Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter 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

REPLY COMMENTS OF FREE PRESS

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SUMMARY

Over the past four months, the Commission has requested an unprecedented level of public comment on issues related to broadband deployment, adoption, investment and competition. In response, Free Press has offered extensive data-driven research demonstrating the true dismal state of broadband in the United States. This is in stark contrast to the evidence offered by providers, which for the most part consists of old discredited myths and data. In these reply comments we once again highlight the deficiencies in the industry comments, and offer further evidence that the Section 706 test of reasonable and timely broadband deployment is not being met.

Industry comments filed in this proceeding fall short on a number of fronts. First, providers ignored the Commission's request for comments based on data. Second, in their comments, some incumbents ignore -- and ask the Commission to ignore -- Congressional intent by advocating for a low definitional threshold for broadband, one at odds with the plain language of the law. Third, in this proceeding industry continues its long history (both in the market and in their filings) of treating upstream capabilities as unimportant. In these reply comments we provide the Commission with further evidence that consumer demand for upload speed is not being met, and that the affordability of broadband must be included in the Commission's determination and that mobile broadband exists in a distinct market.

In these reply comments we also urge the Commission to dismiss the comments filed in this proceeding by its recent hire, industry-funded economist Scott Wallsten. Dr. Wallsten's assertions that the broadband market is adequately serving consumers fail to withstand scrutiny (as we demonstrate below). Further, Dr. Wallsten's current position as a Commission employee working on the National Broadband Plan necessitates that his comments be stricken from the

record. And his potential financial conflicts of interest stemming from his possible current or future industry support may require that he be removed from working on the plan, in order to preserve the integrity of this process.

At the end of the day the record in this proceeding is very clear -- the actual data overwhelmingly demonstrates that advanced telecommunications capability, as defined in Section 706, is not being deployed to all Americans in a reasonable and timely fashion. The Commission should issue its Sixth 706 Report to reflect this well-known reality, and begin the process of turning around years of agency neglect.

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REPLY COMMENTS OF FREE PRESS

Introduction

The detailed analysis Free Press submitted in this proceeding demonstrated that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion. Incumbents and others seeking a positive 706 finding failed to rebut our substantive arguments with data. Instead, their case relied solely on old rhetoric and long-ago discredited arguments. Reality is reality, and no amount of rhetoric can hide basic facts. Prices are high, speeds are slow and meaningful competitive choice in nearly non-existent.

In these reply comments, we point the Commission to existing evidence already placed in the record that refutes all the major arguments offered by those seeking a positive Section 706 finding. We also offer evidence that refutes the few new arguments offered to support the view that all is well in the U.S. broadband market.

I. Industry Respondents Failed to Make a Convincing Case that Advanced Telecommunications Capability is Being Deployed in a Reasonable and Timely Fashion

A. The Commenters Asking the Commission to Make a Positive Section 706 Finding Failed to Make their Case with Data

When the Commission requested comment on whether broadband was being deployed in a reasonable and timely fashion, they asked "all parties to provide data to support their assertions whenever possible."[1] Unfortunately, the comments offered by industry and others seeking a positive Section 706 finding are overwhelmingly void of any data. For the most part, industry commenters "wax" poetic about the U.S. broadband market, but do not support these conclusions with any data, analysis or supporting facts.[2] For example, Comcast asserts that "intense facilities-based competition" exists for broadband within the United States.[3] To back up this bold claim, the Company simply spends a couple sentences listing various technologies and ultimately quotes the United States Telecom Association making a similar claim as justification.[4] Verizon similarly stated their comments on the National Broadband Plan docket "comprehensively" illustrated this competition.[5] But if one examines these comments all that this "comprehensive

[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, A National Broadband Plan for Our Future, GN Docket Nos. 09-137, 09-51, Notice of Inquiry, 24 FCC Rcd 10522, Para. 33 (2009) ("*706 NOI*").

[2] Speech by Blair Levin, Executive Director, Omnibus Broadband Initiative, Free State Conference, Sept. 10, 2009.

[3] Comments of Comcast Corporation at 1. Citations taking the form "Comments of..." refer to the initial comments in the instant proceeding.

[4] *Ibid.* at 5.

[5] Comments of Verizon and Verizon Wireless at 1.

defense" consists of is nothing more than a few sentences that rely on the Commission's widely discredited old Form 477 data.[6]

In this and related proceedings, Free Press offered the Commission substantial and substantive data-driven analysis illustrating the lack of meaningful broadband competition and abuses of market power in the U.S. high-speed Internet market.[7] The Federal Trade Commission (FTC) concurs with this conclusion, stating "[c]urrently, relatively large market shares for fixed, wireline broadband services are typically held by a single incumbent cable operator and a single incumbent telephone company in each geographic area."[8] Most recently, Chairman Genachowski stated that consumers face "limited competition among service providers."[9] And as Mr. Levin has noted lobbyist's "mine first" attitude may be "inconsistent with our country's long-term economic and social interests."[10] We urge the Commission to reject the tired self-interested claims made by network operators who have repeatedly failed to supply the Commission with any data supporting their claims of reasonable and timely deployment of affordable advanced telecommunications capability to all Americans.

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[6] *Ibid.* at 12.

