

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

In the Matter 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)	
In the Matter of)	
)	GN Docket No. 09-51
A National Broadband Plan for Our Future)	

**REPLY COMMENTS OF
THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
ON NOTICE OF INQUIRY**

On August 7, 2009, the Federal Communications Commission (“FCC” or “Commission”) issued a Notice of Inquiry, seeking “comment on whether broadband is being deployed to all Americans in a reasonable and timely fashion.”¹ A significant number of comments were filed.

¹ *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (“09-51”); *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 (“09-137”), Notice of Inquiry, FCC 09-65 (rel. Aug. 7, 2009) (“*Broadband Deployment NoI*”), ¶ 1 (footnote omitted).

The National Association of State Utility Consumer Advocates (“NASUCA”)² submitted brief comments that referred the Commission to NASUCA’s previous filings in these and related dockets. NASUCA now provides these reply comments, responding to key positions in others’ comments.³

NASUCA had noted skepticism about the Commission’s statement that it was proceeding from a “clean slate,”⁴ stating,

[T]here is no “clean slate,” no “*tabula rasa*,” on which these comments are being submitted. There is plenty of history, some good and some bad, and there is a more-than-substantial record on which the Commission can base a decision. There have indeed been changes in legislation and improvements in data gathering, but not that much since the *National Broadband Plan NOI* was issued in April of this year.⁵

NASUCA member the New Jersey Division of Rate Counsel (“NJ Rate Counsel”) more optimistically supported the “clean slate” notion.⁶ Their comment was focused on a “clean slate” as meaning that the Commission is not bound by its previous erroneous decisions. NASUCA agrees with that view; NASUCA interpreted the “clean slate” statement as meaning that the Commission intended to abandon the vast **record** before it.

Part of that record is the key view that

[e]ven where consumers have broadband access, the market is typically

² NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida in 1979 as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

³ These reply comments focus on a few of the more significant initial comments.

⁴ *Broadband Deployment NOI*, ¶ 2.

⁵ NASUCA Comments at 2.

⁶ NJ Rate Counsel Comments at 3.

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.⁷

And effective competition in broadband should be a major Commission concern here.

NASUCA agrees with Free Press that the Commission’s “irresponsible classification of advanced telecommunications services as information services has a direct bearing on this proceeding.”⁸ NASUCA and many others believe that the reclassification must be reversed.

A crucial concern is the speed that “broadband” represents. Many commenters support a definition that is significantly faster than the minimum definition of 768 kbps in both directions supported by NASUCA.⁹ It would be nice to assume that Congress in 1996 was prescient enough to have specified that “advanced telecommunications capability” meant video programming at the levels submitted by Free Press.¹⁰ Although that is an appropriate aspirational goal, it presents the risk that nothing short of the goal is acceptable. This creates a great problem for the many areas of the country that still do not have even the minimum level of broadband service proposed by NASUCA. Clearly improvement should be universal, but the Commission’s primary focus should be bringing the unserved and underserved areas up to that minimum. It is possible that

⁷ Id. at iii.

⁸ Free Press Comments at 6.

⁹ See NASUCA Comments at 3. Alternatives presented include NJ Rate Counsel Comments at iii (3 mbps downstream, 1 mbps upstream, with a longer term goal of symmetrical 5 mbps); Free Press Comments at 13 (not below 5 mbps); Covad Communications Company (“Covad”) at i (100 mbps by 2015); Qwest Communications International Inc. (“Qwest”) Comments at 6 (7-10 mbps for subsidy funding).

¹⁰ Free Press Comments at 4.

future improvements in currently “well-served” areas will be able to be driven by market forces, but the unserved and underserved areas are clear demonstrations of market failures.¹¹

NASUCA agrees that the definition of broadband should be broad enough to encompass the “unique value and characteristics of wireless networks.”¹² But the Commission should not be misled into thinking that wireless is or will be the broadband goal.¹³ It is likely that “[c]onsumer demand for [wireless] technologies demonstrates their performance in the broadband marketplace to deliver the applications that consumers need and want...”¹⁴ only because consumers have no better options.¹⁵ As the Wireless Internet Service Providers Association (“WISPA”) acknowledges, “mobile broadband serves a different market than fixed broadband...”¹⁶

That is one problem with CTIA’s view that “[w]hile adoption indicates availability, a lack of adoption may not indicate a lack of availability.”¹⁷ If broadband is “available,” but consumers do not adopt it because of cost, quality or other issues, then

¹¹ See Free Press Comments at 17-36.

¹² CTIA – The Wireless Association® (“CTIA”) Comments at ii; see also Sprint Nextel Comments at 5-7. The National Cable and Telecommunications Association (“NCTA”) expresses a similar view from the cable side. NCTA Comments at 4-5.

¹³ See Organization for the Protection and Advancement of Small Telephone Companies (“OPASTCO”) Comments at ii (“The primary definition of broadband should focus on the capabilities of highly scalable fixed networks. Indisputably, fixed networks, particularly those utilizing fiber, have superior bandwidth capability and scalability and are therefore in a unique position to accommodate the growing number of highly bandwidth intensive applications and services that rural consumers and business will desire and need to utilize.”); see also Western Telecommunications Alliance (“WTA”) Comments at ii.

¹⁴ CTIA Comments at ii.

