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January 22, 2015

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 14-126; Protecting and Promoting the Open Internet, GN Docket No. 14-28; Framework for Broadband Internet Service, GN Docket No. 10-127*

Dear Ms. Dortch:

On behalf of the National Cable & Telecommunications Association (“NCTA”), I write regarding recent press reports that the Commission is weighing plans to establish a new and significantly higher speed benchmark for measuring broadband deployment as part of its upcoming Broadband Progress Report pursuant to Section 706 of the Telecommunications Act of 1996. According to these articles, the Commission is considering defining “advanced telecommunications capability” in the Report as a broadband service that provides download speeds of 25 Mbps or higher and upload speeds of 3 Mbps or higher¹—a benchmark that, if adopted, would represent a substantial departure from the 4 Mbps/1 Mbps threshold used in the most recent Broadband Progress Report.²

¹ See, e.g., Josh Taylor, *FCC To Define Broadband as Minimum 25 Mbps*, ZDNet, Jan. 8, 2015, available at <http://www.zdnet.com/article/fcc-to-define-broadband-as-minimum-25mbps/> (citing a Commission “fact sheet” distributed to media outlets).

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, as*

As an initial matter, the Commission should make clear, as it has in prior Broadband Progress Reports,³ that any speed benchmark it adopts has no regulatory significance beyond the new Report. As discussed further below, any effort to graft this reporting benchmark onto other contexts—*e.g.*, determining support levels under the Connect America Fund (“CAF”) or deciding which entities should be subject to open Internet rules—would present inevitable tensions given the divergent legal standards and regulatory objectives at play. The Commission should be particularly careful to clarify that it is not endeavoring to define a distinct product market for broadband services meeting the speed benchmark. As the Department of Justice and Federal Trade Commission have explained, “[m]arket definition focuses solely on demand substitution factors, *i.e.*, on customers’ ability and willingness to substitute away from one product to another in response to a price increase” or other non-price factors.⁴ It is beyond question that consumers would consider a 24 Mbps service (or, in many cases, a 15 Mbps or 10 Mbps service) to be a substitute for a 25 Mbps service for all current and anticipated needs, even if the Commission chooses to apply the “broadband” label only to the latter.

Even for the limited purposes of the Commission’s reporting under Section 706(b), adopting a 25 Mbps/3 Mbps threshold for broadband would not be supportable as a factual or legal matter. Section 706(b) instructs the Commission to report on the deployment of “advanced telecommunications capability,” which is defined in Section 706(d) 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.”⁵ Courts and the Commission have consistently interpreted this mandate as focusing on services that can support “current,” “regular[]” uses of broadband.⁶ And the record developed in response to the *Tenth*

Amended by the Broadband Data Improvement Act, Eighth Broadband Progress Report, 27 FCC Rcd 10342 ¶ 7 (2012) (assessing broadband adoption and deployment “using the existing speed benchmark of 4 Mbps/1 Mbps”).

³ *See, e.g., 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, Sixth Broadband Deployment Report, 25 FCC Rcd 9556 ¶ 11 n.46 (2010) (“We emphasize that we are benchmarking broadband in this report solely for purposes of complying with our obligations under [S]ection 706. We specifically do not intend this speed threshold to have any other regulatory significance under the Commission’s rules absent subsequent Commission action.”).*

⁴ U.S. Dep’t of Justice and Fed. Trade Comm’n, *Horizontal Merger Guidelines*, § 4 (2010), available at <http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

⁵ 47 U.S.C. §§ 1302(b), (d).

⁶ *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 14 FCC Rcd 2398 ¶ 20 (1999); *Verizon v. FCC*, 740 F.3d 623, 641 (D.C. Cir. 2014) (noting that the 4 Mbps threshold

Broadband Progress NOI reflects broad consensus that the level of service necessary to enable such uses of broadband—including video streaming, gaming, voice-over-Internet-protocol, social media, and other applications—is well below the 25 Mbps/3 Mbps threshold currently under consideration.⁷

In fact, there is no basis in the record for the Commission to look solely to broadband services with speeds of 25 Mbps/3 Mbps or faster in carrying out its mandate under Section 706 to evaluate whether the deployment of “advanced telecommunications capability” is “reasonable and timely.”⁸ Notably, *no* party provides any justification for adopting an upload speed benchmark of 3 Mbps. And the two parties that specifically urge the Commission to adopt a download speed benchmark of 25 Mbps—Netflix and Public Knowledge—both offer examples of applications that go well beyond the “current” and “regular[]” uses that ordinarily inform the Commission’s inquiry under Section 706. Netflix, for instance, bases its call for a 25 Mbps download threshold on what it believes consumers need for streaming 4K and ultra-HD video content⁹—despite the fact that only a tiny fraction of consumers use their broadband connections in this manner,¹⁰ and notwithstanding the consensus among others in the industry that 25 Mbps is significantly more bandwidth than is needed for 4K streaming.¹¹ Meanwhile, Public Knowledge asserts in conclusory fashion that an “average” U.S. household constantly streams at least three high-definition movies simultaneously while also running various “online backup services and

was established because it is “more appropriate to current consumer behavior and expectations” and captures applications that “consumers now regularly use”).

