

**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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REPLY COMMENTS



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I. Introduction and Summary.

In its initial Comments, ACA asked the Commission to draft a National Broadband Plan¹ that will enable the universal availability of reliable, reasonably priced high-speed broadband service. ACA outlined seven issues the Commission must address to ensure all Americans receive broadband service:

- 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.
- 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.

In short, ACA’s Comments demonstrated the steps the Commission must take to enable the nationwide availability of reliable, high-speed Internet access at reasonable

¹ *In the Matter of a National Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-51, 24 FCC Rcd. 4342 (2009) (“*National Broadband Plan NOP*”).

prices.

ACA files this Reply to highlight the overwhelming support for its recommendations. Commenters agree that these steps are necessary to ensure broadband deployment to all Americans. Without these protections and limitations, content providers, pole owners and others will have ample opportunity to raise costs for consumers and harm broadband deployment in many of the smaller and rural markets served by ACA's members.

In this Reply, ACA also brings to the Commission's attention two additional matters of concern to small and medium-sized cable operators. First, the lack of affordable, high-capacity middle mile infrastructure in many smaller markets and rural areas prevents new and existing broadband operators from providing low-cost next generation broadband services to consumers in these areas. Second, Congressman Eric Massa (D-NY) recently introduced a bill that would restrain broadband operators' freedom to offer consumers lower cost broadband service tiers based on their consumption. Therefore, in addition to the recommendations in ACA's Comments, the Commission must also highlight the following in the National Broadband Plan to Congress:

- The need for additional government funding to build affordable, high-capacity middle-mile facilities in all areas that lack this infrastructure.
- The need for broadband providers to retain the right to offer consumption-based billing plans that will give consumers the ultimate control over their monthly spending on Internet access.

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. The record shows that broadband providers must have non-discriminatory access to all web-based content and services at reasonable and non-discriminatory rates, terms, and conditions.

ACA's Comments identified substantial public interest harms that will result if the Commission does not prohibit content providers from mandating wholesale access fees from broadband providers at discriminatory rates, terms and conditions.² As ACA described, 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 Internet-based ESPN360 service, regardless of customer interest in the service.³ This increases broadband prices for some, and decreases consumer choice for others.

² *National Broadband Plan NOI*, Comments of the American Cable Association at 3-7 (filed June 8, 2009) ("ACA Comments").

³ *Id.* at 5.

The record corroborates ACA on these points. OPASTCO, an organization representing rural and small telcos, describes in their Comments how wholesale access fees like ESPN's harms consumers, particularly those who rely on smaller providers for Internet access.⁴ OPASTCO aptly terms this as "broadband tying."⁵ Moreover, as articulated by Free Press's Policy Director Ben Scott, the "walling off" of Internet content and charging broadband providers for distribution rights is contrary to the basic principle of the online marketplace.⁶

Blocking access to Internet content to secure subscriber fees is not novel. In December 2008, media conglomerate Viacom threatened to deny Time Warner Cable broadband subscribers access to Viacom's websites because Time Warner Cable refused to sign a programming deal with the owner of BET, MTV, and Nickelodeon.⁷

Moreover, with these Reply Comments, we place on the record evidence that other companies are transitioning to a "closed Internet" business model. Paramount,

⁴ *National Broadband Plan NOI*, Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies at 45-48 (filed June 8, 2009) ("*OPASTCO Comments*").

⁵ *Id.* at 47 ("Essentially, this amounts to forced payment on a per-customer basis for access to broadband content (regardless of whether or not the customer views it), in addition to video content. Broadband tying goes well beyond the realm of any reasonable condition for access to video content. As this practice is clearly abusive and anti-competitive, the Commission should take action to end it.").

⁶ John Eggerton, *Updated: ACA Says Charging Sub Fees For Internet Content Could 'Cripple' Broadband Rollout*, MULTICHANNEL NEWS (June 11, 2009), available at <http://www.multichannel.com/article/279029-Updated-ACA-Says-Charging-Sub-Fees-For-Internet-Content-Could-Cripple-Broadband-Rollout.php?rssid=20059&q=%22ben+scott%22> (last visited July 20, 2009) ("E-commerce is built on an online marketplace where companies are free to charge for their services, and consumers are free to buy them," responded Free Press policy director Ben Scott. "The situation changes when companies begin walling off content and selling network operators the right to distribute it.").

⁷ David Chartier, *In dispute, Viacom threatens to pull shows "on TV and online"*, ARSTECHNICA (Jan. 2, 2009), available at <http://arstechnica.com/media/news/2009/01/in-dispute-viacom-threatens-to-pull-shows-on-tv-and-online.ars> (last visited July 20, 2009).

