look to Commission precedent in the context of FOIA requests. There is strong and consistent Commission precedent for

³⁹ See, e.g. *Local Competition and Broadband Reporting*, Report and Order, 15 FCC Rcd 7717, 7758-59 ¶¶ 87-89 (2000).

⁴⁰ See 5 U.S.C. 5 U.S.C. § 552(b).

treating Form 477 data as protected under Exemption 4 as trade secrets and commercial or financial information and privileged and confidential.⁴¹

For example, in *Center for Public Integrity v. FCC*, the Commission articulated core public policy considerations underlying its determination that Form 477 data are confidential.⁴² The Commission's underlying decision, which was affirmed by the court, explained the confidential nature of the data and the competitive harm that could occur from release of the data:

Filers customarily guard this data from their competitors, and release would harm their competitive interests by revealing to competitors their market strategies, their customer identities and counts and where they have deployed their services. For example, competitors could use this data to decide where to target their service offerings, facilities construction and marketing, all to the detriment of Form 477 filers.⁴³

The Commission recognized that release of data protected by Exemption 4 would hinder the Commission's ability to obtain reliable data in the future; interfere with the Commission's responsibility to promote competition; and cause competitive harm to the filer whose confidential data was revealed.⁴⁴ These public policy considerations require the Commission to continue to protect confidential data with the same degree of vigor.

Moreover, the FOIA precedent makes clear that some aggregation may not always be enough, and that when it is possible to derive from aggregated data commercial,

⁴¹ See Defendant's Motion for Summary Judgment in *Center for Public Integrity v. Federal Communications Commission*, Civ. Action No. 06-01644 (*FCC Motion for Summary Judgment*).

⁴² *Center for Public Integrity v. Federal Communications Commission*, 505 F.Supp.2d 106 (D.D.C. 2007) (*Center for Public Integrity*).

⁴³ Letter from Kirk S. Burgee, Letter from Kirk S. Burgee, Associate Bureau Chief, Wireline Competition Bureau, to Drew Clark, Center for Public Integrity, at 3 (Sept. 26, 2006).

⁴⁴ *Id.* at 20, 21, 25.

financial or trade secret information that is confidential or proprietary, the aggregated data must either be withheld or aggregated at a higher level of generality. The Commission's FOIA decisions also indicate that aggregated data could lead to revelation of company confidential or proprietary information, and such aggregated data would therefore be protected under Exemption 4.⁴⁵ In its Motion for Summary Judgment in *Center for Public Integrity*, the Commission also argued, among other things, that even where the filer had not specifically requested confidentiality for the information, "release of that filer's data, when associated with publicly available information, could reveal market-specific information about other filers that did request confidential treatment."⁴⁶ The Commission, in acting vigorously to protect confidential data has helped to ensure the integrity and completeness of the data that it collects from companies. There is a strong public interest, as well as a competitive necessity, in the Commission maintaining its current policies to ensure the continuing flow of reliable and complete data, including confidential and proprietary information.

As USTelecom has argued elsewhere,⁴⁷ Congress, in drafting the BDIA, extended the Commission's current data protection obligations to documents that it supplies to third parties.⁴⁸ In the BDIA, Congress struck the appropriate balance between

⁴⁵ Letter from Kirk S. Burgee, Associate Bureau Chief, Wireline Competition Bureau, to Michael J. Doane, ERS Group (Feb. 22, 2006)(withholding State level aggregated data when there was a possibility that these data could lead to the revelation of confidential information).

⁴⁶ *FCC Motion for Summary Judgment* at 12, 27.

⁴⁷ See Comments of the United States Telecommunications Association, *Providing Eligible Entities Access To Aggregate Form 477 Data As Required By The Broadband Data Improvement Act*, Public Notice, WC Docket No. 07-38, GN Docket No. 09-47, GN Docket No. 09-51 (2009).

⁴⁸ We note that section 1304(h)(2) of the BDIA closely tracks FOIA exemption 4 (5 U.S.C. § 552(b), which provides an exemption from disclosure for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Under 1304(h)(2), Congress has already made the public interest determination in favor of protection of data that would fall under FOIA Exception 4, rather than leaving it to the agency to make the public interest determination.

confidentiality and the provision of data.⁴⁹ Congress was mindful of the need to preserve confidentiality, and made the judgment that the public interest required that “*aggregate data*”⁵⁰ derived from the Form 477, should be available for use in mapping projects, not the more granular data that were collected. Moreover, those aggregate data were to be made available subject to comprehensive confidentiality requirements, and adherence to those confidentiality requirements was explicitly made a condition of grant receipt.⁵¹ Congress understood that stringent protection of “any matter that is a trade secret, commercial or financial information, or privileged or confidential or proprietary” data⁵² is necessary in order to ensure “continued progress in the deployment and adoption of broadband technology.”⁵³ In addition, Congress explicitly instructed the Commission to continue to protect proprietary data in its possession: “Nothing in this chapter shall reduce or remove any obligation the Commission has to protect proprietary information, nor shall this chapter be construed to compel the Commission to make publicly available any proprietary information.”⁵⁴

Data are crucial to good policy decisions. Sound protection for proprietary and confidential data is crucial to the continued public-private partnership in data gathering and analysis.