[7] *See e.g.* Comments of Free Press at 17-65. *See also* Comments of Free Press, In the Matter of *A National Broadband Plan for Our Future,* GN Docket No. 09-51, pp. 31-58 (2009) ("*Free Press NBP Comments*"); Reply Comments of Free Press, In the Matter of *A National Broadband Plan for Our Future,* GN Docket No. 09-51, pp. 13-53 (2009) ("*Free Press NBP Reply Comments*").

[8] Comments of the Federal Trade Commission, In the Matter of *A National Broadband Plan for Our Future,* GN Docket No. 09-51, p. 4 (2009).

[9] Prepared Remarks of Chairman Julius Genachowski, The Brookings Institution, Sept. 21, 2009.

[10] John Eggerton, "Levin: Broadband Comments Don't Move Ball Forward," *Broadcasting & Cable,* July 20, 2009.

B. In their Comments, Some Providers Ask the Commission to Ignore Congressional Intent

As we outlined in our initial comments, Congress already set the parameters of this inquiry by defining "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology".[11] But in their comments, incumbent providers are essentially asking the Commission to ignore Congressional intent.[12] For example, NCTA argues that, "the Commission should conclude that broadband is being deployed to all Americans in a reasonable and timely fashion,"[13] by pointing to the "billions" in investment,[14] the deployment of DOCSIS 3.0,[15] and the wide-range of technologies available to consumers.[16] While we have fully rebutted these investment assertions, the larger issue is industry's complete failure to consider the statutory language at the very center of this inquiry. Congress established a test that focused on what subscribers can actually do with their connections. This focus included the ability "to originate and receive high-quality…video."[17] But NCTA would have the Commission base the Section 706 test on "the types of application that are most commonly used today, such as e-mail and web browsing."[18] This willful avoidance

[11] 7 U.S.C. § 1302(d)(1).

[12] 47 U.S.C. § 1302(b).

[13] Comments of the National Cable and Telecommunications Association at 10.

[14] For a rebuttal, *see e.g. Free Press NBP Reply Comments* at 21-29.

[15] For a rebuttal, *see e.g.* Comments of Free Press at 37-41.

[16] For a rebuttal, *see e.g.* Comments of Free Press at 45-52, *Free Press NBP Reply Comments* at 35-53, *Free Press NBP Comments* at 40-46, 105-106.

[17] 7 U.S.C. § 1302(d)(1).

[18] Comments of the National Cable and Telecommunications Association at 4.

of a finding based on the law was common among network operators' comments.[19] We encourage the Commission to define "advanced telecommunications capability" based on the law as written in 1996, and reaffirmed in 2008.[20]

II. Additional Evidence Further Demonstrates that Advanced Telecommunications Capability is Not Being Deployed in a Reasonable and Timely Fashion

A. Further Evidence Reveals Consumers Make Use of Considerable Upstream Capacity

In Section 706 Congress laid out a vision of a ubiquitous two-way high-capacity and high-quality real-time communications network. Unfortunately, what we have today is a market of anemic asymmetry, where network operators focus marketing and promotional material on the downstream speeds, and tell regulators that Americans really don't want or need upstream capabilities. But applications making full use of what little upstream capacity is available have continued to proliferate, adding further weight to the fact that consumers are not receiving the upstream speeds they desire. We have exhaustively documented the lack of offerings with sufficient origination capabilities.[21] The few offerings that do approach what one could reasonably consider "advanced telecommunications capability" on the upstream side come in highly asymmetric and extremely expensive packages.[22]

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[19] *See e.g.* Comments of Time Warner Cable at 5-6, Comments of AT&T, Inc., 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, A National Broadband Plan for Our Future, International Comparison and Survey Requirements in the Broadband Data Improvement Act*, GN Docket Nos. 09-137, 09-51, 09-47, p. 5 (2009).

[20] 7 U.S.C. § 950bb(b)(1).

[21] *See e.g. Free Press NBP Reply Comments* at 49-50.

[22] *See e.g.* Comments of Free Press at 49-52, *Free Press NBP Reply Comments* at 47-49.

Providers repeatedly cite the existence of asymmetric use of the Internet as evidence that consumers want asymmetric offerings. But this logic ignores the fact that consumers are making great use of the little upstream capacity that they have, and that if given more, they will use it (this argument also ignores the fact that consumers are demanding greater upstream capacity, but the market lacks the adequate competition needed to ensure supply meets demand). One example of this strong consumer desire is seen in the comments submitted by Time Warner Cable. The company compiled data in one "study market" and found that consumers use considerable upstream capacity.[23] The Company stated, "the average upstream consumption per month accounted for only about 25 percent of the total bandwidth used."[24] Time Warner Cable felt this statistic provided "evidence that asymmetrical service offerings meet consumer needs."[25] But we reach the opposite conclusion, based on an analysis of how much total bandwidth is made available to consumers. Time Warner Cable offers customers connections whose asymmetry ranges from 4:1 to 10:1.[26] If this level of asymmetry was meeting consumer needs, <u>the total upstream consumption would be far less than a full quarter of total bandwidth</u>. Instead, subscribers are heavily utilizing what small upstream speed they have to consume. In other words, Time Warner Cable's customers are using a disproportionately high amount of upstream bandwidth. And if greater upstream capacity were commonplace, it is certain that applications would quickly be developed to make use of that capacity.

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[23] Comments of Time Warner Cable at 5.

