

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

In the Matter of )  
)  
Inquiry Concerning the Deployment of )  
Advanced Telecommunications )  
Capability to All Americans in a Reasonable ) GN Docket No. 07-45  
And Timely Fashion, and Possible Steps )  
to Accelerate Such Deployment )  
Pursuant to Section 706 of the )  
Telecommunications Act of 1996 )

**REPLY COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION  
OF AMERICA, AND FREE PRESS**

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## Summary

The Commission's obligations under Section 706 of the 1996 Act are clear. It must first answer a simple question: is advanced telecommunications capability -- defined as that which enables users to originate and receive high-quality video -- being deployed to all Americans in a reasonable and timely fashion? In its most recent *706 Report*, the Commission's answer to this question was "yes." The Commission arrived at this answer despite overwhelming evidence that almost none of this country's broadband providers are deploying services that enable users to originate high-quality video content.

We petitioned the Commission to reconsider the conclusions of the *Fifth 706 Report* because the agency did not even attempt to acknowledge the evidence of the lack of reasonable and timely deployment of connections with adequate origination capabilities. The Commission's report to Congress simply swept this issue under the rug -- an issue that is at the heart of the Section 706 mandate. The ignoring of evidence about upload speeds as well the ignoring of evidence of lack of marketplace competition and declining U.S. international performance led the Commission to submit a report to Congress that is deeply misleading. The Commission has acted in an arbitrary and capricious manner, and has done so to the detriment of the public interest. Congress enacted Section 706 because it wanted to ensure that the Commission was aggressively pursuing the *public interest* by overseeing policies that facilitated rapid deployment of true two-way broadband technologies. By failing to undertake an honest assessment of the U.S. broadband marketplace, the Commission continues to hold the public interest hostage, while it sits idly by and watches the broadband marketplace ossify into an uncompetitive duopoly that only offers consumers increasingly asymmetric services at higher and higher prices. This is simply unacceptable, and the Commission must reverse this trend by reconsidering the misleading conclusions in the *Fifth 706 Report*.

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## **I. Introduction**

The Commission has sought comment on the Petition for Reconsideration (“Petition”) filed by Consumers Union, Consumer Federation of America and Free Press. We challenged the Commission’s conclusion that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. The Commission’s failure to consider important aspects of the broadband marketplace -- chiefly, the extremely asymmetrical connections common across the United States -- is a detriment to the public interest. Congress provided the Commission with a clear and specific definition of “advanced telecommunications capability”, stating that such capability is characterized in part by the ability to originate high-quality video. An honest assessment of the consumer broadband marketplace reveals that this ability is not being deployed in a reasonable and timely fashion. We urge the Commission to recognize this reality and reconsider the conclusion of the *Fifth 706 Report*.<sup>1</sup> Congress and the public deserve an honest, fact-based assessment of the nature of advanced telecommunication services deployment.

## **II. Discussion**

### **A. The Goals of Section 706 of the Telecommunications Act of 1996**

The Commission’s duty to periodically assess the state of deployment of advanced telecommunications capability was established in Section 706 of the Telecommunications Act of 1996 (“The Act”). The Act states:

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<sup>1</sup> See 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, Report (rel. June 12, 2008) (“Fifth 706 Report”).

The Commission shall, within 30 months after the date of enactment of this Act, and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications to all Americans...In the inquiry the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.<sup>2</sup>

In directing the study of advanced telecommunications capability, Congress did not intend for the Commission to determine what that capability *included*. Instead, The Act was quite specific of what such a capability would allow users to *accomplish*:

The term “advanced telecommunications capability” is defined, without regard to any transmission media or technology, 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.<sup>3</sup>

Congress articulated this very clear definition, recognizing the Internet’s ability to provide Americans a *two-way* communications medium that fosters a vibrant discourse across the United States and the world. The definition provided by Congress also wisely recognized broadband’s “convergence” potential -- a technology enabling users to perform any data-related task from a single medium. Thus, advanced telecommunications capability was specifically defined by Congress so as to exclude asymmetric, “broadcast-like” connections that do not provide Americans with the full-suite of connectivity tools needed to originate and receive high-quality media. Unfortunately, nearly all of the connections considered by the Commission in the *Fifth 706 Report* do not meet the standard set by Congress.

