

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

In the Matter of)
)
A National Broadband Plan) GN Docket No. 09-51
For Our Future)
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COMMENTS



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I. Introduction.

In this proceeding, the Commission can build upon its analysis in its recent *Report on a Rural Broadband Strategy*,¹ and draft a National Broadband Plan that will enable the universal availability of reliable, reasonably priced high-speed broadband service. In doing so, the Commission must ensure such a plan addresses the experiences of ACA members. As shown in these comments, ACA members are ideally positioned to help achieve the government's goals, particularly in the rural areas ACA members already serve.

Therefore, ACA recommends that the National Broadband Plan² address the following seven points:

- The need of broadband providers to have non-discriminatory access to all web-based content and services at reasonable rates, terms, and conditions
- The need of broadband providers to have non-discriminatory access to middle mile infrastructure at reasonable and non-discriminatory special access rates, terms, and conditions.
- The need of broadband providers to have non-discriminatory access to pole attachments at reasonable and non-discriminatory rates, terms, and conditions.
- The need for the Commission and other agencies to freeze or reduce regulatory fees on smaller operators.

¹ *Bringing Broadband to Rural America*, Report on a Rural Broadband Strategy, GN Docket No. 09-29 (rel. May 22, 2009) ("*Report on a Rural Broadband Strategy*").

² *In the Matter of a National Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-51, 24 FCC Rcd. 4342 (2009).

- The need to mitigate the harms caused to broadband providers who are also cable operators by the current wholesale practices of programmers and broadcasters.
- The need for a complete national broadband map that includes an inventory of all existing “last mile” and “middle mile” infrastructure.
- The need for any Broadband Universal Service Fund (“USF”) program adopted to be separate from the existing USF high cost program, and for cable operators to have equal access to the funds.
- The need to apply only the four principles identified by the Commission in its *2005 Broadband Policy Statement*.

In short, these comments demonstrate the steps the Commission must take to enable the nationwide availability of reliable, high-speed Internet access at reasonable prices.

American Cable Association. Small markets and rural areas across the country receive video, high-speed broadband, and phone service from more than 900 small and medium-sized independent operators represented by ACA.

ACA’s membership includes a variety of businesses — family-owned companies serving small towns and villages, multiple system operators serving predominantly rural markets in several states, and hundreds of companies in between. These companies deliver affordable basic and advanced services, such as high-definition television, next-generation Internet access, and digital phone, to more than 7 million households and businesses. More than 75 percent of ACA’s members serve fewer than 5,000 subscribers.

II. A National Broadband Plan must ensure that broadband providers have non-discriminatory access to all web-based content and services at reasonable and non-discriminatory rates, terms, and conditions.

To enable consumers to have reasonable access to **all** web-based content and services, the Commission must prohibit content providers from **mandating** wholesale access fees from broadband providers at discriminatory rates, terms and conditions.

Denying access to content is not a new phenomenon. For cable operators, video programmers have long denied subscribers access to their content unless the distributor agrees to pay an access fee, dedicate bandwidth for the content, and distribute it to a set percentage of the operator's customers. This obligates all of the operator's customers to pay for content regardless of whether each customer wants it. Rural customers are especially affected. The independent operators who often serve smaller markets and rural areas are often forced to pay higher fees and accept more onerous terms and conditions than larger distributors. As a result, many rural customers are either unable to access content they desire, or are forced to pay higher monthly fees than they wish.

Universal and unfettered access to Internet content and services by consumers is essential for ensuring that the Internet can drive economic growth and provide a more open and democratic society. It is a concept that many consumers take for granted as they visit dozens of corporate, small business, and personal websites and services in a single sitting. It is the way that the Internet has always been, but it's an environment that is not guaranteed, particularly if the nation's largest Internet content and service providers, many of whom are also our country's largest media conglomerates and owners of television programming, are allowed to impose their lucrative cable programming model onto the Internet.

ACA members report such a transition beginning to occur. For example, the Walt Disney Company's ESPN forces many broadband providers who are also cable operators to pay a per subscriber fee for their entire subscriber base to receive the ESPN360 service, regardless of customer interest in the service.³ Moreover, ESPN360 is a service that is only available to customers of broadband providers that pay the access fee. Therefore, a customer who is interested in the ESPN360 content, but whose broadband provider opts not to pay the fee, cannot subscribe to the content directly from ESPN. Such a business model increases broadband prices for some, and decreases consumer choice for others.

