

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)

**PETITION FOR RECONSIDERATION
CONSUMERS UNION,
CONSUMER FEDERATION OF AMERICA AND FREE PRESS**

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Summary

The Commission should reconsider the *Fifth 706 Report's* conclusion that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion and therefore the FCC is not required to take “immediate action” to rectify this failure. The rosy picture painted by this report misleads Congress about the true state of broadband in America and fails to carry out the clear intent of Congress. Advanced telecommunications capability is *not* being deployed to all Americans in a reasonable and timely fashion, as noted by two FCC Commissioners in their dissent. Rather than painting a rosy picture, the FCC should admit the failures of the broadband market and take immediate action to ensure all Americans receive advanced telecommunications capability.

The Commission must reconsider its *Fifth 706 Report* because its conclusion is arbitrary and capricious in violation of the Administrative Procedure Act, and therefore would be overturned by a reviewing court. The *Fifth 706 Report* ignores statutory law directing the Commission to monitor and facilitate the universal deployment of *two-way* advanced telecommunications technologies. In the process, the Commission also ignores record evidence demonstrating that the nearly all of the commercially available broadband services in the U.S. are highly asymmetric one-way technologies. A simple look at the public offerings of U.S. Internet providers demonstrates that most cable and DSL broadband connections available to American consumers are *not* capable of *originating* high-quality video content. Furthermore, the *Fifth 706 Report* failed to respond to the petitioners' evidence that “third-platform” technologies are currently incapable of providing advanced telecommunications capability and are not available to

the overwhelming majority of consumers. The *Fifth 706 Report* fails to acknowledge this reality and fails to respond in any manner to the Petitioners' filed evidence on this critical statutory issue.

Given the failure of the Commission to refute or even address the relevant facts in the record, we request that the FCC reconsider the *Fifth 706 Report's* conclusions.

Table of Contents

I. Interest and Expertise of Petitioners	5
II. Eligibility to Petition for Reconsideration	5
III. Request of Petitioners.....	5
IV. The Conclusions in the Fifth 706 Report are Based on an Incorrect Interpretation of the Relevant Statutory Provision.....	6
V. The Fifth Report Offers Explanations That Run Counter to the Evidence Put Before the Commission.....	8
A. The Commission Overstates the Deployment of Alternative Technologies and Ignores the Evidence of a Broadband Duopoly.....	8
B. The Commission’s Dismissal of International Comparisons Ignores Relevant Facts.....	9
i. The Commission Repeats the Misguided Use of Raw Figures	9
ii. The Commission Fails To Respond to Arguments on the Impact of Geography and Population Distribution in Broadband Deployment.....	10
iii. The Commission Fails to Recognize the Distinction Between Intermodal and Intramodal Competition	11
VI. The Commission Should Take Immediate Action To Accelerate Deployment of Advanced Telecommunications Capability	12
VII. Conclusion.....	13

I. Interest and Expertise of Petitioners

The interest and expertise of the Petitioners is set forth in our initial comments.¹

II. Eligibility to Petition for Reconsideration

The Petitioners filed timely comments and reply comments in this docket. Each of the changes requested in this Petition is eligible for FCC reconsideration because the adopted Report adversely affects the interests of the Petitioners. The Petitioners represent U.S. consumers who are directly impacted by the lack of reasonable and timely deployment of true broadband technology.

III. Request of Petitioners

The FCC's *Fifth 706 Report*, approved in a 3 to 2 vote, must be reconsidered because it is arbitrary and capricious, in violation of the Administrative Procedure Act, and would be overturned by a reviewing court.² Rather than be overturned, the FCC should correct its order. The order is arbitrary and capricious because the FCC has failed to follow Supreme Court precedent requiring application of Congressional intent and consideration of the relevant facts in the record. The Court has stated that a federal agency "must examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'"³ An agency decision must be based "on a consideration of the relevant factors."⁴ On the other hand, "an agency rule would be arbitrary and capricious if the agency has relied on

¹ Consumers Union et al. Comments at 6-7.

