

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

In the Matter of	)	
	)	
Consumer Information and Disclosure	)	CG Docket No. 09-158
	)	
“Need for Speed” Information for	)	
Consumers of Broadband Services	)	

**COMMENTS OF  
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

June 16, 2011

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**REPLY COMMENTS OF THE  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA) submits these reply comments in response to the Commission’s Public Notice in the above-referenced proceeding.<sup>1</sup> The record in this proceeding demonstrates that the broadband marketplace is working to meet the needs of consumers and that the arguments of parties advocating new mandatory disclosure requirements miss the mark. The record also confirms that future efforts by the Commission in this area should include application providers and not just broadband ISPs. In addition, when the Commission publishes broadband performance data, e.g., speed test results, it should do so in a neutral, factual manner.

**INTRODUCTION AND SUMMARY**

The *Notice* states that it is “a further step in the Commission’s ongoing effort to ensure that consumers have access to the information they need about the communications services they purchase and use.”<sup>2</sup> It seeks input on “the kinds of performance-related information that will be most useful to consumers.”<sup>3</sup> The *Notice* suggests that the record will be used to “encourage

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<sup>1</sup> Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on “Need for Speed” Information for Consumers of Broadband Services*, CG Docket No. 09-158, DA 11-661 (rel. Apr. 11, 2011) (*Notice*).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.*

industry best practices” but also asks whether “mandatory methods or formats [would] be more effective.”<sup>4</sup>

In its initial comments, NCTA demonstrated that federal guidelines are unnecessary to ensure that ISPs provide consumers with relevant information because the broadband marketplace already is working to meet the needs of consumers. Internet access services are experiencing continual improvements in speed and quality and an ever increasing array of applications are riding on those networks. Both the numerous comments filed by ISPs, and the absence of filings documenting any problems, confirm this view of a well-functioning marketplace.

Only a handful of commenters take a different view, but these comments fail to recognize what is taking place in the marketplace today.<sup>5</sup> New America Foundation, for example, asks the Commission to require ISPs to offer guaranteed levels of service to all customers, a proposal that would substantially increase the cost of providing broadband service and undermine the Commission’s broadband adoption efforts. Similarly, Level 3 asks the Commission to impose disclosure requirements that are of no benefit whatsoever for consumers but only are intended to advance Level 3’s own commercial interests in its negotiations with ISPs. None of these pleadings provide evidence of any consumer harms, let alone a problem that could be solved by government regulation.

Finally, a number of ISPs have raised issues regarding the manner in which the Commission reports data regarding broadband performance, e.g., results from the SamKnows

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<sup>4</sup> *Id.* at 2-3

<sup>5</sup> One party – National Association for the Deaf – raises questions that are worth further exploration. Specifically, NAD has raised concerns regarding the sufficiency of broadband connections for Video Relay Services (VRS). As we explain below, many VRS providers already have identified ways to address these concerns and regulation is unnecessary.

testing process. The Commission should recognize that different technologies have different strengths and weaknesses and it should avoid reporting results that inadvertently signal a preference for one technology over another. To achieve this result, the Commission should report a range of information in a neutral, factual manner and avoid making unwarranted assumptions that particular metrics may or may not be important for particular types of customers.

**I. THE RECORD PROVIDES NO EVIDENCE OF A PROBLEM REQUIRING GOVERNMENT INTERVENTION**

In response to the *Notice*, virtually every segment of the ISP industry – large companies and small companies, cable operators and telephone companies, wireless providers and satellite services – filed comments demonstrating how the current broadband marketplace is meeting the needs of consumers. These comments demonstrate that all ISPs have incentives to continually improve the speed and quality of their Internet access services<sup>6</sup> and to provide consumers with information they need to choose the services that best meet their needs in light of the applications they use.<sup>7</sup> As a result, the most recent Commission survey demonstrated a high level of consumer satisfaction with broadband services.<sup>8</sup>

In contrast, not a single application provider or consumer group filed comments. Although the *Notice* implies that consumers are in the dark about what type of broadband service to purchase and, as a result, are not able to use applications they want, the absence of comments from parties that would be affected by this strongly suggests that no such problem exists.

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<sup>6</sup> See, e.g., NCTA Comments at 5-6; CenturyLink Comments at 5; Verizon Comments at 1-2.

<sup>7</sup> See, e.g., AT&T Comments at 3-4; CenturyLink Comments at 8; Time Warner Cable Comments at 3-5.