[24] *Ibid.*

[25] *Ibid.*

[26] *See* http://www.timewarnercable.com/socal/learn/hso/roadrunner/default.html# (accessed Sept. 27, 2009).

In fact, Verizon has sought to highlight the upstream capacity available through FiOS in comparison to cable.[27] Unfortunately, as we outlined in our initial comments, these offerings are only available to a small percentage of households and come at a very high price, but nonetheless illustrate the consumers have a strong interest in such a capability.[28] The Commission also heard from numerous entities discussing the need for upstream bandwidth during the investigation of Comcast's blocking of Bit-Torrent.[29] Further evidence of the pent up demand for origination capacity is seen in the rise of the online web storage market. Amazon now offers its "S3" customers the ability to send their data using the postal system, due to the fact that many customers would find that using their home Internet connections to upload the data would be too "cumbersome."[30] These and other examples in the record make it quite clear that the market has failed to provide consumers with the type of origination capabilities envisioned by Congress.

B. The Commission Must Consider the Affordability of "Advanced Telecommunications Capability"

In our initial comments, we offered the Commission substantial evidence illustrating that incumbent high-speed Internet providers are moving away from price competition entirely,

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[27] Jeff Baumgartner, "Verizon Assails Cable With Amped Upstream," *Cable Digital News*, June 22, 2009.

[28] Comments of Free Press at 50-51.

[29] See e.g. Comments of the National Association of Realtors, In the Matter of *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, p. 1 (2008); Comments of AT&T Inc., In the Matter of *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, pp. 8, 13 (2008).

[30] Werner Vogels, "Expanding the Cloud: Moving large data sets into Amazon S3 with AWS Import/Export," *All Things Distributed*, May 20, 2009.

leaving consumers with little recourse.[31] These companies are pushing consumers to focus on the experience and away from the monthly cost. Cable operators, for one, have found many consumers willing to migrate to higher speed tiers, despite the increased costs.[32] This was further bolstered by recent data from Pew showing more than a third of home broadband users subscribing to higher tier speed offerings.[33]

Another recent survey performed a willingness-to-pay analysis of the broadband market. The overwhelming majority of respondents found such utility in a broadband connection that they would be willing to pay more than they already do just to continue to have the same level of broadband access.[34] In some cases more than double or triple the average monthly bill for broadband.[35] In a competitive market, this high willingness to pay combined with the efficient market price equal to the Ramsey-Boiteux price would result in a large consumer surplus. But in the high-speed Internet market (where, for millions, cable is becoming the only option for service above 7Mbps) the lack of competition means prices will greatly exceed the efficient price, resulting in the erosion of consumer surplus. The Commission must recognize that this risk is already reality, given the statements and actions from providers, and will only get worse with many households forced to pay prices to support profit margins even higher than the already obscene level earned by some incumbents.[36] Such a pricing scheme, which all indications show

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[31] *See* Comments of Free Press at 48-52.

[32] *Ibid.* at 49-50.

[33] John Horrigan, "Home Broadband Adoption 2009," Pew Internet & American Life Project, June 2009, p. 23.

[34] We discussed this utility in previous comments to the Commission. *See Free Press NBP Reply Comments* at 30-31, 34 (2009).

[35] Mark Dutz, Jonathan Orszag and Robert Willig, "The Substantial Consumer Benefits of Broadband Connectivity for U.S. Households," Compass Lexecon, Commissioned by the Internet Innovation Alliance, July 2009, pp. 18-20.

[36] *See e.g.* Comments of Free Press at 41-45.

will continue, will artificially depress the uptake of more advanced broadband and leave households at the whims of provider's pricing decisions. This has a direct bearing on the Commission's review of the broadband market within the context of Section 706. As we reviewed extensively in our initial comments, Congress exhibited a clear desire for the Commission to consider affordability in reviewing the deployment of "advanced telecommunications capability."[37] Not only is there no indication that service offerings that meet the definition set forth by Congress are affordable for consumers, provider's have indicated this trend will only further proliferate in years to come.

C. Mobile Broadband Does Not Compete with Wireline Broadband and Fails to Meet the Congressional Definition of "advanced telecommunications capability"

As the Commission recognized in the *Fourth 706 Report*, broadband is defined by a few key characteristics:

> Broadband differs from dial-up Internet access in several important ways. First, it provides higher speed data transfer, usually referred to as a "high-speed connection." Second, unlike dial-up access, broadband provides a connection that is "always on" so users can receive as well as send data without having to reconnect to the network. Third, and of increasing importance, broadband provides low latency, the ability to send and receive data packets with little, or no noticeable, delay.[38]

As we have illustrated previously, mobile broadband exists in a market distinct from wireline broadband.[39] While mobile Internet services can, at times, provide speeds higher than

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[37] *Ibid.* at 8-9.

[38] *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, 19 FCC Rcd 20540, 20553, p. 12 (2004) ("*Fourth 706 Report*").

