

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

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 10-159

**REPLY COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
(CCIA)**

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The Computer & Communications Industry Association (“CCIA”), by and through counsel, files these Reply Comments in response to the Notice of Inquiry released August 6, 2010, in this docket (“NOI”). CCIA supports the Commission’s adoption of the National Broadband Plan definition of broadband, and urges the Commission to consider the competitive conditions of the broadband market — and their effect on affordability — in its evaluation of whether “reasonable and timely” deployment of broadband services has been achieved.

SUMMARY

The Commission’s review of “whether broadband is being deployed to all Americans in a reasonable and timely fashion”¹ appropriately begins with the application of the 4Mbps downstream /1Mbps upstream threshold adopted in the National Broadband Plan and the previous report.² Though several parties criticize this decision, the Commission made a sound policy choice, based on present and predicted consumer demand, to raise the threshold of what constitutes “broadband” to a more robust level. Congress expects the Commission to steward the telecommunications industry in a manner that aspires to something more than the broadband *status quo*; retaining the outdated 200 Kbps threshold for broadband would be to ‘shoot for the floor’.

In addition to employing the more robust 4Mbps/1Mbps threshold to evaluate the state of broadband, the Commission should also employ a direct analysis of the degree of competition in the broadband market on an intramodal and intermodal basis. Though the record is replete with statistics about the aggregate number of facilities deployed and dollars invested, it is

¹ NOI ¶ 1.

² *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket Nos. 09-137, *et al.*, Sixth Broadband Deployment Report, FCC 10-129, 25 FCC Rcd. 9556 (2010) (“*Sixth Broadband Deployment Report*”).

silent as to the competitive choice that any set of U.S. consumers enjoys. Evidence from the wholesale sector, described herein, suggests that this choice is extremely limited. This lack of competition has translated to broadband service rates that are prohibitively high, and those rates are the primary factor inhibiting consumers from obtaining broadband. Section 706 expressly empowers the Commission to use procompetitive regulation where, as the previous report found, broadband is not being reasonably and timely deployed. The Commission should expressly consider the dearth of competition in the broadband market and employ its section 706 authority to encourage new entry and competition as a means of spurring much-needed deployment as well as availability.

I. THE COMMISSION SHOULD CONTINUE TO APPLY THE NATIONAL BROADBAND PLAN DEFINITION OF “BROADBAND”

CCIA applauds the Commission for taking “the overdue step” of raising the threshold of what constitutes “broadband” to 4 Megabits per second (“Mbps”) downstream and 1Mbps upstream.³ The United States cannot attain the social and economic benefits of the Internet while pretending that a service providing only 200 Kilobits per second (“Kbps”) throughput is “broadband”. Moreover, it would be anomalous to retain the 200 Kbps threshold for measuring broadband availability while simultaneously employing the 4Mbps/1MBps threshold for undergoing the seismic reforms and initiatives that are necessary to implement the National Broadband Plan. Congress surely expects the Commission to do more than ‘shoot for the floor’ in evaluating the state of broadband deployment in the United States. The Commission’s decision to harmonize the two projects, by adopting the 4Mbps/1Mbps standard for this section 706 inquiry, is the only rational policy choice.

³ NOI ¶ 4.

Several parties criticize this decision and actually request that the Commission retract the 4Mbps/1Mbps definition not only in this proceeding but also from the *Sixth Broadband Deployment Report* released in July 2010.⁴ None of these parties, however, provide a basis for doing so. AT&T, for example, purports to adopt a strict statutory approach by arguing that section 706 does not prescribe “any particular technology or numerical speed threshold” to define “advanced telecommunications” services.⁵ That approach ignores the fact that the Commission retains significant discretion in implementing federal statutes, particularly to “fill gaps” in which Congress was silent as to the methods of implementation.⁶ Moreover, it is difficult to surmise how the Commission could report on the relative success of “advanced telecommunications services”⁷ deployment without first defining that which it is measuring.⁸ Further, AT&T seems to have had no objection to the 200 Kbps definition of “broadband” which is also not mentioned in section 706. AT&T’s attempt to discredit the 4Mbps/1Mbps threshold via a purported textual argument simply fails.