⁴⁹ The BDIA has a comprehensive confidentiality scheme covering all aspects of the Act. *See* section 1303(e)(Commission must protect proprietary information); section 1304(c)(3)(grantees must comply with confidentiality provisions); section 1304(d)(2)(C) (peer reviewers must certify that they will enter into non-disclosure agreements); section 1304(h)(2)(eligible entities must preserve confidentiality except as otherwise agreed by the broadband service provider).

⁵⁰ 47 U.S.C. § 1304(h)(1) (emphasis added).

⁵¹ *See* 47 U.S.C. § 1304(c)(3) (“To be eligible to receive a grant under subsection (b), an eligible entity shall--...agree to comply with confidentiality requirements in subsection (h)(2) of this section.”)

⁵² 47 U.S.C. § 1304(h)(2).

⁵³ 47 U.S.C. § 1301(2).

⁵⁴ 47 U.S.C. § 1303(e).

C. **The Commission should collect data on the “middle mile,” but must carefully distinguish between “middle mile” and “special access.”**

In paragraph 39 of the *NOI*, the Commission asks a series of questions to probe issues involving transport from the Internet Service Provider (ISP) to the Internet backbone.⁵⁵ The inquiry itself suffers from the conflation of terms that are both imprecise and distinct—special access and middle mile. While some parties may confuse these terms, the Commission must be careful not to fall into that trap, lest it confuse policy issues that are analytically separate and require fundamentally different approaches.

In the context of the on-going policy debate over pricing flexibility for ILEC “special access” services, the services at issue are, by and large, dedicated high-capacity point-to-point transmission services typically provided in areas of dense, concentrated demand.⁵⁶ As USTelecom has demonstrated in that proceeding, the term “special access” fails to capture the market for high-capacity services, because the term accurately refers to only one source (ILECs) from the myriad of competitive high-capacity services providers – wireline, cable and wireless. The question teed up in the Special Access proceeding, WC Docket 05-25, is whether the Commission’s pricing flexibility rules—which grant reduced regulation on the basis of demonstrating competitive triggers on an MSA-by-MSA basis—established an appropriate test for the availability of competitive alternatives to these ILEC special access facilities. Accordingly, most special access

⁵⁵ The paragraph begins by asking, “Does broadband include the special access services from one or more incumbent LECs, wireless service providers, or other carriers that Internet service providers (ISPs) purchase to transmit end-user traffic to Internet backbone service providers?” As we explain below, this question should be reframed to refer to the “middle mile” and the term “special access” confined to the purchase by end users of last mile transport in the local loop.

⁵⁶ See *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, FCC 05-18 (rel. Jan. 31, 2005) (“Special Access Notice of Proposed Rulemaking”) and FCC Public Notice, *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, FCC 07-123 (July 9, 2007).

services for which pricing flexibility has been granted involve relatively short end-user links to enterprise customers, wireline carriers or wireless providers. USTelecom has filed in this proceeding a detailed report on the extensive competitive offerings for these high-capacity services.⁵⁷

By contrast, the term “middle mile” as it has been used in the context of the Commission’s evaluation of broadband deployment—particularly in the National Broadband Plan NOI, GN Docket 09-51—typically references lengthy facilities used to transport data traffic from rural Internet aggregation points to the Internet backbone.⁵⁸ Leasing or constructing and operating such lengthy facilities can certainly be costly and, particularly when low-density rural communities are served, may have an impact on the ISP’s cost of providing broadband services to rural customers.⁵⁹ But these cost issues are fundamentally different than the issues presented in the Special Access Pricing Flexibility inquiry—indeed, most middle mile links are subject to price controls under traditional price cap or rate-of-return regulation. Accordingly, the key policy issue here is how to ensure that the total costs of transporting Internet traffic long distances to and from relatively small, scattered pockets of rural Internet users do not raise a barrier to use of the Internet.

⁵⁷ See Letter from Walter B. McCormick, Jr., United States Telecom Association to FCC Chairman Julius Genachowski and Commissioners Michael Copps and Robert McDowell, in WC Docket 05-25, GN Docket 09-51 (July 16, 2009), attaching Patrick Brogan and Evan Leo, High-Capacity Services: Abundant, Affordable, and Evolving, (July 2009).

⁵⁸ For example, see NECA *Cost Study Executive Summary* available at http://www.neca.org/cms400min/NECA_Templates/ResourceInterior.aspx?id=107, defining “middle mile” as the cost of transporting Internet traffic from an Internet Service Provider (ISP) operating in a rural telephone company’s territory to an Internet Backbone Provider (IBP)... .”

⁵⁹ See *Rural Broadband Report* (2009) at 34, n. 174 (citing NECA comment that “55% of rural telephone companies are located more than 70 miles from a node [Internet backbone] and 10% are more than 200 miles away.”)