In this proceeding, consumer groups provided the Commission with information on the broadband speeds currently required to meet the Congressional definition of advanced services. In order to originate standard definition video a user would need

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<sup>2</sup> See § 706(b) of the Telecommunications Act of 1996, 104 P.L. 104; 110 Stat. 56.

<sup>3</sup> Id. at § 706(c)(1).

approximately 2 to 4 Mbps of upload speed (megabits per second), while high-definition video requires an upload speed of closer to 40 Mbps.<sup>4</sup> In attempting to discredit our Petition, both Verizon and the National Cable & Telecommunications Association (NCTA) attack standard definition video as possessing too much detail to be considered the equivalent of high-quality.<sup>5</sup> Ironically, both Verizon and the cable industry are spending millions to convince Americans that for a high quality video experience, nothing but high-definition video will do.<sup>6</sup>

The bandwidth figures cited in our original comments were based on industry standards for video transfer with acceptable levels of signal compression. These data rates are very similar to those used by Verizon FiOS and Comcast for their own TV services. For example, press reports indicate that Verizon compresses nine standard definition 480i resolution channels into one single QAM channel slot, the equivalent to a data rate of 4.3 Mbps. Comcast reportedly delivers two high-definition 1080i streams in one single QAM slot, or the equivalent of 19.4Mbps (Comcast in some cases delivers three high-definition channels in a single QAM slot, though this level of compression is viewed by some as unacceptably high).

It should also be noted that these are the actual bandwidth requirements for video transmission, not just the “up to” speeds being advertised by Internet service providers. Unfortunately, the Commission does not actually know how often customers are

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<sup>4</sup> Comments of Consumers Union, Consumer Federation of America and Free Press, May 16, 2007, p. 12.

<sup>5</sup> Opposition to Petition For Reconsideration of Verizon and Verizon Wireless (“Verizon Opposition”), p. 11-12; Opposition to Petition For Reconsideration of National Cable & Telecommunications Association (“NCTA Opposition”), p. 3.

<sup>6</sup> See e.g. <http://www.youtube.com/watch?v=42f-rOK2I2Q>;  
<http://www.youtube.com/watch?v=WL9KMm9XItg>.

receiving the speeds being advertised, if at all.<sup>7</sup> Recently, one provider revealed they intend to punish those customers who spend too much time using the full speed of their upstream or downstream connection.<sup>8</sup>

It is just plain fact that the upload speeds (advertised or actual) of most broadband connections deployed throughout the country do not provide enough bandwidth to originate standard definition video, let alone high definition, high quality video. Americans are not being provided advanced telecommunication capability in a reasonable and timely fashion, as defined with clarity by Congress. The Commission should reverse their finding and alert both the public and policymakers to this fact. To continue to perpetuate the falsehood that the 706 test is being met only cements the likelihood that U.S. consumers will never be delivered the true converged two-way communications platform that Congress envisioned over a decade ago.

### **B. The Legality of the Petition for Reconsideration**

Opposition petitioners attempt to discredit our Petition claiming its invalidity.<sup>9</sup> Rule 1.106(c) of the Commission's rules states clearly that the FCC may grant a petition for reconsideration if "[t]he Commission or the designated authority determines that consideration of the facts relied on is required in the public interest."<sup>10</sup> The Petition establishes many reasons why reconsideration of the Commission's factual and legal conclusions in the *Fifth 706 Report* would serve the public interest.<sup>11</sup>

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<sup>7</sup> See Further Reply Comments of Consumers Union, Consumer Federation of America, Free Press and Public Knowledge, WC Docket No. 07-38, Sept. 1, 2008, p. 12-16. See also e.g. Comments of Michael Shanley, Sept. 11, 2008; Comments of Aaron Farnsworth Sept. 10, 2008.

<sup>8</sup> See Filing of Comcast Corporation, WC Docket No. 07-52, Sept. 19, 2008, Attachment B.

<sup>9</sup> See Verizon Opposition at 3.

<sup>10</sup> 47 C.F.R. § 1.106(c)(2).