⁴ GN Docket No. 10-159, Comments of CTIA – The Wireless Association at 2, 11-12 (Sept. 7, 2010); Comments of AT&T Inc. at 2, 5-6 (Sept. 7, 2010); Comments of Verizon and Verizon Wireless on the Seventh Broadband Deployment Notice of Inquiry at 3, 21-23 (Sept. 7, 2010) (the “Verizon Companies Comments”).

⁵ AT&T Comments at 5.

⁶ *E.g., Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543, 550 (D.C. Cir. 2009) (denying petition for review) (quoting *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

⁷ As the NOI explains, the terms “broadband” and “advanced telecommunications services” are used “synonymously” in this proceeding. NOI n.2.

⁸ As the Commission has explained, any attempt to measure the deployment of broadband requires “a relatively static point at which to gauge the progress and growth of the advanced services market from one Report to the next.” NOI ¶ 6 (quoting *Sixth Broadband Deployment Report*, 25 FCC Rcd. at 9565 ¶ 13).

Other parties criticize this “overdue” threshold⁹ on the basis, it seems, that they fear they cannot meet it. CTIA argues that the Commission errs in relying on the 4Mbps/1Mbps threshold because it “does not reflect what many consumers consider to be important in the provision of broadband — mobility[.]”¹⁰ CTIA goes so far as to assert that the Commission “simply ignores this reality.”¹¹ This argument is curious, because it assumes that the Commission is considering, or could be able to consider, only one factor in its evaluation of broadband availability: either bandwidth or “mobility”, but not both. The NOI itself disproves CTIA’s assumption, because it expressly seeks comment on “mobile broadband services” and recognizes “the growing significance of mobile Internet access.”¹² Plainly the Commission will consider mobile services, and the value that consumers place on “mobility”, in this proceeding. But there is no need for the Commission to abandon or decrease the threshold it uses for defining broadband. Though certainly mobile broadband service, as CTIA asserts, “offers ... unique benefits” to consumers,¹³ the characteristic of mobility does not warrant the watering down of what the Commission expects service providers to deliver, especially for wired broadband.

The Verizon Companies also argue that the 4Mbps/1Mbps threshold is in error. They claim that this threshold is too “forward-looking”, and that it is higher “than a standard that reflects typical consumers’ current demands[.]”¹⁴ Does Verizon want the country’s broadband

⁹ See NOI ¶ 4.

¹⁰ CTIA Comments at 11.

¹¹ *Id.*

¹² NOI ¶ 26.

¹³ CTIA Comments at 12.

¹⁴ Verizon Companies Comments at 21.

market to be “backward-looking”?¹⁵ The Verizon Companies also assert that adopting the threshold “had the effect of arbitrarily ignoring” the fact that “**consumers choose** (and find useful)” services “such as a DSL or cable modem service with upstream speeds that may be lower than 1Mbps.”¹⁶ Yet what the Verizon Companies ignore is the very real possibility, described in Section II below, that consumers subscribe to these low-speed services because they have no other choice, and because telephone companies rarely, if ever, compete with each other for wireline subscribers, and neither do cable companies.

The Commission has been forthright in stating that the 4Mbps/1Mbps threshold is a “target” — something more than what the nation has today.¹⁷ It nonetheless made the reasonable prediction¹⁸ that “consumers are likely to continue purchasing increasingly fast broadband connections in the future.”¹⁹ Indeed, the Commission acknowledged that some may criticize

¹⁵ The United States Telecom Association (“USTA”) agrees that “[t]he Commission should base its determination under Section 706 not on a backward-looking determination of broadband deployment but, per the statute, a forward-looking assessment of whether broadband is being deployed in a reasonable and timely manner.” GN Docket No. 10-159, Comments of The United States Telecom Association at 9 (Sept. 7, 2010). Though CCIA does not believe, as explained below, that mere “deployment” of facilities in itself satisfies Congress’s mandate that broadband be “available”, it agrees with USTA that those who criticize a forward-looking broadband standard are misguided.