For broadband operators, these sorts of access fees limit their ability to offer a low-cost broadband package to consumers who solely want email and other limited services. Instead, these Internet providers are forced to put out a bloated and more expensive Internet package that includes high-priced content that the customer is not interested in receiving. The problem is particularly troublesome for customers of smaller operators who often reside in smaller markets and rural areas, because they are forced to pay higher fees than larger operators. Whereas today Internet content and service providers that have leverage are demanding unreasonable fees from all Internet users, tomorrow these operators are likely to demand faster speeds than those of independent sites, drastically reducing the benefits of an open Internet, and altering the

³ ESPN360.com bills itself as a broadband network for live sports programming that "harnesses the quality ESPN has built through its TV networks and delivers online sports programming to fans through a rich, interactive, and easy-to-use experience." Moreover, ESPN360.com claims that it "broadcasts thousands of live games and events online each year..." including "broadband-enhanced versions of games from one of ESPN's TV networks." See ESPN360.com Help/FAQ Topics, *available at* <http://espn.go.com/broadband/espn360/faq#1> (last visited Jun. 8, 2009).

way consumers expect the Internet to operate.

Permitting web-based content and service providers to discriminate and deny access to content and services based on factors unrelated to the cost of delivering the service to the broadband provider should be prohibited because it often harms customers, particularly those who rely on smaller providers for Internet access. It also places higher costs on the use of the Internet; such access fees must be passed along to all customers rather than those who are interested and willing to pay for access to the content or services.

Web-based content and service providers should also be prohibited from **mandating** wholesale access fees from broadband providers in order for end-users to have access to such content or services. While wholesale access fees may be offered, individual end-user access fees should also be offered as an option on a reasonable and non-discriminatory basis. The Internet superhighway should not be turned into a series of toll roads where an end-user simply cannot access a website or service because his Internet service provider has not paid an access fee on his behalf.

To ensure all end-users have the ability to access content and services, any National Broadband Plan should ensure that:

- All broadband providers have the ability to access web-based content and services at reasonable and non-discriminatory prices, terms, and conditions.
- Web-based content and service providers make their content and services available to individual end-users on non-discriminatory terms and conditions, including price, regardless of whether there is an agreement between the Internet access provider and the web-based content or service provider.

The foregoing, backed by firm Commission oversight and enforcement, will provide an effective check on the public interest harms caused by wholesale Internet content discrimination.

III. A National Broadband Plan must ensure broadband providers have non-discriminatory access to “middle mile” infrastructure at reasonable and non-discriminatory special access rates, terms, and conditions.

To efficiently and effectively provide affordable broadband Internet access to small markets and rural areas, broadband providers (i) must have affirmative, non-discriminatory rights of access to “middle mile” infrastructure at (ii) reasonable and non-discriminatory special access rates, terms, and conditions.

ACA recently noted the existence of significant investment in “last mile” infrastructure in many areas of the country by cable operators.⁴ Part of the broadband problem was explained as the “lack of economically viable ways of connecting existing ‘last mile’ facilities with the Internet; the high-speed, broadband connectivity between rural broadband cable and telephone plants and the Network Access Points (NAPs) they must connect to, which are almost exclusively located in major urban centers.”⁵ By constructing or interconnecting to appropriate high-capacity “middle-mile” facilities, entities can connect small markets and rural areas to faster broadband speeds. However, while some areas may have “middle mile” infrastructure, the price to connect and access the “middle mile” facilities can be an obstacle to offering an affordable high-

⁴ *In the Matter of American Recovery and Reinvestment Act of 2009 Broadband Initiatives*, National Telecommunications and Information Administration and Rural Utilities Service Joint Request for Information and Notice of Public Hearings, Docket No. 090309298-9299-01, Comments of the American Cable Association at 9 (filed Apr. 13, 2009), available at <http://www.ntia.doc.gov/broadbandgrants/comments/7DB6.pdf>.

⁵ *Id.* at 9-10.

speed broadband product. This is true even when there is “last mile” infrastructure that can support higher broadband speeds.

Providing affirmative, non-discriminatory access to “middle mile” infrastructure at reasonable and non-discriminatory special access prices, terms, and conditions will profoundly impact broadband deployment in sparsely populated and geographically challenged communities where current economics make providing high-speed Internet nearly impossible. Such access is critical to expanding broadband and broadband investment.

IV. A National Broadband Plan must ensure that broadband providers have non-discriminatory access to pole attachments at reasonable and non-discriminatory rates, terms, and conditions.

To enable broadband providers to reach sparsely populated areas, all pole owners must calculate rates consistent with the FCC’s regulations and provide access on a non-discriminatory basis.