<sup>8</sup> John Horrigan and Ellen Satterwhite, *Americans' Perspectives on Online Connection Speeds for Home and Mobile Devices* (2010), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-298516A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298516A1.pdf).

Indeed, the record does not even include anecdotal evidence of consumers not being able to use applications because they have purchased the “wrong” broadband service, let alone tangible evidence that this is a pervasive problem requiring government intervention. As we demonstrate in the following section, even the few entities that advocate mandatory disclosure obligations did not provide any substantive evidence of a problem. While the Commission may choose to continue monitoring this situation, e.g., through periodic customer surveys, there is certainly no basis on this record for imposing mandatory disclosure obligations.

## **II. THE REQUIREMENTS PROPOSED BY NEW AMERICA AND LEVEL 3 ARE UNNECESSARY AND POTENTIALLY HARMFUL TO CONSUMERS**

While the majority of comments encourage the Commission to pursue a voluntary approach to disclosure, if it takes action at all, a handful of commenters urge the Commission to pursue a more activist approach to regulating disclosure. As we explain below, none of these arguments provide a basis for Commission regulation.

The most comprehensive request for regulation comes from New America, which revives its 2009 proposal for a “nutrition label” that would include “service guarantees” on a variety of matters, including “minimum speed,” minimum reliability/uptime,” and “maximum round-trip latency.”<sup>9</sup> Although presented as a disclosure requirement, New America is really proposing that the Commission mandate a major substantive change not only in the way that ISPs offer their services but also in the services offered themselves. While ISPs offer guaranteed services to commercial customers, they generally do not offer such service to residential consumers.<sup>10</sup>

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<sup>9</sup> New America Comments at 6.

<sup>10</sup> As Time Warner Cable explains, ISPs market their services to consumers in a manner that makes clear that performance is not guaranteed. Time Warner Cable Comments at 17 (“TWC and other broadband providers generally have refrained from making predictions of “actual” performance, not out of a desire to keep their customers in the dark, but specifically in order to avoid misleading them. TWC and others publicize maximum

Consequently, the standard disclosure that New America proposes for all ISPs is simply not applicable to today's residential broadband services and essentially would operate as a requirement that ISPs provide residential customers the same type of guaranteed service offerings that are offered to businesses. What New America fails to consider however, is that guaranteed service levels are only possible at higher prices.

Requiring ISPs to offer guarantees to all customers as New America proposes would actually harm consumers by raising the price of broadband service substantially.<sup>11</sup> Portions of ISP networks are shared among multiple customers and network engineers must constantly balance the efficiency gains from sharing of facilities with the potential service degradation if too many customers use the facility at the same time. Providing guaranteed levels of service can reduce the significant efficiencies associated with shared facilities and raise the cost of providing service, which is why ISPs charge higher rates for such services relative to mass-market residential services.<sup>12</sup> Mandating that ISPs provide a guaranteed level of service to all customers would result in substantial cost increases that would completely undermine the Commission's efforts to promote broadband adoption.

New America attempts to justify its proposal by arguing that ISPs have little incentive to compete on actual speed and that there is a 50% gap between advertised and actual speeds. Both statements are wrong. The suggestion that ISPs do not compete on actual speed is belied by the fact that cable operators have introduced services using DOCSIS 3.0 technology to 80 million

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speed capability – that is, “up to” speeds – because that is the clearest available benchmark for consumers to assess a broadband provider's speed performance capability.”).

<sup>11</sup> On the other hand, permitting ISPs to offer guaranteed quality of service in some cases, rather than requiring it in all cases, offers many potential benefits to consumer. *See* Comments of the National Cable & Telecommunications Association, GN Docket No. 09-191 (filed Jan. 14, 2010) at 39-41.

<sup>12</sup> Time Warner Cable Comments at 17.

households over the past few years, as well as the fact that cable operators have developed and introduced PowerBoost technology, which makes more efficient use of existing network facilities to deliver additional speed to consumers. As NCTA explained in its comments, cable operators make these investments because they have strong incentives to attract and retain customers in the face of competition.

As to the purported gap between actual and advertised speeds, NCTA has demonstrated,<sup>13</sup> and the Commission staff has acknowledged,<sup>14</sup> that the 50% figure cited in the National Broadband Plan is not accurate. NCTA and many of its member companies have been active participants in the SamKnows testing that the Commission is conducting and we anticipate that those results will demonstrate substantially better performance by ISPs than the flawed data cited in the National Broadband Plan. As with the theory that consumers are buying broadband services that do not meet their needs, the myth that ISPs are not delivering the services they advertise should be retired.