<sup>11</sup> See e.g. Consumers Union, Consumer Federation of America and Free Press Petition for Reconsideration ("Consumers Union et al. Petition"), p. 6-7. ("Congress specified that a connection should count as having advanced telecommunications capability only when consumers both consume and share

Verizon contends that the Petition offers no legal basis for reconsideration and should be denied.<sup>12</sup> Verizon’s arguments are incorrect on several levels. First, Verizon’s proffered standard is incorrect as a matter of law. Verizon’s standard omits this provision entirely, alleging “[r]econsideration is appropriate only when the petitioning party either demonstrates a material error or omission in the underlying order or raises additional facts not previously known or existing that the Commission failed to consider.”<sup>13</sup> Verizon defends this new standard by citing only to a single FCC order dealing with a station license renewal;<sup>14</sup> this is hardly enough support to justify setting aside the clear text of the relevant FCC rule. Incidentally, Verizon has filed several past petitions, which would be in violation of Verizon’s alleged standard.<sup>15</sup>

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high-quality content. Unfortunately, Americans are not receiving advanced telecommunications capability; very few can originate high-quality video content...A large percentage of American consumers cannot even receive high-quality video.”); Consumers Union et al. Petition, p. 13 (“Given the reality in the United States in which the broadband market does not provide users advanced telecommunications capability, the Commission must act... to reconsider its decision and enact policies that will return the United States to a being a broadband leader.”).

<sup>12</sup> Verizon Opposition at 3-5.

<sup>13</sup> Id. at 3.

<sup>14</sup> *WWIZ, Inc.*, 37 FCC 685, 686 (¶ 2) (1964), *aff’d sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied* 383 U.S. 967 (1966).

<sup>15</sup> See e.g., *Promotion of Competitive Networks in Local Telecommunications Markets*, WT No. 99-217, Petition for Clarification and/or Reconsideration of Verizon, at 2-3 (June 13, 2008) (seeking “clarification and/or reconsideration” solely on the grounds that precise wording by the Commission could be twisted by Verizon’s competitors); *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones*, WT Docket No. 01-309, *Biennial Regulatory Review –Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services*, WT Docket 03-264, *Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 06-169, *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket No. 96-86, Petition for Reconsideration of Verizon, at 3-4 (June 14, 2007) (disagreeing with “regulatory disparities” created by the FCC’s Order); *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Review of Sections 68.104, and 68.213 of the Commission’s Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket No. 88-57, Petition for Reconsideration of Verizon Wireless, at 3 (Feb. 12, 1001) (reiterating a request that the Commission introduce an exception into recently passed regulations for Verizon and other CMRS providers).



Furthermore, the Petition is legitimate even under Verizon's standard because it demonstrates a material error in the report, namely that the Commission has erred considerably in its characterization of the scope of deployment of certain broadband technologies.<sup>16</sup> NCTA's opposition to the Petition acknowledges this error, but contends that it is not material.<sup>17</sup> The Commission's Section 706 report centers around whether broadband services are being deployed to consumers; a mischaracterization regarding the scope of deployment of an entire category of services, one with significant repercussions for consumer choice, goes to the very heart of the report, and is certainly a "material error." The Commission should dismiss opposition petitioners' misguided attempts to invalidate our Petition.

The Commission must reconsider the conclusions of the *Fifth 706 Report*, for if they are allowed to stand, the public interest is clearly harmed. Section 706 directs the Commission to promote the public interest by overseeing policies that facilitate the rapid deployment of two-way broadband technologies, if they determine that such technology is not being deployed in a reasonable and timely fashion. If the Commission incorrectly determines that deployment is reasonable and timely, then the public interest is harmed.

Recent comments filed in this proceeding provide ample evidence from ordinary American consumers that the public interest is indeed harmed by the *Fifth 706 Report's* finding. Numerous individuals took the time to write the Commission on an issue as obscure as challenging the findings in the *Fifth 706 Report*. The Commission would be wise to consider the comments of everyday Internet users like Josh McQueen<sup>18</sup> of Dallas,

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<sup>16</sup> Consumers Union et al. Petition at 8-9.

<sup>17</sup> NCTA Opposition at 9.

<sup>18</sup> See Complaint of Joshua McQueen, Sept. 22, 2008.