The ability of some pole owners, such as electric co-operatives, to charge pole attachment rates without regard to the FCC’s pole attachment rate calculation impedes the delivery of broadband in sparsely populated rural areas. As the Commission recognizes, there are fewer homes per mile of plant in these areas.⁶ More poles —

⁶ See, e.g., *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd. 6453, ¶ 118 (2000) (“The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers.”); *In the Matter of Caribbean Communications Corp., Petition for Special Relief*, Memorandum Opinion and Order, 17 FCC Rcd. 7092, ¶ 14 (2002) (noting that systems with more than 15,000 subscribers average 68.7 subscribers per mile, while small systems service on average only 35.3 subscribers per mile. More than half of ACA’s members’ serve fewer than 1,000 subscribers and serve even fewer subscribers per mile).

and, consequently, more attachments — are required to bring broadband to each subscriber's home. Therefore, excessive rates have a disproportionately negative impact on the subscribers in rural areas, and increase the cost of expanding broadband in rural areas.

Moreover, all pole owners must provide access to poles, ducts, conduits, or rights-of-way on a non-discriminatory basis. Non-discriminatory access to existing poles, conduits, and rights-of-way is an integral part of expanding the reach of broadband services.

V. A National Broadband Plan should seek to freeze or reduce regulatory fees on smaller operators until universal broadband deployment becomes a reality.

To permit broadband providers to efficiently and effectively use valuable economic resources to upgrade networks and deploy broadband in smaller markets and rural areas, the Commission and other agencies should freeze or reduce the regulatory fee burden on smaller operators until such time as the government achieves its goal of universal broadband.⁷

VI. A National Broadband Plan must ensure that wholesale programming and retransmission consent practices do not harm broadband deployment, especially in smaller markets.

⁷ See *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2009*, MD Docket No. 09-65, Comments of the American Cable Association (filed Jun. 4, 2009) (urging the Commission to freeze certain regulatory fees for small cable operators which would deprive small cable operators of needed capital to deploy advanced services, such as high-speed Internet access, in small markets and rural areas).

To expand broadband deployment to rural, underserved, and unserved markets, the Commission must restrict wholesale programmers and broadcasters from discriminating against small and medium-sized cable companies.

In comments and reply comments filed in the Commission's program access inquiry last year, ACA detailed how price discrimination and wholesale bundling by broadcasters and video programmers hampers its members' ability to deploy and upgrade broadband networks.⁸ In that proceeding, the record visibly demonstrated that wholesale programming and retransmission consent practices significantly increase the costs for small and medium-sized cable companies and their customers.⁹ Moreover, the record demonstrated that fair and reasonable access to popular channels and "must have" programming is critical to upgrading networks and offering broadband services to consumers.¹⁰

As the Commission has repeatedly recognized — and has recognized with this

⁸ See *In the Matter of Implementation Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, MB Docket No. 07-198, Comments of the American Cable Association at 20 (filed Jan. 3, 2008) ("As described by ACA members, wholesale programming practices raise their costs and harm their ability to compete. These effects combine to erode resources available for the substantial capital and operating costs necessary to deploy broadband. This consequence is particularly harmful for very small, rural cable systems where upgrading to provide broadband poses, at best, a significant financial challenge. The ever-escalating pressure on cost and bandwidth from programmers and broadcasters can delay and even prevent very small systems from upgrading to provide broadband.") ("*ACA Program Access Comments*"); see also Reply Comments of the American Cable Association at 16-18 (filed Feb. 12, 2008) ("*ACA Program Access Reply Comments*").

⁹ See *ACA Program Access Reply Comments* at 13-14, 16-23, 25-27.

¹⁰ *Id.*; see also, e.g., *In the Matter of Implementation Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, MB Docket No. 07-198, Comments of The Organization for the Promotion and Advancement of Small Telecommunications Companies; The Independent Telephone and Telecommunications Alliance; The Western Telecommunications Alliance; and the Rural Independent Competitive Alliance at ii (filed Jan. 4, 2008) ("Forced tying arrangements, where MVPDs are forced to carry certain programming in exchange for access to must-have programming, are rampant in the industry and impede both consumers' choice...as well as broadband deployment.").

NOI — promoting broadband deployment is a national communications policy goal of the highest priority.¹¹ As the record in the Commission’s program access proceeding illustrates, in many rural markets, the wholesale practices of programmers and broadcasters undercut this important goal. Moreover, the recently released *Report on a Rural Broadband Strategy* noted that “access to video programming could become an issue that has an impact on the potential competitiveness of the service offerings of rural broadband providers and thus on rural broadband deployment.”¹²

To ensure the deployment of broadband to rural, underserved, and unserved markets, any National Broadband Plan should restrict wholesale programmers and broadcasters from discriminating against small and medium-sized cable companies.

VII. A National Broadband Plan must ensure the completion of a national broadband map.

To enable broadband to reach all rural areas, the Commission must complete a current and accurate national broadband map and ensure that it is updated periodically.