² 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*").

³ *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983).

⁴ *Id.*

factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁵ In the *Fifth 706 Report*, the FCC failed to assess the state of deployment of broadband connections with adequate upload speeds, ignoring the plain language of the Act and facts presented by the Petitioners.

IV. The Conclusions in the Fifth 706 Report are Based on an Incorrect Interpretation of the Relevant Statutory Provision

The *Fifth 706 Report* misinterprets Congressional instruction. At the outset of the *Fifth 706 Report*, the Commission reiterates that Section 706(c) of the Telecommunications Act of 1996 (“The Act”) “describes 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.’”⁶ In our initial comments, petitioners illustrated that this definition showed up consistently in previous iterations of The Act and in the accompanying Committee language.⁷ Throughout these documents, Congress states that an advanced telecommunications connection should “enable users to *originate* and *receive* high-quality voice, data, graphics *and* video.”⁸ Congress specified that a connection should count as having advanced telecommunications capability only when consumers both consume and share high-quality content.

⁵ Id.

⁶ *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), ¶2. (“Fifth 706 Report”) [emphasis added]

⁷ Consumers Union et al. Comments at 9-11.

⁸ Id. [emphasis added]

Unfortunately, Americans are *not* receiving advanced telecommunications capability; very few can originate high-quality video content. As noted in our comments, “a user would need approximately 2 to 4 Mbps of upload speed to originate a standard-definition quality television signal.”⁹ We recorded the speeds offered by major providers and found only one to be providing an *advertised* upload speed that would enable standard definition origination at a cost of \$199.95.¹⁰ Despite speed increases since the comment period¹¹, Americans still do not have the ability to originate high-quality video content at an affordable price, especially compared to the prices seen in overseas markets.¹² The standard industry practice of providing dynamic IP addresses to non-business customers is a further impediment to consumers who wish to originate content.¹³

A large percentage of American consumers cannot even *receive* high-quality video. The *Fifth 706 Report* states that more than 40 percent of all U.S. high-speed lines have a download speed between 200 kbps and 2.5 mbps, below the level needed to merely receive such content.¹⁴ While it may be the case that “*non-dial up*” Internet services are being deployed in a reasonable and timely fashion, advanced telecommunications capability, as defined by Congress, is certainly not.

⁹ Consumers Union et al. Comments at 12.

¹⁰ The sole service potentially providing this capability is Verizon FiOS and it is only available in limited areas. *Id.* at 13.

¹¹ Verizon FiOS has increased the speeds available to customers in the few markets where it offers the service. The cable industry has primarily increased download speeds, though some cable operators have increased upload speeds. Cable Internet access is provided over a shared network architecture that significantly reduces the throughput available to customers, despite the advertised speeds. See <http://www.dslreports.com/shownews/ATT-Says-Cable-Operators-Not-Delivering-Advertised-Speed-92217>. Furthermore, Petitioners have noted in another proceeding, the cable industry’s admission that they focused solely on providing consumers with downstream capabilities during the initial network upgrades. See Comments of Free Press et al., In the Matter of Broadband Industry Practices, p. 53, WC Docket No. 07-52, February 13, 2008.

¹² Consumers Union et al. Comments at 39-40.

¹³ *Id.* at 14.

¹⁴ Fifth 706 Report, Appendix B, Chart 9.

V. The Fifth Report Offers Explanations That Run Counter to the Evidence Put Before the Commission

The Commission's Report is riddled with conclusions that have been directly refuted by Petitioners.