TX, William Attwood<sup>19</sup> of Cottonwood Heights, UT, and Dustin Ruskell of Stanwood, WA.<sup>20</sup> These Americans, among others, wrote to the Commission to say first hand that broadband connections lack the necessary upload speed for advanced telecommunications capability. John Clark even attempted to provide the Commission with concrete evidence by including the results of a connection speed test.<sup>21</sup> Even consumers in big cities like San Francisco<sup>22</sup> and Houston<sup>23</sup> note the slow speeds available to them. Another commenter, James Rainer of Littleton, CO documents the lack of competition that results in slow deployment and high prices.<sup>24</sup> Others even bring up America's dismal international broadband rankings.<sup>25</sup> These everyday Internet users are asking the Commission to reject the tired, self-interested arguments offered by incumbent Internet service providers and recognize that advanced telecommunications capability is not being deployed in a reasonable or timely fashion.

### **C. Opposition Petitioners Fail to Respond to the Arguments Put Forth in the Petition For Reconsideration**

Despite contrary assertions by NCTA and Verizon, the Commission in the *706 Report* did fail to address or even consider critical arguments and evidence put forth by petitioners in comments for the *Notice of Inquiry*. This failure led the Commission to an inaccurate determination, and thus led to the creation of a misleading report to Congress. The purpose of Section 706 of The Act is to ensure that the Commission is applying the right mix of public policies to ensure the reasonable and timely deployment of two-way

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<sup>19</sup> See Comments of William Attwood, Sept. 10, 2008.

<sup>20</sup> See Comments of Dustin Ruskell, Sept. 10, 2008.

<sup>21</sup> See Comments of John Clark, Sept. 19, 2008.

<sup>22</sup> See Comments of Jesse Jones, Sept. 9, 2008.

<sup>23</sup> See Comments of Judson Dunn, Sept. 10, 2008.

<sup>24</sup> See Comments of James Rainer, Sept. 10, 2008.

<sup>25</sup> See e.g. Comments of Jeff Timm, Sept. 10, 2008.

broadband technologies. An erroneous conclusion based on incomplete information deprives the Congress and Commission of the information needed to create and oversee policymaking that serves the public interest.

Verizon claims the Commission “considered and rejected” the arguments highlighted in our Petition.<sup>26</sup> This claim has no basis in reality. This is reflected by Verizon’s failure to present evidence to support their claim. Indeed, consumer groups would not have filed a Petition for Reconsideration had the Commission responded to the facts presented. The Commission simply failed to explain why the fact that the U.S. broadband marketplace is bereft of adequate upload speeds does not matter for the purposes of a positive 706 determination.

**i. The Commission Has Failed To Consider Key Facts to the Detriment of Policymakers and the Public**

Despite NCTA and Verizon’s best attempts to justify the Commission’s positive 706 finding, the reality of the U.S. broadband market contradicts them at every turn. Through the use of misleading figures and vague statements, the Commission overstated the number of competitors in the U.S. broadband marketplace in the *Fifth 706 Report*.<sup>27</sup> The domination of local broadband markets by incumbent telephone and incumbent cable companies is well established, and meets the formal definition of a true duopoly.<sup>28</sup> This lack of choice in broadband affects the public on a daily basis, with the only choice being between two products both with inadequate speeds at high prices. Rather than address

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<sup>26</sup> Verizon Opposition at 2.

<sup>27</sup> Consumers Union et al. Petition at 8-9.

<sup>28</sup> The local marketshares of the incumbent cable and telcos (DSL or Fiber) constitute a formal duopoly market structure, despite the existence in some cases of minor competition from other providers. HHIs are likely in the range of 5,000, the functional equivalent of a 2 firm market. See, William G. Shepherd, *The Economics of Industrial Organization*, Englewood Cliffs, NJ, Prentice Hall, 1985.

the unchallenged facts submitted into the record illustrating this reality, the Commission relied solely on the selective and flawed arguments put forth by Internet service providers. This unsound analysis misleads rather than informs broadband policymaking, and is a detriment to the public interest. Providers engage in a similar exercise in opposing our petition.