The Commission already collects Form 477 census tract data, and can use this data to identify rural areas where broadband is either non-existent, or where broadband speeds need to be improved. With this data, the Commission should inform Congress and all agencies responsible for encouraging broadband deployment through

¹¹ See, e.g., *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101, ¶ 4 (2007) (“Section 706 of the Telecommunications Act of 1996 directs the Commission to encourage broadband deployment by removing barriers to infrastructure investment....”); *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd. 20,195, ¶ 36 (2007) (“Section 706 of the 1996 Act directs us to promote the deployment of broadband infrastructure....”).

government programs, such as the U.S. Department of Commerce's National Telecommunications and Information Administration and the Department of Agriculture's Rural Utilities Service, of where broadband service is currently available, as well as at what speeds.

Policymakers should also gather data on the Internet backbone and "middle-mile" Internet access points that could support broadband network facilities. This includes: (i) fiber routes and fiber-lit locations; (ii) locations of base stations, towers, switches, and collocation facilities; and (iii) locations of non-communications infrastructure, such as water towers, railroads, and highways.

The importance of a current and accurate national broadband map that includes Internet backbone and "middle mile" Internet access points cannot be understated. ACA therefore urges the Commission to use Form 477 data to identify where broadband is available, and at what speeds, and for the government to also collect complementary "middle mile" data and information. The combined data and information will be invaluable to the goal of expanding broadband and broadband investment, and should be a central component of any National Broadband Plan.

VIII. Any Broadband Universal Service program should be separate from the existing USF high cost program and cable operators must have equal access to the funds.

To most effectively begin Broadband Universal Service, any program implemented by the Commission must be separate from the existing USF high cost program, and must ensure that cable operators have equal access to the program's

¹² *Report on a Rural Broadband Strategy* at 71, ¶ 159 (rel. May 22, 2009).

funds.

The Commission must not attempt to squeeze Broadband Universal Service into a Universal Service program for telephony that is in drastic need of reform. This would simply add another layer of complexity to the already complicated issue of how to reform the Universal Service for High Cost areas telephony program. Instead, any Universal Service for broadband proposal must remain a separate program with its own rules on funding and eligibility.

Additionally, any Broadband Universal Service must ensure that cable operators have access to funds. ACA members have brought broadband to rural areas and small towns throughout the country, and have facilities in place in many more rural communities. From this, ACA members have experienced first-hand the challenges and expenses associated with bringing broadband services to rural and sparsely populated areas. Therefore, ACA members are uniquely situated to accomplish the purpose of any Universal Service for broadband proposal and, thus, any USF program must ensure that cable operators have access to funds.

IX. A National Broadband Plan should not place additional obligations on broadband providers other than the four principles outlined by the Commission in its *2005 Broadband Policy Statement*.

To enable broadband providers to most efficiently manage and expand their broadband networks, the Commission must not place additional obligations on broadband providers other than the four principles outlined in its *2005 Broadband Policy Statement*.¹³

¹³ *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline*

Consumers should have the ability to access any lawful content, applications, or services through a network, and should be permitted to attach any legal devices that do not harm the network.¹⁴ However, because of rapidly changing methods and technology, broadband providers should also continue to be able to utilize non-specific, reasonable network management practices and techniques.¹⁵

As discussed above, right now the best way for the government to protect the open Internet would be to ensure that all broadband providers and their customers have access to all web-based content and services. Internet content and service providers should not be allowed to mandate that consumers pay for and receive unwanted content. This would have a negative impact not only on consumers, but also broadband deployment and demand.

The Commission's four principles permit users to access the content and services that they want, while at the same time allowing broadband providers to use network management practices that will enhance the Internet experience for all. The Commission should therefore continue to adhere to the four principles outlined in its *2005 Broadband Policy Statement*.

X. Conclusion.

Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Policy Statement, 20 FCC Rcd 14986 (2005) (“2005 Broadband Policy Statement”).

¹⁴ See *id.* at 14987-88, ¶ 4.

¹⁵ See *id.* at 14988 n.15 (“Accordingly, we are not adopting rules in this policy statement. The principles we adopt are subject to reasonable network management.”).

The Commission has an opportunity to develop a National Broadband Plan that will ensure that all Americans have access to reliable, reasonably priced broadband services. In order to accomplish that goal, the Commission must make sure that any National Broadband Plan includes the recommendations made in these comments.

ACA members are ideally situated to help carry out the goals of a National Broadband Plan, and stand ready to help the Commission develop a plan that ensures that all Americans, regardless of where they live, have access to vital high-speed Internet services.

Respectfully submitted,

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