Lionsgate, and MGM recently launched a web-based premium movie site called “Epix.”⁸ The business model behind Epix is much like ESPN360’s – it will require the bundling of its service directly into basic broadband packages offered by internet service providers.⁹ As with ESPN360, broadband subscribers of internet service providers that choose to pay for the rights to distribute this content will have no choice but to pay for the Epix service without ever seeing an itemized charge for the service on their bills. Of course, broadband subscribers that wish to receive the Epix service cannot do so if their internet service provider chooses not to pay for distribution rights.

Regrettably, these “closed Internet” business models are cheered by some financial analysts. Last month, Media analyst Richard Greenfield of Pali Research issued a research note encouraging Internet content owners to seek aggressive monthly fees from broadband access providers for their content and services, like the Walt Disney Co.’s ESPN360, knowing these costs would be passed along to all consumers. ACA vigorously criticized his comments.¹⁰ That said, if the publicly traded media conglomerates and web giants can curry analysts’ favor by pursuing these “closed Internet” business models, then we can expect others will follow the lead of Disney and the movie studios behind Epix.

⁸ Nate Anderson, *Movie studios launch Epix, 720p streaming service for films*, ARSTECHNICA (June 8, 2009), available at <http://arstechnica.com/media/news/2009/06/movie-studios-launch-epix.ars> (last visited July 20, 2009).

⁹ *Id.* (“Epix will be bundled directly into cable packages; under the current business model, it will never appear as a separate charge on the bill and will never have to be added to a package.”).

¹⁰ Press Release, American Cable Association, ACA Criticizes Influential Wall Street Analyst on Broadband Pricing, available at <http://www.americancable.org/node/1376> (last visited July 20, 2009).

Therefore, the Commission must prohibit these “closed Internet” business models. Prohibiting mandatory access fees will provide an effective check on the public interest harms caused by wholesale Internet content discrimination.

III. The record shows that broadband providers need non-discriminatory access to “middle mile” infrastructure at reasonable and non-discriminatory special access rates, terms, and conditions.

The record provides solid support for ACA’s analysis that 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.

What ACA says:

[W]hile 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-speed broadband product. . . . 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.¹¹

What other participants say:

NTCA:

To achieve and maintain the goal of universal affordable broadband service for all Americans, the Commission should regulate the terms, conditions and pricing of Internet backbone services, including special access (middle mile) transport needed to reach the Internet backbone.¹²

Allied Fiber:

¹¹ *ACA Comments* at 7-8.

¹² *National Broadband Plan NOI*, Comments of the National Telecommunications Cooperative Association at 38 (filed June 8, 2009) (“*NTCA Comments*”).

The national broadband plan must address the need for affordable middle mile facilities of sufficient, scalable bandwidth to accommodate next generation last mile networks. . . . [E]specially in rural areas.¹³

Free Press:

For “third-platform” competition to become reality, new ISPs need reasonable access to so-called “middle-mile” or “special access” high-capacity telecommunications lines that transport data back and forth from the Internet backbone to local facilities.¹⁴

Sprint:

Reforming special access regulation is thus critically important to realizing Congress’s goal of universal, affordable access to broadband services.¹⁵

These comments reveal the significant need for special access regulation. 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-speed broadband product. Support for ACA’s analysis does not end here. Public Knowledge, Media Access Project, New America Foundation, and U.S. PIRG also noted the importance of non-discriminatory special access rates, terms, and conditions in another Commission proceeding.¹⁶ According to the groups, the high special access rates and unreasonable terms and conditions demanded by incumbents “prevent competitor carriers from building infrastructure and offering services necessary for reasonable competition, driving prices to consumers and delaying the deployment of broadband

¹³ *National Broadband Plan NOI*, Comments of Allied Fiber, LLC at 15 (filed June 8, 2009).

¹⁴ *National Broadband Plan NOI*, Comments of Free Press at 25 (filed June 8, 2009).

¹⁵ *National Broadband Plan NOI*, Comments of Sprint Nextel Corporation at 12 (filed June 8, 2009).

¹⁶ *Special Access for Price Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 Ex Parte of Public Knowledge, Media Access Project, New America Foundation, and U.S. PIRG (filed June 10, 2009) (“[I]ncumbents continue to overcharge their competitors for wholesale access to high-speed digital lines.”).

services in rural areas and the emergence of competing broadband providers even in more densely populated areas.”¹⁷

In summary, the need for special access regulation is well-established. Therefore, the Commission must ensure that broadband providers can obtain affirmative, non-discriminatory access to “middle mile” infrastructure at reasonable and non-discriminatory prices, terms, and conditions.

IV. The record shows that the Commission must provide funding for “middle mile” infrastructure.

For ACA members, affirmative, non-discriminatory rights of access to “middle mile” infrastructure at reasonable and non-discriminatory special access rates, terms, and conditions is not enough. In many areas, especially rural underserved and unserved, “middle mile” infrastructure does not exist. The Commission must close these gaps by funding the construction of “middle mile” facilities.