NCTA responds to our argument of the Commission “overstating the deployment of alternative technologies” by claiming the Commission “did examine other technologies and provided a detailed examination of their role in the broadband marketplace.”<sup>29</sup> This in no way addresses the arguments put forth by petitioners. We do not challenge that *an* examination took place (albeit a hollow one). Our Petition argues that the analysis was incomplete and failed to account for relevant facts submitted into the record.

NCTA continues by claiming that regardless of the availability of alternative technologies, two providers are sufficient because of the limited deployment of Verizon FiOS and the cable industry’s much delayed deployment of DOCSIS 3.0.<sup>30</sup> Such an argument is exactly the type of outlook the Commission must recognize as fiction. The second largest member of the NCTA, Time Warner Cable, stated they intend to deploy DOCSIS 3.0 “surgically,” only “using it where we need it.” The primary reason being “the company already competes ‘very effectively’ with phone companies.”<sup>31</sup> Comments such as these illustrate the lack of meaningful competition in the residential broadband

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<sup>29</sup> NCTA Opposition at 8.

<sup>30</sup> Id. at 6-8.

<sup>31</sup> David B. Wilkerson, “Time Warner Cable COO: DOCSIS 3.0 to roll ‘surgically’,” MarketWatch, Sept. 9, 2008, Available at <http://www.marketwatch.com/news/story/time-warner-cable-coo-docsis/story.aspx?guid={3C6636C1-5C0E-42E8-8C36-BFA7FE71E8FC}&dist=hpmp>.

market and that advanced telecommunications capability is hardly occurring in a “timely fashion.”

Furthermore, the best-kept secret about the deployment of DOCSIS 3.0 is that it does not currently provide any increase in upload speed.<sup>32</sup> The NCTA draws attention to the cable industry’s single deployment of the technology.<sup>33</sup> As NCTA noted, Comcast’s Minneapolis-only service is advertised as providing “speeds of up to 50 Mbps downstream and 5 Mbps upstream.”<sup>34</sup> This extreme asymmetry creates a scenario where Minneapolis customers not subscribed to DOCSIS 3.0 can receive 1 Mbps of upstream bandwidth for every 6 Mbps of downstream bandwidth, meanwhile those subscribing to a service more than three times as expensive can only receive 1 Mbps of upstream bandwidth for every 10 Mbps of downstream bandwidth.<sup>35</sup> Thus, the cable industry’s deployment of this “wideband service” *exacerbates* the current asymmetry problem. This increasing asymmetry should be of great concern to the Commission, because it is at the center of the Commission’s Section 706 mandate. While the current technical limitations of DOCSIS 3.0 are important to note, we certainly do not believe that cable operators could not immediately provide customers with a symmetrical connection. In fact, cable operators have a number of tools they could put to use immediately.

Cable operators can merely devote more capacity to upstream Internet services. Despite increasing high-speed Internet revenues, cable operators have yet to devote an equivalent amount of capacity to Internet use. Such an action would reduce the number

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<sup>32</sup> Jeff Baumgartner, “Comcast Enters the Wideband Era,” Light Reading, April 2, 2008, Available at [http://www.lightreading.com/document.asp?doc\\_id=150015&site=cdn](http://www.lightreading.com/document.asp?doc_id=150015&site=cdn).

<sup>33</sup> NCTA Opposition at 6-7.

<sup>34</sup> *Id.* at 6.

<sup>35</sup> *See* Comcast High-Speed Internet plans for Minneapolis, <http://www.comcast.com>, Accessed Sept. 22, 2008.

of customers sharing each portion and increase the maximum bandwidth available to each customer. Furthermore, as NCTA members are undoubtedly aware, the average cable operator has not even taken advantage of the full benefits of DOCSIS 2.0, which had its first equipment certified in late 2002.<sup>36</sup> Providers could double the upstream bandwidth available simply by improving the modulation scheme. Yet this is a rare occurrence due primarily to operator's failure to perform sufficient maintenance on the lines running through neighborhoods.<sup>37</sup> Of course, providers could also increase the number of logical, modular and physical node splits thereby reducing the oversubscription rate for each 10 Mbps of capacity.<sup>38</sup> We provide these examples not to micromanage cable operators upgrade decisions, but to illustrate to the Commission that cable providers *currently* have the ability to deploy true advanced telecommunications capability, and need not wait for DOCSIS 3.0. The fact that an inexpensive technological solution has been sitting unused for years is direct evidence that broadband deployment has certainly not occurred in a "timely fashion."