A. The Commission Overstates the Deployment of Alternative Technologies and Ignores the Evidence of a Broadband Duopoly

In the *Fifth 706 Report*, the Commission ignores the large body of evidence that the vast majority of Americans have access to just two services (cable modem and DSL) that could (under an extremely loose definition) possibly qualify as “advanced telecommunications capacity”, instead suggesting that a wealth of different broadband technologies are available to consumers. To make its case, the Commission cited a variety of technologies that are not widely deployed and are not capable of providing the speeds needed to meet the Congressional definition. Consider Broadband over Power Line (BPL). During the comment period, Petitioners refuted claims from industry that BPL is a widely deployed competitor to the cable-DSL duopoly. Petitioners noted that the FCC's own data from June 2006 show that the technology has just over five thousand residential subscribers¹⁵ (comprising less than 0.01 percent of all residential lines); this number has increased by 254 customers, according to the most recent Commission data.¹⁶ As noted in our Comments, Verizon offered the Commission an estimate that BPL will increase from 400,000 subscribers in 2007 to 2.5 million in 2011.¹⁷ But in 2004, Verizon cited an estimate from the Commission's previous 706 Report concluding that “BPL will

¹⁵ Consumers Union et al. Reply Comments at 3.

¹⁶ Fifth 706 Report, Appendix B, Table 3.

¹⁷ Consumers Union et al. Comments at 3.

encompass six million power lines by 2006”.¹⁸ Despite the repeated failure of BPL deployment to even come close to meeting expectation, the Commission writes, “[s]ince the *Fourth Report*, the broadband over power line (BPL) industry continues to evolve.”¹⁹ We are puzzled how the Commission can describe the BPL market in a positive light without mentioning the facts put forth by the Petitioners that demonstrate just the opposite. We see similar disregard to the record when the *Fifth 706 Report* addresses other technologies discussed by the Petitioners, including satellite, mobile wireless, and Wi-Fi hot spots.²⁰ The Commission simply did not address-- or even acknowledge-- the facts in the record regarding these technologies.

B. The Commission’s Dismissal of International Comparisons Ignores Relevant Facts

In the *Fifth 706 Report*, the Commission fails to address the consumer groups’ discussion of America’s standing in the Organization for Economic Cooperation and Development’s (OECD) international broadband ranking. Two Commissioners highlight this omission in their dissenting statements.²¹ Petitioners submitted a lengthy justification of the OECD and other international rankings that went unanswered by the Commission.

i. The Commission Repeats the Misguided Use of Raw Figures

Industry commenters used the population and size of the United States to explain away our broadband woes. Despite the consumer groups’ thorough and largely

¹⁸ Id. at 3-4.

¹⁹ Fifth 706 Report ¶22

²⁰ Consumers Union et al. Reply Comments at 3-8.

²¹ Dissenting Statement of Commissioner Michael J. Copps; Dissenting Statement of Commissioner Jonathan S. Adelstein. *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.*

unchallenged rebuttal of these industry claims, the Commission embraced this misleading approach in the *Fifth 706 Report*. The Commission’s use of raw numbers is flawed, as raw figures are irrelevant in this context. For example in its attempt to downplay America’s declining performance in international rankings, the Commission cites the total number of broadband subscribers in the United States. It also cites the raw figure of U.S. fiber connections and Wi-Fi hot spots. However, the Petitioners warned the Commission about the use of such figures stating, “[t]he repeated use of raw numbers does nothing to inform the Commission or policymakers, and in effect disguises the true performance of the U.S. broadband market.”²² Petitioners noted that by employing this same logic, the U.S. would have the largest number of unemployed workers amongst OECD countries, yet when accurately put in a per-capita context the U.S. has amongst the lowest unemployment *rates* of any country.²³ Furthermore, Petitioners specifically responded to the use of all three of the raw number totals used by industry commenters, yet the Commission, undeterred, provided arguments using the same three figures, refusing to address or consider our criticism.²⁴ This failure to respond to key arguments in the record is a troubling sign of an Agency unable or unwilling to fulfill its duties in a non-arbitrary manner.

ii. The Commission Fails To Respond to Arguments on the Impact of Geography and Population Distribution in Broadband Deployment

The Commission also wrongly suggests geography and population density explain the U.S. standing in broadband, even though the (ignored) record evidence refutes that

²² Consumers Union et al. Reply Comments at 13.

²³ Id. at 12-13.