The following excerpts from the record describe how funding for “middle mile” infrastructure will increase broadband deployment:

Allied Fiber:

The national plan should include upgrading current middle mile facilities that provide insufficient bandwidth, and plans for new last mile network construction should include sufficient middle mile connectivity.¹⁸

FirstMile:

Through funding of strategically located “open” middle mile infrastructure(s) paired with low-cost, regional “community connection points” (also known as exchange/peering/transit points), subsidies can effectively ameliorate the

¹⁷ *Id.*

¹⁸ *Allied Fiber Comments* at 17.

enormous costs that have prevented many local broadband buildouts.¹⁹

Texas Statewide Telephone Cooperative, Inc.:

[U]nless there are middle-mile facilities available to rural broadband providers that are adequate (with sufficient capacity for high transmission speeds) and the facilities are cost-effective, a barrier to broadband access will be created in rural America.²⁰

The Record reflects ACA's position – the Commission must take an active role in closing “middle mile” gaps that are far too prevalent.

V. The record shows that any broadband mapping plan must be accurate and include “middle mile” facilities.

Commenters from all points agree – any broadband mapping plan must be accurate and include “middle mile” infrastructure.

What ACA says:

The importance of a current and accurate national broadband map that includes Internet backbone and “middle mile” Internet access points cannot be understated.²¹

What other participants say:

California Public Utilities Commission:

As we suggested to the NTIA earlier this year, California recommends that maps contain . . . infrastructure data.²²

FirstMile:

¹⁹ *FirstMile Comments* at 13-14.

²⁰ *National Broadband Plan NOI*, Comments of the Texas Statewide Telephone Cooperative, Inc. at 17 (filed June 8, 2009).

²¹ *ACA Comments* at 12-13.

²² *National Broadband Plan NOI*, Comments of the California Public Utilities Commission at 46 (filed June 8, 2009).

Instances of open infrastructure should be given special note on the map.²³

Telcordia Technologies:

[Mapping must] [p]rovide a comprehensive view of broadband infrastructure that includes deployment, penetration, performance, reliability, interoperability, accessibility, cost, and operational efficiency of broadband services.²⁴

Therefore, the record firmly shows that the Commission must undertake and publish an accurate national broadband map that includes “middle mile” infrastructure.

VI. The record shows that broadband providers must have non-discriminatory access to pole attachments at reasonable and non-discriminatory rates, terms, and conditions.

The record reflects the need for Commission action to ensure that all pole owners calculate rates consistent with the FCC’s regulations and provide access on a non-discriminatory basis. Moreover, the Commission must dismiss the unsubstantiated claims made by the Coalition of Concerned Utilities (“Utilities Coalition”).²⁵

ACA supports NCTA’s reasoned analysis that the Commission should take steps to ensure that pole attachment and conduit fees are no higher than needed to cover the costs incurred by the pole and conduit owner.²⁶ As suggested by NCTA, and further

²³ *National Broadband Plan NOI*, Comments of FirstMile.US at 22 (filed June 8, 2009) (“*FirstMile Comments*”).

²⁴ *National Broadband Plan NOI*, Comments of Telcordia Technologies at 9 (filed June 8, 2009).

²⁵ *National Broadband Plan NOI*, Comments of the Coalition of Concerned Utilities at 3-4 (filed June 8, 2009) (“*Utilities Coalition Comments*”).

²⁶ *National Broadband Plan NOI*, Comments of the National Cable Television Association at 35 (filed June 8, 2009) (“*NCTA Comments*”) (“The Commission can promote broadband deployment by taking steps to ensure that pole attachment and conduit fees are no higher than needed to cover the costs incurred by the pole and conduit owner. The best means of achieving the Commission’s goals of promoting broadband and encouraging true regulatory parity would be to set a formula that enables all broadband providers to pay rates established under the existing cable rate formula.”).

supported by Time Warner,²⁷ the Commission can accomplish this by setting a formula that enables all broadband providers to pay rates established under the existing cable rate formula.²⁸

Before concluding, we must address the comments submitted by the Utilities Coalition. The Utilities Coalition, comprised of electric utility companies with record earning reports,²⁹ and healthy net revenue reports,³⁰ seeks to derail the broadband stimulus program by once again attacking the well-established pole attachment rate calculation.³¹ The Utilities Coalition contends that the established calculation results in a cross-subsidy in favor of cable television companies.³² The rate calculation formula they attack was promulgated by the Commission pursuant to statute and has been consistently upheld by the Courts.³³ Additionally, the Utilities Coalition urges the Commission to ignore this precedent and support a plan which would have federal agencies ignore their broadband stimulus statutory obligations, and instead “allocate a substantial portion of the federal broadband stimulus funds to electric utility

²⁷ *National Broadband Plan NOI*, Comments of Time Warner Cable Inc. at 24-25 (filed June 8, 2009).