It may be unrealistic to hope that the inherently high costs of building facilities over extremely long distances with sparse populations can be solved solely through technology and innovation. Stimulus funding targeted to areas that are unserved may underwrite substantial progress in this area. In fact, there have been a number of proposals for stimulus funding involving middle mile projects.⁶⁰ In the longer term, additional subsidy measures may be necessary to ensure broadband access is not deterred by the challenges of transporting rural traffic long distances to connect to the Internet.

The solution proposed by some of simply lowering the price of special access is counterproductive as well as overbroad and underinclusive. First, the proposed solution would run counter to policymakers' desire to promote further broadband investment. Artificially constraining prices will deter investment in new middle mile infrastructure, precisely what is needed. Second, it is overbroad because it would sweep in many portions of special access service that bear no relation to middle mile transport needed to reach unserved areas. Most special access services do not touch on any middle mile problem. Third, this proposal is underinclusive because it would fail to address the many situations of non-ILEC transport of the ISP's end-user traffic to the Internet backbone, services unrelated to ILEC special access transport.

Gathering data about middle mile transport availability may aid the Commission in analyzing how cost issues related to the provision of middle mile transport in rural

⁶⁰ For example, Level 3 has applied for 15 million dollars in stimulus funding and offered a matching 5 million dollars "to create new access points or 'middle mile' connections for its network in more than 50 rural markets in six states." Associated Press, "Level 3 Applies for Stimulus Funding" (August 24, 2009) available at <http://www.businessweek.com/ap/financialnews/D9A99HF80.htm>, (last accessed on Sept. 1, 2009). See also Kelly M. Teal, "Global Crossing: Stimulus Must Include Middle Mile," May 14, 2009, available at <http://www.xchangemag.com/articles/global-crossing-stimulus-include-middle-mile.html>, (last accessed on Aug. 28, 2009) ("For RLECs, the problem with getting broadband to underserved regions, the areas for which the broadband stimulus funds are intended, is not a lack of last-mile resources. Rather, the trouble comes from an inability for existing operators to run their networks at top speeds because of slow middle-mile connections linking their facilities to network access points miles away near urban zones.").

areas can best be addressed. But that data collection is distinct from the effort that needs to be undertaken in the Commission's Special Access proceeding, WC Docket 05-25. Conflating the two terms and the issues that underlie them will only add further confusion to a debate already too often subject to imprecise and undocumented claims.

D. The Commission should begin to collect data on public sector and not-for-profit institution projects to deploy broadband and on the availability of broadband through community anchor institutions.

While private investment will supply the primary source of funding for infrastructure deployment, in order for the Internet to reach those sparsely populated corners of the United States, where there is no business case for Internet deployment and operation, supplemental projects and programs should be undertaken. And there are a variety of such projects that have been completed, are underway, or are on the cusp of funding. Public funding initiatives are supporting broadband deployment to households in unserved areas. Internet access is also being provided in a variety of forms such as community access points in libraries and schools. More continue to go online. Universities have formed consortia to provide access and link to other institutions of higher learning. Telehealth projects add links, as well.

The federal government and many state governments have a variety of programs designed to increase deployment of broadband facilities as well as adoption of broadband service by residential consumers. We are all aware that the American Recovery and Reinvestment Act of 2009 established the Broadband Initiatives Program (BIP), housed in the Department of Agriculture's Rural Utilities Service (RUS) as well as the Broadband Technology Opportunities Program (BTOP) which is administered by the National Telecommunications and Information Administration in the Department of

Commerce. BIP is structured as a combination of federal government loans and grants while BTOP is exclusively a grant program. While Congress directed that both programs promote sustainable infrastructure investment, the programs' funding is of a one time, not continuing nature. This is in contrast to the ongoing RUS broadband loan program which receives an annual appropriation sufficient to support a prescribed level of lending. The RUS infrastructure loan program also results in the construction of broadband plant as it funds joint use facilities. RUS also has a much smaller Community Connect grant program which funds broadband deployment. But there is no single place in which the infrastructure created by these programs is being catalogued.

Moreover, other agencies, such as the National Science Foundation and the Department of Education, also provide grants for broadband projects. A listing of the projects completed and underway by all federal agencies could help the Commission to assess more completely the extent to which broadband is being deployed to all Americans and aid researchers, as well as improve coordination so badly needed to avoid wasteful and duplicative programs and leverage the government dollars being spent on broadband deployment.

A number of states have initiated programs to stimulate broadband deployment and adoption.⁶¹ Such state programs range from bodies established to promote policy solutions to broadband deployment and adoption issues, to public-private partnerships that map availability and implement programs to promote adoption, aggregate demand and accelerate broadband build-out. Some states also directly fund programs to support

⁶¹ Information on state broadband initiatives has been collected in a joint project of the Alliance for Public Technology and Communications Workers of America, *State Broadband Initiative: A Summary of State Programs Designed to Stimulate Broadband Deployment and Adoption* (June 2009). It would be helpful if the Commission could serve as a clearinghouse for information concerning such cataloguing efforts.

the build-out of advanced networks by leveraging private sector funds. At least 30 states have state networks connecting schools, universities, libraries and state and local government agencies, while at least 25 states support state telehealth networks.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

A handwritten signature in black ink, appearing to read "Jon Banks", written over a horizontal line.

By: _____

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