[39] *See e.g. Free Press NBP Comments* at 42-43, 105-106, *Free Press NBP Reply Comments* at 38-44, Reply Comments of Consumers Union, Consumer Federation of America and Free Press, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to*

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that of dial-up, it does not offer subscribers an "always on" connection nor provide a connection "with little, or no noticeable, delay."[40] The two largest mobile broadband providers make clear that the connection should not be considered "always on" in their accompanying terms of service (TOS).[41] Verizon Wireless states in their TOS that, "[e]xamples of prohibited usage include… as a substitute or backup for private lines or dedicated data connections."[42] AT&T similarly states in their TOS that, "[e[xamples of prohibited uses include… as a substitute or backup for private lines, landlines or full-time or dedicated data connections."[43] Furthermore, the latencies of mobile Internet services are typically in excess of 100ms.[44] This is no faster than dial-up latencies[45] and hardly on par with a true wireline connection.[46] These limitations are in addition to the slow speeds, low bandwidth caps, excessive overages, high monthly costs, and that the connections themselves are typically limited to a single user. Indeed, subscribers who attempt to use this connection as a substitute find themselves with monthly bills in the *thousands* of

(footnote continued)
Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Petition for Reconsideration, pp. 15-16 (2008).

[40] *Fourth 706 Report* at 13.

[41] This is a common selling point amongst broadband service providers. *See e.g.* http://www.timewarnercable.com/socal/learn/hso/roadrunner/default.html# (Accessed on Sept. 27, 2009).

[42] *See* http://b2b.vzw.com/broadband/bba_terms.html (Accessed on Sept. 27, 2009).

[43] *See* http://www.wireless.att.com/learn/messaging-internet/media-legal-notices.jsp (Accessed on Sept. 27, 2009).

[44] *See e.g* Dan Meyer, "Network speed tests shootout: AT&T, Verizon, Sprint modems go head-to-head," *RCR Wireless News*, Sept. 11, 2008.

[45] *See e.g* Steve Steinke, Network tutorial: a complete introduction to networks, San Francisco: CMP Books, 2003, p. 31.

[46] *See e.g.* Vince Vittore, "CES: Seidenberg touts FiOS TV, gaming network," *Telephony Online*, Jan. 6, 2006.

dollars.[47] A spokeswoman for AT&T recently reiterated this fact, stating, "our wireless data services are not intended to be used as a replacement for Wi-Fi, DSL or cable services."[48] Verizon similarly states that "[a]ppropriate broad goals should distinguish between fixed and mobile services because…inherent technical limitations will likely always mean that such services are subject to particular performance constraints that differ from fixed services."[49] Amazingly, only a few pages earlier Verizon points to mobile broadband as evidence that the U.S. has "a level of intermodal competition present in few if any other places in the world."[50] The Commission should consider the voluminous record illustrating these two avenues to the Internet to be distinct markets. Apart from this, the Commission must recognize that the capabilities offered by mobile Internet services do not even come close to meeting the standard defined in Section 706 for "advanced telecommunications capability."

D. In Order to Preserve the Integrity of this Proceeding The Commission Must Ignore or Strike from The Record Comments Filed by its Recent Hire, Industry-Funded Economist Scott Wallsten

The Commission's decision to hire Scott Wallsten was met with considerable and well-deserved skepticism.[51] Mr. Wallsten has for many years been employed by industry-funded think tanks that actively worked to undermine the Commission's public interest mission for the

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[47] *See e.g.* Marin Perez, "AT&T, Radio Shack Sued For $5,000 Netbook Bill," *InformationWeek*, March 2, 2009.

[48] *See e.g.* Ivan Penn, "Overusing that AT&T air card connection can cost big bucks," *St. Petersburg Times*, Sept. 16, 2009.

[49] Comments of Verizon and Verizon Wireless at 9.

[50] *Ibid.* at 2.

[51] *See e.g.* Kim Hart, "Heat over FCC hires," *The Hill*, Sept. 17, 2009. *See also* the numerous comments left in the blog posts authored by Dr. Wallsten at the FCC's Weblog "Blogband.com".

sole benefit of their financial backers.[52] These funding efforts are meant to provide industry with "independent" analysis to point to, but are often nothing more than recycled talking points (indeed, one of these coin-operated think tanks, the Phoenix Center, is so transparent in its support for its major benefactor AT&T, that it has been on both sides of the special access debate depending on AT&T's status as a CLEC or RBOC).[53] In this capacity as a PhD for hire, Mr. Wallsten has written numerous misleading documents describing the U.S. broadband market as being fine and dandy. Perhaps most relevant to the current atmosphere is "What U.S. Broadband Problem?"[54] The large broadband providers who contribute to these entities heavily cite the findings of Wallsten's efforts.[55] The Commission should cast a skeptical eye towards this past work.

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[52] *See* http://www.techpolicyinstitute.org/about/supporters/ (accessed on Sept. 28, 2009); http://www.pff.org/about/supporters.html (accessed on Sept. 28, 2009); http://web.archive.org/web/20070807225413/http://www.aei.brookings.org/about/funding.php?menuid=1 (accessed on Sept. 28, 2009).

[53] For example, in their 2003 paper Phoenix said, "sunk costs deter entry and may allow market power to be exercised without fear of entry.", but in 2009 the same two economists wrote "concentrated markets in an industry with large fixed and sunk costs may be a sign of intense price competition." *See* Phoenix Center Policy Paper Number 18, "Set It and Forget It? Market Power and the Consequences of Premature Deregulation in Telecommunications Markets," July 2003; and Phoenix Center Policy Paper No. 35, "The Need for Better Analysis of High Capacity Services," June 1, 2009.

[54] Scott Wallsten and Seth Sacher, "What U.S. Broadband Problem?" *AEI-Brookings Joint Center*, Policy Matters 06-18, July 2006.