²⁸ *NCTA Comments* at 34-36.

²⁹ See FIRSTENERGY CORP., 2008 ANNUAL REPORT, at 2 “Message to Shareholders” (2009) (“*First Energy Report*”).

³⁰ See e.g. *FirstEnergy Report* at 1; ALLEGHENY ENERGY, INC. AND SUBSIDIARIES, 2008 ANNUAL REPORT at 170-172 (2009); DAYTON POWER AND LIGHT CO., 2008 ANNUAL REPORT at 63 (2009), NSTAR, 2008 ANNUAL REPORT (FORM 10-K) at 50 (2009).

³¹ *Utilities Coalition Comments* at 3-4.

³² *Id.* at 3.

³³ See 47 U.S.C. § 224; 47 C.F.R. § 1.409; see, e.g., *F.C.C. v. Florida Power Corp.*, 480 US 245, 107 S. Ct. 1107, 1112-13 (1987); *Nat’l Cable and Telecommunications Ass’n, Inc. v. Gulf Power Co.*, 534 US 327, 112 S. Ct. 782, 786-90 (2002); *Southern Co. Serv., Inc. v. F.C.C.*, 313 F.3d 574, 579-582, 584-85

ratepayers.”³⁴ The broadband stimulus funds must be used to fulfill the statutory purpose of promoting broadband deployment and demand, not the desires of a special interest group. The Utilities Coalition arguments must be rejected.

VII. The Record demonstrates that a broadband USF Program must be technology neutral and must include cable operators.

ACA members currently offer broadband services throughout the small towns and rural areas of America. As NCTA notes, the cable industry already makes broadband accessible to over 92% of the country.³⁵ Any broadband USF program should build on, not ignore, the cable industry’s existing infrastructure investment. Accordingly, any broadband USF program adopted should be (i) technology neutral and not favor one technology over another whether through eligibility rules, service areas or otherwise; and (ii) separate from the telephony USF high cost program.

As the record indicates, the need for a broadband USF program to be technology neutral and to include cable operators has universal support from commenters outside of the cable industry:

Benton Foundation:

A voucher could be provided to certified customers to reduce the price of broadband modems and to obtain a discount on monthly internet charges. Again, the voucher should be usable with any broadband provider: wireline, cable, satellite, fixed wireless, mobile wireless, etc.³⁶

Google:

(D.C. Cir., 2002); *Alabama Power Co. v. F.C.C.*, 311 F.3d 1357, 1367-1372 (11th Cir., 2002).

³⁴ *Utilities Coalition Comments* at 3.

³⁵ *NCTA Comments* at 10.

³⁶ *National Broadband Plan NOI*, Comments of the Benton Foundation at 57 (filed June 8, 2009).

The FCC should commit to take action within one year on pending proposals regarding Federal Universal Service Funds for broadband. This includes support mechanisms available on a technology-neutral basis for provision of broadband in rural areas. Rather than a PSTN “universal service” focus, the stated objective should be universal access to broadband encompassing connectivity, ubiquity, and symmetry.³⁷

USA Coalition:

[T]he support mechanism must include support for broadband services in a technologically neutral manner.³⁸

VIII. Consumption-based billing.

Congressman Eric Massa recently introduced a bill, The Broadband Internet Fairness Act (“BIFA”),³⁹ which would direct the Federal Trade Commission to “review volume usage service plans of major broadband Internet service providers to ensure that such plans are fairly based on cost.”⁴⁰ As part of BIFA, cable, telephone, and other Internet providers would be required to file a “service plan analysis” that justifies the reasonableness and need for tiered service.⁴¹ The fact is, consumption-based billing benefits consumers by giving them ultimate control over how much they spend each month for Internet access.

The Commission must therefore acknowledge the need for broadband service providers to offer Internet usage payment models, and the consumer benefits that such payment models will deliver. Legislation, such as the bill introduced by Representative

³⁷ *National Broadband Plan NOI*, Comments of Google, Inc. at 35 (filed June 8, 2009) (citations omitted).

³⁸ *National Broadband Plan NOI*, Comments of the Universal Service for America Coalition at 7 (filed June 8, 2009).

³⁹ H.R. 2902, 111th Cong. (2009).

⁴⁰ *Id.*

⁴¹ *Id.*, § 3(b).

Massa, would have a chilling effect on broadband operators offering these types of consumer-friendly options.

IX. Conclusion.

The Commission has before it ample evidence that a National Broadband Plan must include the recommendations made by ACA in this proceeding. The recommendations proposed by ACA would ensure that all Americans have access to reliable, reasonably priced broadband services, and the Commission should adopt them.

Respectfully submitted,

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