¹⁵ OPASTCO Comments at iii (“[I]t is critical that these [wireless] services not be deemed as a substitute for fixed technologies as a result of a generalized definition of broadband that is set at a substandard speed.”).

¹⁶ WISPA Comments at 4.

¹⁷ CTIA Comments at ii; see also Time Warner Cable (“TWC”) Comments at 6-8.

that availability does not advance the public interest. This highlights the error in NCTA's statement that

[t]he process of defining broadband should not be used as a vehicle for imposing substantive obligations, such as standards or mandates for speed, price, "openness," and the like, on competitive providers of broadband services. Instead, the Commission should adopt a generic definition that focuses on the core functionality of the service.¹⁸

If "broadband" does not include such substantive obligations, then some consumers will be relegated to the minimalist intentions of their carriers. As WISPA points out, \

Some WISPs report that in their areas, 60 percent of the households have no broadband option other than satellite. A January 2009 Pew Research Center Study found that 15 percent of dial-up users were completely unserved - *i. e.*, had no access to broadband Internet.¹⁹

But it is clear that the Commission also needs to focus on strategies to increase adoption of broadband service, where the facilities are available.²⁰ To paraphrase the old saw, however, you can lead a consumer to broadband, but you can't make him log on.²¹

Back to the supply side, NASUCA agrees with numerous commenters who assert that middle mile (and special access) facilities should be included in the definition of broadband.²² The few comments to the contrary²³ are hardly persuasive.

¹⁸ NCTA Comments at 4.

¹⁹ WISPA Comments at 7.

²⁰ See, e.g., Verizon Comments at 6-8; WISPA Comments at 9; TWC Comments at 11-12.

²¹ In this regard, NASUCA opposes proposals to eliminate support for traditional voice service, replacing it with support for broadband. At this stage, support for broadband should supplement support for voice service.

²² OPASTCO Comments at iii; US Telecom Comments at 23-26; Sprint Nextel Comments at 1-4; Pennsylvania Public Utilities Commission Comments at 4; WISPA Comments at 4.

²³ See, e.g., Qwest Communications International Inc. ("Qwest") Comments at 7-13.

There are some who view the current level of broadband deployment through rose-colored (and self-interested) glasses.²⁴ It may be that this view is driven by the need to see “market-driven” (i.e., “provider-driven”) policy as the best solution.²⁵ TWC states, “When consumers demand upload speeds that match or exceed current download speeds, broadband service providers will respond accordingly.”²⁶ If that were the case, there would be no need for a National Broadband Plan.

There is a long list of areas where the Commission needs to take action in order to ensure effective ubiquitous broadband deployment. These include adding broadband to the list of supported services under the universal service fund (“USF”),²⁷ adding a low-income support program for broadband service,²⁸ and assessing broadband providers to support broadband deployment.²⁹ Such actions also include reforming pole attachment rates,³⁰ ensuring the availability of existing copper facilities and adopting TELRIC pricing for access to those facilities,³¹ controlling special access rates,³² and allocating additional spectrum for wireless broadband.³³ But the Commission should not allow

²⁴ See United States Telecom Association (“US Telecom”) Comments at 3-8; CTIA Comments at ii; Comcast Corporation (“Comcast”) Comments at 2-6; TWC Comments at i-ii; NCTA Comments at 5-8.

²⁵ US Telecom Comments at 8-9. This leads to obvious errors, such as quoting AT&T’s supposed \$18 billion investment in 2009, compared to an annual total industry investment of \$60 billion. *Id.* at 8. See also Comcast Comments at 8-9.

²⁶ TWC Comments at i.

²⁷ OPASTCO Comments at iv. We also agree that the Commission need not support more than one wireline broadband provided in a rural service area. *Id.*

²⁸ OPASTCO Comments at iv; District of Columbia Public Service Commission Comments at 2-3.

²⁹ OPASTCO Comments at iv.

³⁰ US Telecom Comments at 13-14; see also CTIA Comments at ii; Verizon and Verizon Wireless Comments at 1.

³¹ Covad Comments at i.

³² *Id.*

³³ CTIA Comments at ii; WISPA Comments at 2, 9.

itself to be distracted by initiatives that are not essential for such deployment, although they may be worth considering in other contexts.³⁴

Then there is the issue of confidentiality of provider information.³⁵ These claims are fundamentally at odds with market realities: If where a provider offers service is a confidential matter, how will the customers on whom the provider depends find out that the service is available? The claims all depend on the absurd idea that providers should and would keep confidential the services that they sell.

In conclusion, NASUCA agrees with NJ Rate Counsel that

[t]he 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.³⁶

NASUCA is also optimistic on this count.

³⁴ This includes intercarrier compensation reform (US Telecom Comments at 11-13) and eliminating the identical support rule and revising the rural high-cost fund (OPASTCO Comments at iv; WTA Comments at iii). It also includes the adoption of a "shot-clock" for tower siting. CTIA Comments at ii. WISPA has a more reasonable, less preemptory approach on access to towers. WISPA Comments at 9.

³⁵ US Telecom Comments at 19-22; NCTA Comments at 5.

³⁶ NJ Rate Counsel Comments at iv.

Respectfully submitted,

David C. Bergmann
Assistant Consumers' Counsel
Chair,
NASUCA Telecommunications
Committee

Office of the Ohio Consumers'
Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Phone (614) 466-8574
Fax (614) 466-9475
bergmann@occ.state.oh.us

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

October 2, 2009