[55] *See e.g.* Comments of AT&T, In the Matter 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*, pp. 17-18 (2007), Reply Comments of Verizon and VZW, In the Matter of *Broadband Industry Practices*, WC Docket No. 07-52, pp. 24-25 (2007), Comments of the National Cable and Telecommunications Association, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, pp. 22-23, 25-26 (2009); Reply Comments of Comcast Corp., In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, pp. 7, 39-41, 44 (2009).

But while the Commission should give any comment filed in this proceeding equal weight, we suggest that Dr. Wallsten's current role as a member of the Broadband Plan team raises serious process issues that must be confronted. At a minimum, the Commission should strike the Comments filed in these proceedings by Dr. Wallsten in order to avoid the appearance of a conflict of interest. But we also request that the Commission investigate whether Dr. Wallsten is receiving any kind of remuneration from parties with an interest in the outcome of the Section 706 Inquiry or the National Broadband Plan while he works on the plan, or has an understanding of future payments from interested parties once he returns to his position with the Technology Policy Institute. If he is currently receiving compensation or has an understanding of future compensation (directly or indirectly) from parties participating in this proceeding, then this is a clear conflict of interest that requires Dr. Wallsten's immediate dismissal. Let us be clear, Dr. Wallsten has an absolute right to file comments in this proceeding as a commenter from outside the Commission. And his past work in no way disqualifies him from working for the Commission on the broadband plan. What is not appropriate however is his filing comments in the open proceedings while also working inside the Commission on the same proceedings. And it is not appropriate for Dr. Wallsten to receive or to have knowledge of future compensation from industry while he works inside the Commission on the National Broadband Plan. This is about the integrity of this process, and the Commission cannot take these concerns lightly.

Now, if the Commission chooses to consider Dr. Wallsten's comments even in light of his conflicts of interest, then the Commission must be made aware of how just how wrong his arguments are. In response to the Commission request for comment on a National Broadband Plan, Dr. Wallsten submitted a series of recommendations that include many of the misleading

(or flatly incorrect) claims made while he was employed at various coin-operated think tanks. At the time he filed these comments, Dr. Wallsten was employed as a senior fellow at the Technology Policy Institute, an organization whose supporters include AT&T, Verizon, Comcast and Time Warner Cable.[56] The filing starts by attempting to illustrate that "the broadband market is working well in the United States."[57] To justify this, Wallsten begins with the long held industry practice of attacking the OECD rankings (we will address this below).[58] The next argument is to paint a picture of vibrant intermodal competition. While Wallsten expresses slight skepticism about the viability of satellite and wireless broadband, their inclusion makes clear his purpose. We need not repeat the mountains of evidence we have submitted for years illustrating that consumers have access to at best, two forms of broadband, DSL and cable modem service, and that non-existent intermodal competition in a duopoly is no replacement for real intramodal competition.[59]

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[56] *See* http://www.techpolicyinstitute.org/about/supporters/ (accessed on Sept. 28, 2009).

[57] Comments of Robert Hahn and Scott Wallsten, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, p. 2 (2009) ("*Wallsten Filing*").

[58] *See e.g.* Comments of Comcast Corp., In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Appendix (2009), Comments of Verizon and Verizon Wireless, In the Matter 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*, GN Docket No. 07-45, pp. 22-31 (2007).

[59] *See e.g.* Comments of Free Press et al., In the Matter 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*, GN Docket No. 07-45, pp. 29-36 (2007); Reply Comments of Free Press et al., In the Matter 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*, GN Docket No. 07-45, pp. 3-11 (2007); Free Press Petition for Reconsideration, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such*

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Wallsten then states that "consumers report that the price they pay for broadband generally fell from 2002 through 2008."[60] This assertion was justified by pointing to the surveys regularly conducted by the Pew Internet and American Life Project.[61] But soon after, Mr. Wallsten filed his comments, the latest figures from Pew were released showing the average cost of broadband rising to its highest level in five years.[62] Wallsten also fails to point out data from JD Power & Associates showing an increase in price between 2004 and 2007, let alone the Average Revenue Per User information available from many publicly traded companies, which exhibits a similar trend.[63] Furthermore, the OECD figures show the United States ranked 22nd with one of the highest average monthly cost of broadband amongst the 29 countries included in that analysis.[64]

Wallsten attempts to bolster his claim by relying on information from the United States Telecommunications Association, the principle trade group of the telephone industry. This information is meant to show that the price of certain speed offerings have declined over time.[65] Unfortunately, USTA failed to adequately cite their figures, forcing observers to simply trust the

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(footnote continued)
Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, GN Docket No. 07-45, pp. 8-9 (2008); Reply Comments of Free Press et al., In the Matter 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*, GN Docket No. 07-45, Petition for Reconsideration, pp. 11-17 (2008); Comments of Free Press, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, pp. 58-129 (2009).

[60] *Wallsten Filing* at 4.

[61] *Ibid.*

[62] John Horrigan, "Home Broadband Adoption 2009," Pew Internet & American Life Project, June 2009, p. 25.

[63] *Free Press NBP Comments* at 118.

[64] *Ibid.* at 39.