¹⁶ Verizon Companies Comments at 3 (emphasis added).

¹⁷ NOI ¶ 4; *see also Sixth Broadband Deployment Report*, 25 FCC Rcd. at 9565 ¶ 13 (4Mbps/1Mbps is “a practical goal”), at 9566 ¶ 14 (4Mbps/1Mbps “as an initial broadband availability target”).

¹⁸ The Commission has the discretion to make reasonable predictions about market and consumer behavior in the communications industry. *E.g., Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1107 (D.C. Cir. 2009) (Commission reasonably predicted that amount of Universal Service support to Competitive Eligible Telecommunications Companies would grow); *National Cable & Telecomms. Ass’n v. FCC*, 567 F.3d 659, 669 (D.C. Cir. 2009) (Commission reasonably predicted “the likely present and future effects of changing competitive pressures on the cable market”).

¹⁹ *Sixth Broadband Deployment Report*, 25 FCC Rcd. at 9564 ¶ 12.

4Mbps/1Mbps “as being too low.”²⁰ But this threshold represents a sound policy choice that aptly combines an analysis of what consumers are likely to demand²¹ and what current deployment indicates is possible to achieve.²²

For all these reasons, the Commission should not decrease or abandon the 4Mbps/1Mbps threshold for defining what constitutes broadband.

II. THE OLIGOPOLISTIC STRUCTURE OF THE BROADBAND INTERNET ACCESS MARKET IMPACTS THE “AVAILABILITY” OF BROADBAND

In this proceeding, the Commission is “determining whether broadband is being deployed to all Americans in a reasonable and timely fashion” pursuant to the annual reporting requirement of section 706.²³ As the Commission is aware, however, section 706 includes another criterion for measuring broadband: “the **availability** of advanced telecommunications capability to all Americans[.]”²⁴ The application of this criterion requires the Commission to consider more than the dollar amounts that carriers have spent or the number and potential reach of transmission facilities installed in the ground. Rather, the question whether broadband is truly “available” requires an analysis of whether consumers have reasonable access to these services. That analysis hinges on the competitive structure of the broadband market, and on whether firms are in fact working to win customers by competing meaningfully on the price and terms of service.

²⁰ *Id.*, 25 FCC Rcd. at 9565 ¶ 13.

²¹ *Id.*, 25 FCC Rcd. at 9562-65 ¶¶ 9-12.

²² *Id.*, 25 FCC Rcd. at 9564 ¶ 12 (discussing that consumers presently purchase service “that is advertised to deliver download speeds of ‘up to’ 7 Mbps” but noting that actual speeds “may be roughly half of advertised speeds”).

²³ NOI ¶ 1.

²⁴ Section 706(b), *codified at* 47 U.S.C. § 1302(b) (emphasis added); *see also* NOI ¶ 1.

A. Retail Broadband Internet Access Remains Dominated by an Oligopoly

The large broadband service providers have been quick to supply the Commission with statistics about the aggregate amount of facilities and investment that the industry has expended.²⁵ AT&T reports that, based on the Commission's recent report on Internet access,²⁶ "96.6 percent of census tracts have two or more providers of fixed broadband service," and that "broadband providers will invest more than \$240 billion between 2008 and 2015[.]"²⁷ AT&T also reports the deployment of DOCSIS 3.0 by Comcast, Time Warner, and other cable companies,²⁸ as well as the fact that "advanced service offerings ... will be available from AT&T, Verizon, and Qwest to 41 percent of U.S. households by the end of 2010[.]"²⁹ Yet AT&T conspicuously refrains from discussing the degree to which any of these service providers compete with each other. But we do know that for the majority of census tracts, broadband options likely come from only two providers.