⁷ See, e.g., Reply Comments of Verizon, GN Docket No. 14-126, at 7-9 (filed Sep. 19, 2014); Reply Comments of AT&T, GN Docket No. 14-126, at 2-3 (filed Sep. 19, 2014); Reply Comments of the Wireless Internet Service Providers Association, GN Docket No. 14-126, at 3-6 (filed Sep. 19, 2014); Comments of TechFreedom, GN Docket No. 14-126, at 10-14 (filed Sep. 4, 2014); Comments of the Satellite Industry Association, GN Docket No. 14-126, at 4-5 (filed Sep. 4, 2014); see also, e.g., Internet Connection Speed Recommendations, Help Center, Netflix, <https://help.netflix.com/en/node/306> (last visited Jan. 22, 2015) (recommending download speed of 5 Mbps for streaming high-definition video).

⁸ 47 U.S.C. § 1302(b).

⁹ See Comments of Netflix, Inc., GN Docket No. 14-126, at 4-5 (filed Sep. 4, 2014).

¹⁰ See Joel Epstein, TDG Research, *Forecasting the 4K Video Ecosystem 2014-2025*, available at <http://tdgresearch.com/report/forecasting-the-4k-video-ecosystem-2014-2015/> (finding that 4K video remains a “niche” market and is at least five years away from mass market adoption).

¹¹ See, e.g., Akamai Technologies, Inc., *Akamai’s State of the Internet*, at 17 (2014), available at http://www.akamai.com/dl/akamai/akamai-soti-q114.pdf?WT.mc_id=soti_Q114 (defining “4K readiness” according to a download speed of 15 Mbps).

other applications”—without providing any evidence indicating that such usage is at all “average.”¹²

In reality, these hypotheticals dramatically exaggerate the amount of bandwidth needed by the typical broadband user, and the Commission’s own recent findings bear out this reality. Just last month, the Commission determined that an Internet service provider must offer speeds of 10 Mbps/1 Mbps in order to be eligible for broadband-related CAF support—based on findings that “[h]igh definition video requires 5 Mbps downstream,” and that 10 Mbps downstream would be *more than sufficient* to support “multiple users . . . relying upon the [same] broadband connection.”¹³ The Commission also noted that a relatively small percentage of consumers who have access to speeds of 25 Mbps/3 Mbps actually choose to purchase service at those speeds, while most consumers tellingly opt for lower speeds that meet their needs.¹⁴ In light of these findings, the adoption of a 25 Mbps/3 Mbps benchmark would improperly substitute the speculative judgment of the Commission for the actual, demonstrated preferences of consumers in the marketplace, and would be entirely out of step with current consumer conceptions of “broadband.” Relatedly, the Commission recognized in a separate item released last month that consumers can use widely available broadband services to access online video distribution services that offer high-quality video images “comparable to programming provided by a television broadcast station.”¹⁵ Adopting a benchmark of 25 Mbps/3 Mbps thus would exclude an entire range of broadband services that are plainly capable of delivering “high-quality voice, data, graphics, and video telecommunications” to typical end users,¹⁶ and would not fulfill the Commission’s mandate under Section 706.¹⁷

Additionally, defining broadband in this proceeding to include *only* those services at 25 Mbps/3 Mbps or higher would breed unnecessary complexity and confusion in other contexts.

¹² See Comments of Public Knowledge, GN Docket No. 14-126, at 16-18 (filed Sep. 4, 2014).

¹³ *Connect America Fund*, WC Docket Nos. 10-90 et al., Report and Order, FCC 14-190, ¶ 17 (rel. Dec. 18, 2014).

¹⁴ See *id.* ¶ 17 n.37 (“The adoption rate for at least 10 Mbps/768 kbps is 56% in urban areas and 47% in rural areas, with an overall adoption rate of 52%. . . . The adoption rate for at least 25/3 Mbps is 30% in urban areas, 28% in rural areas, with an overall adoption rate of 29%.”).

¹⁵ *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Notice of Proposed Rulemaking, FCC 14-210, ¶ 16 n.35 (rel. Dec. 19, 2014) (internal quotation marks, citations, and alterations omitted).

¹⁶ 47 U.S.C. § 1302(b).

¹⁷ While NCTA would not be opposed if the Commission were to track service offerings at 25 Mbps/3 Mbps *in addition to* offerings at lower speeds, the Commission should not rely *exclusively* on that high threshold in reporting on broadband deployment under Section 706.

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For instance, the Commission presumably plans to impose open Internet rules on “broadband Internet access services” regardless of whether those services meet the 25 Mbps/3 Mbps threshold—thus calling into question the relevance of any new definition of “broadband” in the Broadband Progress Report. And as noted above, there is an obvious tension in defining broadband as 10 Mbps/1 Mbps when evaluating whether to provide CAF support for broadband deployment, while at the same time *measuring* such deployment under a 25 Mbps/3 Mbps threshold. Such inconsistencies may well render any decision to adopt a 25 Mbps/3 Mbps benchmark in this proceeding—or any effort to rely on that threshold in adopting rules in other proceedings—arbitrary and capricious.

The Commission thus should not adopt a benchmark of 25 Mbps/3 Mbps for purposes of evaluating broadband deployment, and in all events should make clear that any benchmark it does adopt has no regulatory significance beyond the upcoming Report.

Sincerely,

/s/ Matthew A. Brill
Matthew A. Brill
*Counsel for the National Cable &
Telecommunications Association*