The other opposition petitioner, Verizon presents similar arguments in their petition that have been wholly rebutted by consumer groups. Verizon employs the use of the Commission's widely discredited Form 477 ZIP Code data.<sup>39</sup> Both the GAO and consumer groups exposed this data to be misleading at best.<sup>40</sup> Furthermore, the

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<sup>36</sup> CableLabs, "CableLabs Achieves Industry First With Certification for DOCSIS 2.0," Dec. 19, 2002, Available at [http://www.cablelabs.com/news/pr/2002/02\\_pr\\_docsis\\_cw24\\_121902.html](http://www.cablelabs.com/news/pr/2002/02_pr_docsis_cw24_121902.html).

<sup>37</sup> Ron Hranac, "Broadband: Upstream 64-QAM Success Story," Communications Technology, April 1, 2007, Available at <http://www.cable360.net/ct/operations/bestpractices/22839.html>.

<sup>38</sup> Jeff Baumgartner, "Comcast preps Docsis 3.0 Trials," Light Reading, May 1, 2007, Available at [http://www.lighreading.com/document.asp?doc\\_id=123046&site=cdn](http://www.lighreading.com/document.asp?doc_id=123046&site=cdn).

<sup>39</sup> Verizon Opposition at 2.

<sup>40</sup> "Broadband Deployment is Extensive throughout the United States, but it is Difficult to Assess the Extent of Deployment Gaps in Rural Areas", United States Government Accountability Office, Report to Congressional Committees, GAO-06-426, May 2006; Comments of Consumers Union, Consumer Federation of America and Free Press, WC Docket No. 07-38, June 15, 2007.

Commission itself “questioned whether these requirements were sufficient to capture the actual extent of broadband deployment.”<sup>41</sup> As Verizon acknowledges,<sup>42</sup> only with the changes made in the recent *Data Gathering Order* will the Commission begin to collect some of the data needed to determine whether the mandate of Section 706 is being met.<sup>43</sup>

The Commission may have put it best in the *Data Gathering Order*:

These changes will greatly improve the ability of the Commission to understand the extent of broadband deployment... in particular to carry out its obligation under section 706 of the Telecommunications Act of 1996 to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”<sup>44</sup>

Incredibly, Verizon also continues to promulgate the myth of competition from the broadband-over-powerline (BPL) industry. As we noted in our petition, Verizon cited an estimate predicting “BPL will encompass six million power lines by 2006.”<sup>45</sup> Obviously this estimate was wildly inaccurate. Nonetheless, in their Opposition Verizon states, “the Commission has good reason to be optimistic about the future of BPL.”<sup>46</sup> Both Verizon and the Commission continue to express unfounded optimism in a technology that has little hope of being anything other than a small niche player in the broadband market.

Verizon similarly falls back to a long discredited assertion regarding mobile wireless claiming, “wireless services will continue to increase competition in the broadband market.”<sup>47</sup> Not surprisingly, these arguments fail to account for the rebuttal

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<sup>41</sup> *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-38, (rel. June 12, 2008), (“Data Gathering Order”), ¶8.

<sup>42</sup> Verizon Opposition at 12.

<sup>43</sup> Data Gathering Order.

<sup>44</sup> Id. at ¶3.

<sup>45</sup> Consumers Union et al. Petition at 8-9.

<sup>46</sup> Verizon Opposition at 9.

<sup>47</sup> Id. at 8.

presented by consumer groups during this proceeding.<sup>48</sup> Furthermore, Verizon currently markets a wireline and mobile wireless data bundle, illustrating the uncompetitive nature of these distinct Internet services.<sup>49</sup> Similarly, during the SBC-AT&T merger that resulted in the latter's full acquisition of Cingular, AT&T touted "the merged firm's ability to jointly market wireline and wireless services."<sup>50</sup> Of course, the two dominant mobile wireless data providers are AT&T and Verizon. They account for over 50 percent of mobile wireless subscribers.<sup>51</sup> Barring FCC action, this number will move to 60 percent before years end,<sup>52</sup> if not higher.<sup>53</sup> This hardly instills confidence that competition from the mobile wireless industry will provide consumers with a viable alternative.