Comcast states that "[b]y year-end 2010, 40 percent of U.S. households will be passed by *either* Verizon's FiOS *or* AT&T's U-verse[.]"³⁰ Frontier, the incumbent wireline provider in many areas after its recent acquisitions from Verizon, will provide "more than 4.3 million housing units ... access to DSL with actual speeds of 4Mbps download and 1Mbps

²⁵ AT&T Comments at 8-18; Comcast Comments at 3-7; Verizon Companies Comments at 5-9; *see also* CTIA Comments at 2-9; USTA Comments at 2-3, 10-12; Comments of the National Cable & Telecommunications Association at 4-5 (Sept. 7, 2010).

²⁶ Wireline Competition Bureau, FCC, Internet Access Services: Status as of June 30, 2009 (Sept. 2010), *available at* <http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0902/DOC-301294A1.pdf>.

²⁷ AT&T Comments at 9.

²⁸ *Id.* at 11.

²⁹ *Id.* at 10.

³⁰ Comcast Comments at 4 (emphasis added).

upload.”³¹ The Verizon Companies report that “cable modem services are available to at least ... 92 percent of all U.S. households and DSL to approximately 84 percent.”³² Neither commenter discusses whether any of these providers have deployed these facilities to compete directly with each other.

Considerable data demonstrates that these companies do not in fact compete. Economics and Technology, Inc. (“ETI”) has studied the availability of facilities in the wholesale special access market — the facilities on which new entrants and competitors must rely in order to reach retail customers — and concluded that the Regional Bell Operating Companies (“RBOCs”) retain significant market power.³³ ETI notes that “the ILECs,³⁴ and only the ILECs, provide the last-mile access facilities at more than 95% of commercial locations nationwide.”³⁵ Moreover, the incumbents’ market power in these facilities is demonstrated by the “monopoly profits” — with a rate of return of 101%³⁶ — they extract via their special access rates.³⁷ Thus, with regard to wireline broadband service, there is reason to conclude that consumers have just one provider from which to purchase service. It then follows that for the 96.6 percent of census tracts that enjoy two

³¹ *Id.* (quoting GN Docket No. 10-127, Letter from Thomas Navin, Counsel to Corning, Inc., to Marlene Dortch, Secretary, FCC (Aug. 25, 2010)).

³² Verizon Companies Comments at 6 (citing National Cable & Telecomms. Ass’n, *Industry Data*).

³³ Susan M. Gately, *et al.*, *Longstanding Regulatory Tools Confirm BOC Market Power: A Defense of ARMIS* (Jan. 2010), Economics & Technology, Inc., available at <<http://www.econtech.com/library/ETILongstandingregulatorytools.pdf>> (“*BOC Market Power*”).

³⁴ Incumbent Local Exchange Carriers

³⁵ *BOC Market Power* at 1.

³⁶ *Id.* at iii & Table A-1.

³⁷ *Id.* at 6, 7. ETI examined the rates as they were reported by the carriers to the Automated Reporting and Management Information System, or ARMIS.

or more providers of wireline and cable-based broadband, the other provider is likely to be the resident cable company. Ninety-six percent of America is covered by a duopoly.

A recent story in the *New York Times* provides further evidence that the incumbent carriers have decided not to build networks to compete for customers.³⁸ Google has established a program to fund the deployment of 1 Gigabit-per-second broadband service to unserved communities. More than 1,100 cities have applied; only one or a few will be chosen.³⁹ And in Chattanooga, Tennessee, the company that finally will bring meaningful broadband service to market is the energy company, EPB.⁴⁰ It appears that the incumbent carriers simply do not want or need to reach these communities, and as a result they have gone unserved.

The Commission is aware that, because it previously concluded that broadband is not being reasonably and timely deployed,⁴¹ it must “take immediate action to accelerate deployment ... by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”⁴² In order to take this action, the Commission should assess, in a direct way, the degree to which providers of broadband service compete, if at all. Evidence already suggests that this competition, both as between providers of like technologies (intramodal) and across technologies (intermodal), is minimal. This circumstance absolutely affects, as explained below, the degree to which broadband service is available. Competition is most easily

³⁸ Steve Lohr, *Fastest Net Service in U.S. Coming to Chattanooga*, N.Y. Times (Sept. 12, 2010), available at <http://www.nytimes.com/2010/09/13/technology/13broadband.html?_r=1&scp=1&sq=chattanooga&st=cse>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Sixth Broadband Deployment Report*, 25 FCC Rcd. at 9558 ¶ 2.