Level 3 proposes that ISPs disclose the details of commercial arrangements with other networks and whether any of those network arrangements experiences significant congestion.<sup>15</sup> According to Level 3, these disclosure requirements “can aid the Commission in preventing certain broadband providers from engaging in hidden anti-competitive conduct when entering into underlying commercial agreements.”<sup>16</sup> If these underlying agreements require payment to

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<sup>13</sup> Letter from Neal M. Goldberg, NCTA, to Joel Gurin, Chief, Consumer and Governmental Affairs Bureau, Federal Communications Commission, GN Docket No. 09-51 (Mar. 26, 2010).

<sup>14</sup> See Workshop on Universal Service and Intercarrier Compensation (Apr. 27, 2011), at <http://www.fcc.gov/events/intercarrier-compensationuniversal-service-fund-reform-workshop> (statement of Walter Johnston, Office of Engineering and Technology, that 50 percent is “a bad number to quote.” (at 61:28)).

<sup>15</sup> Level 3 Comments at 4-5.

<sup>16</sup> *Id.* at 2.

the broadband provider or do not require the broadband provider to augment capacity as traffic increases, Level 3 asserts that severe congestion could result.<sup>17</sup>

Level 3's request for disclosure of information regarding ISPs' network arrangements is wholly self-serving and not remotely beneficial to consumers. It is premised on the erroneous view that ISPs have no incentive to provide quality service to consumers and that absent regulation they will not make the network arrangements necessary to deliver quality service. Level 3 also simply ignores the reality that congestion can be dynamic and short lived, and can be caused by factors entirely outside an ISPs' control – including behavior by other network providers that engage in opportunistic traffic engineering. Level 3's novel proposal should be seen for what it is: yet another attempt to invite government intervention into the operational details of the Internet backbone for the sole purpose of advancing Level 3's commercial position. For all the reasons that NCTA has explained previously,<sup>18</sup> the Commission should decline Level 3's invitation.

### **III. THE COMMISSION SHOULD EXPAND ITS FOCUS TO INCLUDE APPLICATION PROVIDERS**

As NCTA explained in its initial comments, the *Notice* takes too narrow a view of the Internet marketplace by focusing almost exclusively on ISPs.<sup>19</sup> To the extent the Commission takes further action in response to the *Notice*, e.g., by attempting to develop a set of voluntary best practices, its efforts should also include application providers. As AT&T explains, “the

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<sup>17</sup> *Id.* at 4.

<sup>18</sup> *See, e.g.*, Letter from James W. Cicconi, AT&T, and Kyle E. McSlarrow, NCTA, to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket No. 09-191 (Feb. 14, 2011).

<sup>19</sup> NCTA Comments at 9.

entity in the best position to know, and explain to consumers, the performance needs of a given application is the provider of that application.”<sup>20</sup>

The comments filed by the National Association for the Deaf (NAD) illustrate the important role that application providers can play in addressing consumer needs. NAD suggests that disclosure requirements may be needed to ensure that consumers are purchasing broadband service that is capable of handling Video Relay Service (VRS) calls.<sup>21</sup> While NAD has raised a valid question, experience in the marketplace demonstrates that VRS providers have the same incentive as other applications providers to make sure their services work on today’s networks. For example, some providers, such as Sorenson and Snap, clearly disclose the minimum speed required for VRS to function.<sup>22</sup> Sorenson also includes a link to an online speed test to confirm that the connection is adequate before the potential customer applies for a video phone.<sup>23</sup>

Sorenson’s approach is an example of how application providers can and do take steps on their own to ensure that their applications will work for their customers. Notwithstanding the incentives that exist for VRS providers, if the Commission were to find that VRS customers were continuing to experience the types of problems suggested by NAD, it could encourage VRS providers to implement a testing functionality similar to that used by Sorenson or, if necessary, mandate such functionality as a condition of receiving government funding for VRS. These

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<sup>20</sup> AT&T Comments at 7.

<sup>21</sup> NAD Comments at 2-3. NAD also suggests that VRS calls should be prioritized by ISPs. *Id.* at 4. The request to prioritize VRS traffic raises a number of issues that are well beyond the scope of the *Notice*.