[65] *Wallsten Filing* at 5.

information (something Wallsten readily does).[66] Regardless, this information misses the point, as no one denies that the cost subscribing to a .768 Mbps connection has declined somewhat since its introduction. However, the speed and adequacy with which new speed tiers are being introduced and at what price is a much more illustrative method of determining the health of the U.S. broadband market.[67]

Wallsten then moves on to a comparison of broadband speeds where he uses an extremely questionable data source, in the form of speedtest.net to assert that U.S. broadband speeds are comparable to most other countries.[68] Speedtest.net is a website that performs *self-selected browser-based tests of a computer's* Internet connection. Both Free Press and network operators have repeatedly listed the reasons why such tests cannot be relied upon, especially as a basis for policymaking.[69] Perhaps most concerning is the fact that these tests fail to account for the temporary speed boosts that result from cable modem connections which include a feature known as PowerBoost. PowerBoost is a Comcast-patented technology that (provided excess capacity exists in the network) allows subscribers to experience an increase in speed for a few seconds as a file begins to be transmitted.[70] Thus, speedtest.net will record the temporary speed provided by PowerBoost and fail to accurately ascertain the true speed of the connection over

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[66] *Ibid.* at 5, n. 13.

[67] *See e.g.* Comments of Free Press at 48-54.

[68] *Wallsten Filing* at 7.

[69] *See e.g. Free Press NBP Comments* at 282, Comments of the AT&T Inc., 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, pp. 3-5 (2008).

[70] For more information *See e.g.* http://www.comcast.com/Customers/Faq/FaqCategory.ashx?CatId=377 (accessed on Sept. 29, 2009).

time.[71] It should be no surprise then that Comcast recommends customers test their connection at speedtest.net in order to see if "they have experienced the PowerBoost speed enhancement".[72] Furthermore, PowerBoost is far from rare; more than 85% of customers with major cable operators have access to the technology.[73] Wallsten not only fails to note the inherent limitations of such tests but also attempts to draw correlations from them.[74] Perhaps Wallsten just doesn't see speed as important to consumers, given that only a few short years ago he stated "[f]or many, dialup--often supplemented by broadband access at work--is sufficient for their current needs."[75]

This discussion of speed then moves to Wallsten pointing to the varied upgrade plans of different operators.[76] To say this review is favorable to operators would be an understatement. Wallsten points to Comcast's deployment of DOCSIS 3.0 with no mention of other cable operators nor the tale of overseas DOCSIS 3.0 deployments.[77] Wallsten also points to the ILECs limited deployments of FTTx with no discussion of deprecation, rural areas, nor the rollout of accompanying video services.[78] Furthermore, despite his attention to the price of broadband, no information is provided on the underlying cost of these new service offerings (thereby ignoring the supra-competitive profits operators earn on these services, an indication of the very type of

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[71] A much more reliable method of testing the actual speeds of broadband has been pioneered in the U.K. *See* Comments of Free Press at 15, *Free Press NBP Comments* at 282-283.

[72] *See* http://www.comcast.com/Customers/FAQ/FaqDetails.ashx?Id=3698 (accessed on Sept. 29, 2009).

[73] Free Press analysis using the various announcements of Powerboost from cable operators (includes Comcast, Time Warner Cable, Cox, Cablevision and MediaCom (Charter intends to launch PowerBoost on Oct. 15 but was not included in this figure)) and Leichtman Research Group, "Under 650,000 Add Broadband in the Second Quarter of 2009," Aug. 17, 2009.

[74] *Wallsten Filing* at 7.

[75] Scott Wallsten and Seth Sacher, "What U.S. Broadband Problem?" *AEI-Brookings Joint Center*, Policy Matters 06-18, July 2006. (Emphasis added)

[76] *Wallsten Filing* at 8.

[77] *See e.g.* Comments of Free Press at 52-54.

[78] *See e.g. Free Press NBP Reply Comments* at 21-29.

market failure Wallsten says the FCC should be focused on).[79] Finally, without citation, Wallsten states, "wireless companies are investing heavily".[80] While Dr. Wallsten may consider this common knowledge, we have illustrated with actual data that what we are seeing is *declining* investment from the wireless industry.[81] The paper subsequently makes recommendations largely based on the flawed premise of a healthy market for broadband within the United States.[82]

The second filing recently sent to the Commission by Mr. Wallsten was an update on a paper written for the Technology Policy Institute entitled "Understanding International Broadband Comparisons."[83] The primary purpose of this paper is to combat the fact that the United States has seen its international broadband standing fall since 2001 -- a top propaganda priority of TPI's funders.[84] Wallsten paints OECD's broadband penetration as being misleading because they do not report information on a per household basis.[85] While it is true that household level data is another informative metric, Wallsten's solution is to present per household data that is derived from disparate sources that are ill-suited for comparison *especially* given the varying dates of collection.[86] As we have pointed out, a source with comparable data,

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[79] *See e.g.* Comments of Free Press at 50-51.

[80] *Wallsten Filing* at 8.

[81] *Free Press NBP Reply Comments* at 18-19.

[82] *Wallsten Filing* at 10-17.

[83] Filing of Scott Wallsten, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (2009) ("*Wallsten Paper*"). Numerous figures within this filing were unreadable for an unknown reason. Thus, we utilized a version hosted by the Technology Policy Institute. *See* http://www.techpolicyinstitute.org/files/international%20broadband%20comparisons%202009%20update%20final.pdf (Accessed Sept. 27, 2009).

[84] *See e.g.* Comments of Free Press at 31.

[85] *Ibid.* at 2-3.