⁴² *Id.*, 25 FCC Rcd. at 9560 ¶ 7 (quoting Section 706(b), *codified at* 47 U.S.C. § 1302(b)).

realized in the form of downward price pressure, and prevailing prices for broadband remain prohibitively high.⁴³

CCIA urges the Commission to include an analysis of the market structure for these services in its forthcoming report. Only by conducting this analysis can the Commission begin, as it intends to do, “tak[ing] immediate action ... by promoting competition” pursuant to section 706.

B. The Record Provides Little Insight as to Whether the Rates for Broadband Service Render It Truly “Available” to “All Americans”

As stated above, the question to be answered in this proceeding is whether broadband is being deployed reasonably.⁴⁴ Addressing this question requires an honest understanding of what is reasonable in the context of serving American consumers with high-quality, high-speed telecommunications service. Many parties in this proceeding conflate “access” to service⁴⁵ with the “availability” of service,⁴⁶ and urge the Commission to inform Congress that broadband has been reasonably and timely deployed based on the amount of facilities in the ground rather than the number of consumers on the web. They focus on the number of homes that broadband-capable facilities “pass” with far greater emphasis than they report the number of consumers that actually subscribe to broadband service.⁴⁷ USTA takes the boldest position on this issue, instructing the Commission not to address the broadband adoption rate in its “evaluation of

⁴³ GN Docket No. 09-51, FCC, Connecting America: The National Broadband Plan, § 9.1 at p. 168 (Mar. 2010) (high broadband rates are most-cited reason that consumers do not subscribe to broadband service).

⁴⁴ See NOI ¶ 1.

⁴⁵ E.g., AT&T Comments at 4, 7; USTA Comments at 2; Verizon Companies Comments at 1, 5; Comcast Comments at 3 (quoting Navin Letter, Att. at 3).

⁴⁶ Section 706(b), *codified at* 47 U.S.C. § 1302(b).

⁴⁷ AT&T Comments at 10; Comcast Comments at 6; Verizon Comments at 7; USTA Comments at 3.

whether broadband is being deployed in a reasonable and timely manner for purposes of the 706 Report.”⁴⁸

It cannot reasonably be suggested that Senator Pressler, who drafted and introduced section 706, had no regard for the affordability of broadband service. In fact, the Senate Report to S. 652, the Senate version of the 1996 Act, expressly states that the Commission, in its “regular inquiries” as to whether broadband has been deployed “in a ‘reasonable and timely fashion’ ... shall include an assessment ... of the availability, **at reasonable cost, of equipment needed to deliver advanced broadband capability.**”⁴⁹

The price of broadband service is a material hindrance to ensuring its availability. The National Broadband Plan notes that the price of broadband was cited as the most prevalent reason that consumers do not subscribe to broadband: 36% of non-adopters stated that the “cost” of service has prohibited them from obtaining broadband service.⁵⁰ When the price of service is the primary hindrance to consumers’ access to broadband, any conclusion that service is reasonably available is severely undermined. The cause of that hindrance therefore must be addressed, as several parties already have suggested.⁵¹

Several parties have discussed the importance of affordability. The United States Cellular Corporation, for example, has stated that

Now is the time for the Commission to focus its broadband deployment reports on an assessment of data relevant to affordability and comparability in rates between rural and urban areas. The

⁴⁸ USTA Comments at 17.

⁴⁹ S. Rep. 104-230, 104th Cong. 2d Sess. at 210 (Feb. 1, 1996) (emphasis added).

⁵⁰ National Broadband Plan § 9.1 at p. 168.