<sup>22</sup> See Sorenson Application for a Free VP-200 Videophone, at [http://www.sorensonvrs.com/vp200\\_application](http://www.sorensonvrs.com/vp200_application); Snap Application for a Free Ojo Video Phone, at <http://snapvrs.com/deaf/apply/>. Both companies suggest that a speed of 256 kbps is sufficient for VRS. That speed is well below what is offered by most cable operators on even their slowest tiers of service.

<sup>23</sup> See Sorenson Application for a Free VP-200 Videophone, at [http://www.sorensonvrs.com/vp200\\_application](http://www.sorensonvrs.com/vp200_application).

would be much more direct, and more effective, steps for addressing this problem than imposing mandatory disclosure requirements on ISPs.

#### **IV. THE COMMISSION SHOULD PUBLISH A RANGE OF PERFORMANCE STATISTICS IN A NEUTRAL, FACTUAL MANNER**

A number of ISPs filed comments advocating that the Commission include (or exclude) particular broadband performance statistics in materials made available to consumers. Time Warner Cable, for example, suggests that the Commission avoid highly technical data and focus on information that will be easy for the average consumer to understand.<sup>24</sup> ViaSat states that consumer education efforts should not “inadvertently bias continuing development of broadband services or the underlying regulatory environment.”<sup>25</sup> In particular, it warns against “using educational materials that make value judgments (or worse, ill-informed guesses) about the suitability of a given service for a particular type of user or application.”<sup>26</sup> CenturyLink also raises concerns about the form of any educational materials, in part because it fears that results from “turbo-boost” products offered by cable operators may be misleading.<sup>27</sup> Similarly, Verizon proposes that the Commission emphasize a single statistic – “minimum speeds that customers receive 90% of the time” – that it suggests will identify broadband providers that consistently deliver high speeds.<sup>28</sup>

NCTA agrees with the basic premise advanced by ViaSat that the Commission should avoid a “top-down approach in which government places its imprimatur on certain types of

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<sup>24</sup> Time Warner Cable Comments at 12-13.

<sup>25</sup> ViaSat Comments at 1.

<sup>26</sup> *Id.* at 2-3.

<sup>27</sup> CenturyLink Comments at 4 n. 8

<sup>28</sup> Verizon Comments at 2 n.2.

broadband services, but not others.”<sup>29</sup> In the absence of any tangible evidence that any particular performance metric is essential to consumers (and there is no such evidence in the record), the best approach for the Commission is to facilitate marketplace competition, without influencing it, by publishing a range of performance data in a neutral, factual manner. And as Time Warner Cable proposes, the Commission should focus on data that is easy for the average consumer to understand.<sup>30</sup>

For example, telephone companies have advocated that the Commission focus on “sustained” speeds and that the “burst” results achieved by cable operators that use PowerBoost technology should be eliminated or downplayed in any Commission reporting.<sup>31</sup> The advocacy by these telephone companies is not based on any evidence that one set of data or the other would be more or less valuable for consumers, but instead is a rather obvious attempt to have the Commission report broadband performance data in a manner that emphasizes their perceived strengths and downplays the strong performance of cable operators. The better approach is for the Commission to report both sets of statistics equally and allow consumers and other third parties to determine their relative significance for the services and applications they may use. Similarly, rather than focusing on the lowest level of performance a provider achieves, as some commenters suggest,<sup>32</sup> the Commission should focus on some sort of typical or average performance experienced by consumers. The Commission should be careful not to tip the scales

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<sup>29</sup> ViaSat Comments at 2.

<sup>30</sup> Time Warner Cable Comments at 12-13.

<sup>31</sup> CenturyLink Comments at 4 n. 8 (“A discussion about whether these kinds of short-bursts of bandwidth should be reported separately and not as total available bandwidth is an important discussion to be had.”). *See also* Letter from Glenn Reynolds, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158 (June 3, 2011) (Telephone companies encouraged Commission staff “to acknowledge in the [SamKnows] report the importance of sustained broadband speeds to consumers.”).

<sup>32</sup> Verizon Comments at 2 n.2.

in favor of one technology over another through how it defines the metrics it chooses to report. Instead it should publish a variety of information in a neutral, yet factual manner.

### **CONCLUSION**

For all the reasons explained in these comments, there is no need for any new mandatory disclosure requirements on ISPs at this time. To the extent the Commission proceeds down this path, it should encourage voluntary best practices and it should broaden its focus and look at the entire Internet ecosystem, not just broadband ISPs. The Commission also should take a neutral, factual approach to reporting broadband performance data and avoid tipping the scales in favor of one technology over another.

Respectfully submitted,

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