[86] *Ibid.* at 4, n. 4.

Strategy Analytics, found that the U.S. ranked 20th, which is close to our 22nd-place ranking in the ITU's ranking of overall broadband penetration among all the world's nations.[87]

Wallsten once again presents speed information from speedtest.net but also includes Akamai's State of the Internet report.[88] We similarly view this speed information with considerable skepticism. First, the Akamai tests include both business and consumer connections.[89] Second, the company releases a fairly limited amount of data, offers only a vague explanation of testing methodology and considerable variation seems to arise between each report.[90] Nonetheless, in his quest to paint the U.S. in a favorable light, Wallsten utilizes selective information from this report. First, Wallsten presents information on download speed by continent.[91] This is hardly informative. Outside of Australia, every other continent includes many more countries than the two included in North America. For instance, Europe includes 19 countries.[92] Furthermore, the countries themselves can vary greatly with countries like India (average speed .772 Mbps) combined with South Korea (average speed 15.2 Mbps).[93] The second Akamai data point used by Wallsten is the download speed by OECD country. This places the U.S. 11th out of 30 countries.[94] If one looks at the full list of countries the U.S. comes

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[87] *See Free Press NBP Reply Comments* at 52.

[88] Wallsten also offers data from a speed test created by the Communication Workers of America (speedmatters.org), which suffers from the same flaws as those described for speedtest.net. *See Wallsten Paper* at 7.

[89] Akamai, "The State of the Internet," Vo1. 1:4, 4th Quarter, 2008, p. 22 ("*Akamai Q4*").

[90] *Ibid.* at 21. For an example of variability, the average speeds for South Korea went from 15.2 Mbps in Q4 2008 to 11 Mbps in Q1 2009. *See Ibid.* and Akamai, "The State of the Internet," Vo1. 2:1, 1st Quarter, 2009, p. 24.

[91] *Wallsten Paper* at 6.

[92] *Akamai Q4* at Appendix.

[93] *Ibid.*

[94] *Wallsten Paper* at 7.

in 17th.[95] What's more, in compiling the percentage of countries connections above 2 Mbps, Akamai found that the United States falls to 35th.[96] The rest of Wallsten's claims center on the United States having higher growth in sale of digital music and video and stated this couldn't be the case if speeds compared so poorly to other countries.[97] Hardly a strong data point, as any number of cultural, economic or other technical factors could explain this disparity. He goes on to list a variety of price metrics, none of which support his findings.[98]

Mr. Wallsten also points to overall ICT figures as a way of portraying the U.S. *broadband* market as doing quite swell.[99] But this is a very disingenuous approach that is self-undermining to anyone who understands what goes into these ICT rankings. First, these ICT investment figures include investment in non-broadband items like software and computer equipment. Perhaps in response to this fact, Wallsten also offered a composite chart, which still showed overall ICT investment but also which portion came from which area. Of course, the inclusion of the aggregate figure leaves the United States ranked first. However, had Wallsten explicitly broken these metrics out, the reader would see the United States ties for first in software investment, ranks fourth in communication equipment investment and sixth in IT equipment investment.[100] Nonetheless, these figures have little, if any, bearing on the central topic of his filing (and the proceeding), the deployment of *broadband*. If Wallsten was aware of this, but did not highlight it, then he is guilty of actively misleading the Commission. But as we see, nowhere in the filing does Wallsten explain what each of these categories encompasses.

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[95] *Akamai Q4* at 22.

[96] *Ibid.* at 26.

[97] *Wallsten Paper* at 8-10.

[98] *Ibid.* at 10-15.

[99] *Ibid.* at 16-17.

[100] Free Press analysis of data behind chart cited on *Wallsten Paper* at p. 17, n. 11.

Upon further research into Wallsten's primary sources, we found the only metric that could possibly include investment related to broadband networks is communications equipment.[101] But we subsequently found that this category is made up exclusively of equipment manufacturers such as Motorola and Cisco Systems.[102] This is logical given the *actual* title of the chart used by Wallsten (but not mentioned in Wallsten's filing) is "Investment in ICT equipment and software."[103] Thus, the ICT investment indicators used by Wallsten fail to provide readers with any specific information about U.S. broadband investment. This is simply the only metric that gave the United States the number one ranking Wallsten was apparently desperately looking for, to throw cold water on the reality understood by the millions of consumers Wallsten actively works to undermine with filings like these.

Wallsten also includes indices related to a country's "e-readiness".[104] This is an argument commonly employed by network operators.[105] As Wallsten recognizes these indices are "inherently problematic", yet due to their showing the U.S. at or near the top of the rankings, they are included anyway.[106] As we have previously explained, these indices, even those that have us ranked much lower, include factors such as literacy and education levels.[107] In other words, factors are included that have little bearing on a true comparison of broadband networks across nations -- factors that if viewed in the right light actually make our poor broadband

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[101] Organisation for Economic Co-operation and Development, "The economic impact of ICT: measurement, evidence and implications," 2004, p. 63.

[102] Organisation for Economic Co-operation and Development, "OECD Information Technology Outlook," 2008, p. 59.

[103] *Wallsten Paper* at p. 17, n. 11.

[104] *Ibid.* at 18.

[105] *See e.g.* Comments of AT&T Inc., In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, p. 78.

[106] *Wallsten Paper* at 18.