⁵¹ GN Docket No. 10-159, Comments of Free Press at 8 (Sept. 7, 2010); Comments of the Michigan Public Service Commission at 3-4 (Sept. 7, 2010) (“Michigan PSC Comments”); Comments of United States Cellular Corporation at 15-17 (Sept. 17, 2010) (“US Cellular Comments”).

collection and analysis of such data would assist the Commission in making decisions regarding the scope and extent of reform measures that will be necessary to achieve the goal of broadband affordability for all Americans.⁵²

Free Press reminds the Commission that

Congress clearly viewed affordability as an important component of this determination. This should include equipment pricing and contract length. Pricing has a direct bearing on the availability of services to consumers.⁵³

Similarly, the Michigan Public Service Commission states that “it is essential that broadband not just be deployed in the ground, but the service offered must be priced such that it is affordable to the majority of American citizens.”⁵⁴ These comments underscore the fact that “availability” of broadband, which Congress expressly instructed the Commission to review, is a function not only of “passing” homes but of making service actually accessible.

Section 706 includes the instruction that if broadband is not “availab[le]” to “all Americans”, or is not “being deployed to all Americans in a reasonable and timely fashion,” the Commission “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”⁵⁵ Removing barriers to entry and promoting competition therefore should be the Commission’s primary focus in addressing the conceded lack of broadband availability in the United States.

⁵² US Cellular Comments at 16.

⁵³ Free Press Comments at 8.

⁵⁴ Michigan PSC Comments at 3.

⁵⁵ Section 706(b), *codified at* 47 U.S.C. § 1302(b).

The Commission’s decision to employ Universal Service funds for broadband, which CCIA strongly supports, may to some degree remedy the low adoption rates. This decision, however, seeks to remedy a serious flaw, if not a failure, in the market that has enabled broadband prices to remain at prohibitive levels. Though the Commission’s goal of bringing broadband to lower-income consumers is laudable, under the present circumstances this diversion of funds could subsidize and perpetuate an unreasonably concentrated market. The Commission should therefore couple its Universal Service strategy with a renewed effort to, as section 706 requires, “promot[e] competition in the telecommunications market.”⁵⁶

Finally, the Commission should not be swayed by assertions that adopting Open Internet regulations or returning to Title II treatment of broadband Internet access will impede broadband deployment and availability.⁵⁷ As CCIA explained in its Reply Comments in the “Third Way” docket, evidence demonstrates that the deregulation of wireline services, particularly broadband, after 2000 resulted in a significant *decrease* in ILEC network investment.⁵⁸ So much so, in fact, that the Commission was forced this year to conclude that broadband is not being reasonably and timely deployed.⁵⁹

Moreover, as CCIA previously has explained, the adoption of Open Internet rules will enlarge the market for broadband services by increasing consumer demand. “[B]roadband adoption is more likely to occur when subscribers can be assured that Internet access will indeed

⁵⁶ *Id.*

⁵⁷ AT&T Comments at 29; CTIA Comments at 16-17; Verizon Companies Comments at 41-45; *see also* USTA Comments at 19-20.

⁵⁸ GN Docket No. 10-127, Reply Comments of the Computer & Communications Industry Association at 15-17 (Aug. 12, 2010) (quoting Lee Selwyn, *et al.*, Economics & Technology, Inc., *The Role of Regulation in a Competitive Telecom Environment* (Mar. 2009); Susan M. Gately, *et al.*, Economics & Technology, Inc., *Regulation, Investment and Jobs* (Feb. 2010)).

⁵⁹ *Sixth Broadband Deployment Report*, 25 FCC Rcd. at 9558 ¶ 2.

allow them to reach all content, services, and applications available on the Web, not just some subset preselected or favored by their [Internet Access Provider].”⁶⁰ Therefore, the Commission should not forego its necessary work in the Open Internet proceedings in order to address the market’s failure, or inability, to bring broadband service to American consumers.

CONCLUSION

For all these reasons, the Commission should retain the 4Mbps/1Mbps threshold for defining “broadband” and “advanced services”, and should expressly consider the competitive structure of this market, and its effect on the affordability of service, when addressing the question “whether broadband is being deployed to all Americans in a reasonable and timely fashion.”

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⁶⁰ GN Docket No. 09-191, Comments of the Computer & Communications Industry Association at 3 (Jan. 13, 2010).

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