²⁴ Id. at 6-7, 12-13.

suggestion.²⁵ Petitioners provided extensive evidence throughout the comment period that such defenses and excuses are without merit.²⁶ The Commission recognizes that urbanicity, *i.e.* the proportion of total population living in dense areas, and not population density, is the appropriate geographic metric for the purpose of accounting for some of the differences in broadband deployment between countries.²⁷ However, the Commission simply points to the fact that two in three Canadians live near the country’s southern border to justify that geography and population distribution play a role.²⁸ This ignores entirely the Petitioners detailed arguments illustrating that when the relationship between urbanicity and broadband penetration is examined, there is only a “very weak, statistically insignificant correlation.”²⁹ Petitioners go on to state, “8 of the 14 countries ahead of the U.S. in the OECD broadband rankings have lower percentages of their population living in urban areas.”³⁰ To illustrate this we provide a figure entitled “Broadband Penetration vs. Percent Urban Population.”³¹ The Commission fails to respond or acknowledge any of these direct rebuttals made during the comment period.

iii. The Commission Fails to Recognize the Distinction Between Intermodal and Intramodal Competition

In seeking to discount the OECD rankings, the Commission asserts that an important and unique characteristic of the U.S. broadband market is the presence of

²⁵ Fifth 706 Report ¶68

²⁶ Consumers Union et al. Comments at 40-44; Consumers Union et al. Reply Comments at 15-16.

²⁷ “It is likely to be significantly more costly to deploy broadband infrastructure in countries where a significant portion of the population is located in rural and sparsely populated areas compared with countries where the vast majority of the population is located in urban areas.” Fifth 706 Report ¶68.

²⁸ Fifth 706 Report ¶68. The Canadian example offered by the Commission is weak, as the percentage of Canada’s population living in urban areas is nearly identical to that of the United States, as shown in Figure 7 of the consumer groups’ initial comments.

²⁹ Consumers Union et al. Comments at 42.

³⁰ *Id.*

³¹ *Id.* at 43.

intermodal competition.³² In attempting to illustrate U.S. dominance in the realm of platform competition with the prevalence of cable modem use in America, the Commission notes that in 23 of the 30 OECD countries “60 percent or more of broadband subscribers use DSL.”³³ While this hardly demonstrates the point that the Commission is attempting to make, the Petitioners’ comments address this point, noting that in 7 of the 14 countries ahead of the U.S. in the OECD rankings, “the leading platform has a marketshare of 62% or less.”³⁴

The Commission compounds its error with its failure to recognize that there is also significant intramodal competition occurring in countries outside the United States. Not only do these countries have access to different technologies, they also have competition within each of these platforms. The Commission even vaguely refers to its decision to disfavor this form of competition in the United States.³⁵ Yet it fails to note the benefits intramodal competition has brought to overseas markets, as presented in the record.³⁶

VI. The Commission Should Take Immediate Action To Accelerate Deployment of Advanced Telecommunications Capability

The Act states that if Americans are not receiving the capabilities Congress intended that the Commission “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting

³² Fifth 706 Report ¶69. “Intermodal” competition refers to competition *between* platforms, while “intramodal” competition refers to competition *within* platforms.

³³ *Id.*

³⁴ Free Press et al. Comments at 43-44.

³⁵ “Importantly, the Commission has removed regulatory hurdles to promote infrastructure investment by competing broadband platforms in the United States.” Fifth 706 Report ¶69

³⁶ Consumers Union et al. Comments at 40-41, 44-46.

competition in the telecommunications market.³⁷ Given the reality in the United States in which the broadband market does not provide users advanced telecommunications capability, the Commission must act.

VII. Conclusion

As noted in detail above, in the *Fifth 706 Report* the Commission failed to properly follow congressional intent and offered analysis and explanations that are directly contradicted by the evidence in the record. On behalf of millions of underserved and overcharged Americans, Consumers Union, Consumers Federation of America, and Free Press petition the FCC to reconsider its decision and enact policies that will return the United States to a being a broadband leader.

Respectfully submitted,

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³⁷ See § 706(b) of the Telecommunications Act of 1996, 104 P.L. 104; 110 Stat. 56.

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