Despite providers never-ending right around the corner rhetoric, the sum of these facts demonstrates what consumer groups have long asserted; the market for broadband access is not competitive. The slow deployment of asymmetrical connections will continue until the FCC acts on behalf of consumers. A case in point is Qwest's latest deployment, offering consumers only 896 Kbps (kilobits per second) of upstream

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<sup>48</sup> Reply Comments of Consumers Union, Consumer Federation of American and Free Press, GN Docket No. 07-45, May 31, 2007, p. 4-5.

<sup>49</sup> See <http://promo.verizon.com/CHSIWirelessBundle/?CMP=ILC-DRY00>.

<sup>50</sup> See Comments and Opposition of the New Jersey Division of Rate Counsel, WC Docket No. 07-139, Aug. 20, 2007, p. 17.

<sup>51</sup> AT&T: 72.9 million subscribers, Verizon: 68.7 million subscribers (numbers taken from Q2 2008 Financials). 141.6 million subscribers/262.7 million subscribers = 54% (See CTIA, "Wireless Quick Facts," <http://www.ctia.org/advocacy/research/index.cfm/AID/10323>)

<sup>52</sup> Verizon has sought to acquire Alltel and its 13.2 million subscribers. (See <http://www.fcc.gov/transaction/verizon-alltel.html>; [http://news.cnet.com/8301-10784\\_3-9960664-7.html](http://news.cnet.com/8301-10784_3-9960664-7.html)). The Commission has already agreed to allow Verizon to acquire Rural Cellular Corporation and its 790,000 customers. *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation*, Memorandum Opinion and Order and Declaratory Ruling, WT Docket No. 07-208, (Rel. Aug. 1, 2008).

<sup>53</sup> Kevin Fitchard, "For AT&T and Verizon Wireless, the subscriptions just keep on coming," *Telephony Online*, July 24, 2008, Available at <http://telephonyonline.com/wireless/news/att-verizon-increase-subscriptions-0724/index.html>.



bandwidth with a price tag of more than \$100.<sup>54</sup> This lack of upload speed comes during the widespread proliferation of next generation consumer electronics devices that require high origination speeds such as digital video cameras, not to mention the accompanying Web 2.0 explosion. Commission and provider claims of a market with “competitive prices and increasing speeds” must be put in its appropriate context.<sup>55</sup>

Finally, following in the footsteps of the Commission, the opposition petitioners have failed once again to understand the substance of our arguments regarding international comparisons. NCTA responds to our detailed rebuttal of the Commission’s efforts to dismiss international comparisons by simply noting that the Commission “devoted an entire section” to the topic.<sup>56</sup> As NCTA has proven time and again, one can devote substantial ink to a topic while failing to provide a rebuttal of the facts. Verizon takes a predictable strategy of trotting out the same arguments that have been both debunked and have no relevance to the facts put forth in the petition.<sup>57</sup> The efforts of opposition petitioners have done nothing to advance the record and merely encourage the Commission continue to accept arguments that hold no basis in reality.

### **III. Conclusion**

Now is the time for the Commission to take a stand and recognize a stark reality that consumers are keenly aware of: that the U.S. broadband market is an uncompetitive duopoly characterized by highly asymmetric connections, and that there is little hope that

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<sup>54</sup> See <http://www.dslreports.com/shownews/Sorry-Qwest-Next-Generation-Broadband-Isnt-896kbps-Upstream-95775>.

<sup>55</sup> Verizon Opposition at 2.

<sup>56</sup> NCTA Opposition at 10.

<sup>57</sup> Verizon Opposition at 14-15.

this situation will change in the foreseeable future.<sup>58</sup> The Commission must consider the evidence presented by consumer groups and act in the public interest by reversing the finding of the *Fifth 706 Report*. The reasonable and timely deployment of true advanced telecommunications capability depends on it.

Respectfully submitted,

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<sup>58</sup> See e.g. Comments of Judson Dunn, Sept. 10, 2008; Comments of James Rainer, Sept. 10, 2008; Comments of Jeff Timm, Sept. 10, 2008.