[107] *Free Press NBP Comments* at 33, n. 29.

performance look even *worse*. Simply put, Wallsten clung to discredited and misleading research in order to convince the Commission that all is well with U.S. broadband. Even more irresponsible is the fact that these assertions were subsequently cited by broadband providers who pay Dr. Wallsten's salary.[108]

E. With a Comprehensive Record, the Commission Should Move Forward With Broadband Data Collection

Since the Commission launched its first broadband data *Notice of Proposed Rulemaking* more than two years ago, providers have sought to stifle the process at every opportunity.[109] The Commission must be made aware of this obstructionism to see just how much disregard some providers have for the public interest, and how little weight these providers should be given on matters surrounding the data underlying a Section 706 determination.

First, the Commission was told no improvements to its data were needed.[110] Following the subsequent *Order*[111] improving some aspects of Form 477 (most notably, the collection of

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[108] *See e.g.* Reply Comments of Comcast Corp. In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, p. 7, 39-41, 44 (2009), Reply Comments of AT&T Inc., In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, p. 86 (2009), Reply Comments of Verizon and Verizon Wireless, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, p. 15 (2009).

[109] *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, Notice of Proposed Rulemaking, 22 FCC Rcd 7760 (2007).

[110] *See e.g.* Comments of United States Telecommunications Association, 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, p. 4 (2007).

[111] *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*

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Census Tract subscribership information), providers told the Commission that the collection of availability information was not needed.[112] Similarly, they urged the Commission to decline to collect any information on actual speeds and price.[113] Congress subsequently passed the Broadband Data Improvement Act, which required the Commission to report to Congress "a list of geographical areas that are not served by any provider of advanced telecommunications capability".[114] The Commission requested comment on implementing this legislation.[115] In response, providers urged the Commission to collect no further data and simply rely on the improved subscribership information being reported and third party information.[116] When the Commission sought to define broadband, providers argued for the status quo, the same 200 kbps first put in use a decade ago.[117]

(footnote continued)
(VoIP) Subscribership, WC Docket No. 07-38, Notice of Proposed Rulemaking, 22 FCC Rcd 7760, (2008).

[112] *See e.g.* Comments of the National Cable and Telecommunications Association, 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, p. 6 (2008).

[113] *See e.g.* Comments of the AT&T Inc., 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, pp. 3-6 (2008).

[114] 47 U.S.C. § 1302.

[115] "Comment Sought on Providing Eligible Entities Access to Aggregate Form 477 Data as Required by the Broadband Data Improvement Act," WC Docket No. 07-38; GN Docket Nos. 09-47, 09-51, Public Notice, 74 FR 36446 (2009); "Comment Sought on International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act," GN Docket No. 09-47, Public Notice 24 FCC Rcd 3908 (2009).

[116] *See e.g.* Comments of United States Telecommunications Association, In the Matter of *Comment Sought on International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act*, GN Docket No. 09-47, pp. 3-4 (2009).

[117] *See e.g.* Comments of Time Warner Cable, In the Matter of *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All*
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Most recently, the Commission has asked what steps it "should take to improve its regular broadband data collections."[118] Predictably, providers are nearly unanimous in once again attempting to delay and derail the Commission's efforts to gather useful data. Verizon states, "it is too soon to know whether it makes sense to adopt additional reporting requirements."[119] Time Warner Cable takes this delaying a step further pointing out that the Commission's "consumer broadband registry, which is intended to collect data from consumers on a voluntary basis, remains under development."[120] Of course when the Commission asked for comment on whether they should develop this very same registry, Time Warner Cable (TWC) stated "[n]or does TWC support self-reporting by consumers, as such information is likely to be unreliable, particularly in a dynamic marketplace."[121] Providers simply use whatever arguments they can in any given proceeding to slow Commission action on broadband data. But the need for this data only continues to grow.[122] The Commission should dismiss the self-interested

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(footnote continued)
Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, A National Broadband Plan for Our Future, International Comparison and Survey Requirements in the Broadband Data Improvement Act, GN Docket Nos. 09-137, 09-51, 09-47, p. 6-7 (2009).

[118] *706 NOI* at para. 67.

[119] Comments of Verizon and Verizon Wireless at 15.

[120] Comments of Time Warner Cable at 13.

[121] Comments of Time Warner Cable, 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, p. 13 (2007).

[122] *See e.g.* Comments of Free Press, 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, A National Broadband Plan for Our Future, International Comparison and Survey Requirements in the Broadband Data Improvement Act*, GN Docket Nos. 09-137, 09-51, 09-47, pp. 4-5 (2009), Ex Parte of Free Press,
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recommendations of providers and move forward with a comprehensive collection of broadband data.

Conclusion

The Commission's past Section 706 determinations have been deeply flawed, with the most recent being based on pure fantasy and a deep-sixing of the real evidence and data in the record. In every prior Section 706 Report to Congress, the Commission's analysis consisted of little more than a public seconding of the whimsical predictions of network operators. The determinations were high on rhetoric and future predictions but failed to perform a data-driven analysis of the present market -- and none ever took the step of looking back to evaluate the accuracy of prior rosy predictions. The sixth report to Congress is an opportunity to implement meaningful change into this process. We encourage the Commission perform an honest assessment of the state of advanced telecommunications deployment in the United States and find that it is neither reasonable nor timely.

Respectfully Submitted,

_____/s/_____

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(footnote continued)
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