

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)	

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

RONALD K. CHEN
PUBLIC ADVOCATE

Kimberly K. Holmes, Esq.,
Acting Director

Division of Rate Counsel
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, NJ 07101
(973) 648-2690 - Phone
(973) 624-1047 – Fax
www.rpa.state.nj.us
njratepayer@rpa.state.nj.us

On the Comments:

Christopher J. White, Esq.
Deputy Public Advocate

Economic Consultant:
Susan M. Baldwin

Date: May 16, 2007

TABLE OF CONTENTS

I. INTRODUCTION.....	1
A. INTEREST OF THE RATE COUNSEL IN THE INSTANT PROCEEDING.	2
B. SCOPE OF THE PUBLIC NOTICE	3
C. SUMMARY OF COMMENTS.....	5
Preliminary analyses and recommendations.....	7
II. DEFINING “ADVANCED TELECOMMUNICATIONS CAPABILITY”	9
III. IS ADVANCED TELECOMMUNICATIONS CAPABILITY BEING DEPLOYED TO ALL AMERICANS?.....	15
The Commission should modify its data collection methodology.....	15
Consumers, in many cases, do not have a choice of broadband providers, and where they do have a choice, the market is dominated by the cable-telco duopoly.....	18
Broadband availability is increasing, but is not yet sufficiently widespread at affordable rates.	21
IV. IS DEPLOYMENT REASONABLE AND TIMELY?.....	28
V. WHAT ACTIONS CAN ACCELERATE DEPLOYMENT?	31
Approval of mergers and spin-offs that is contingent upon broadband deployment in a timely manner at affordable rates should continue.....	31
VI. CONCLUSION	35

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)	

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

I. INTRODUCTION

On April 16, 2007, the Federal Communications Commission (“FCC” or “Commission”) released a Notice of Inquiry (“Notice”) to begin its fifth inquiry under Section 706 of the Telecommunications Act of 1996 (“1996 Act”)¹ into whether advanced telecommunications is being deployed in a “reasonable and timely fashion” to all Americans.² In response to this Notice, the New Jersey Division of Rate Counsel

¹ / Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“1996 Act”). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as “the 1996 Act,” or “the Act,” and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

² / *In the Matter of 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, *Notice of Inquiry*, Rel. April 16, 2007 (“Notice”).

(“Rate Counsel”) submits these comments to assist the Commission in assessing whether broadband deployment is reasonable, timely and accessible to all Americans.³

A. INTEREST OF THE RATE COUNSEL IN THE INSTANT PROCEEDING.

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities.⁴ Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel’s continued participation and interest in implementation of the Telecommunications Act of 1996. The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and

³ / Notice, at para. 1. Comments are due May 16, 2007, and Reply Comments are due May 31, 2007. Rate Counsel commends the Commission for taking action on such an important matter, but questions the ability of parties to submit thorough analyses and the Commission to gain adequate insight into the issue with a two-week period (which includes a holiday weekend) between the filing of initial and reply comments. Although Rate Counsel recognizes that the inquiry is long overdue, additional time would enable a full assessment of the issues that this proceeding encompasses.

⁴ / Effective July 1, 2006, the New Jersey Division of the Ratepayer Advocate is now Rate Counsel. The office of Rate Counsel is a Division within the New Jersey Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jersey citizens who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Whitman’s Reorganization Plan. See New Jersey Reorganization Plan 001-1994, codified at N.J.S.A. 13:1D-1, et seq. The mission of the Ratepayer Advocate was to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that were just and nondiscriminatory. In addition, the Ratepayer Advocate worked to insure that all consumers were knowledgeable about the choices they had in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (N.J.S.A. §§ 52:27EE-1 et seq.). The Department is authorized by statute to “represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest,” N.J.S.A. 52: 27EE-57, i.e., an “interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens.” N.J.S.A.52:27EE-12; The Division of Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters. The Division of Rate Counsel represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates in Federal and state administrative and judicial proceedings.

it has found that competition will “promote efficiency, reduce regulatory delay, and foster productivity and innovation” and “produce a wider selection of services at competitive market-based prices.” The resolution of the complex economic and policy issues that this proceeding embraces directly affects the structure of telecommunications markets, and the prices that consumers pay for basic telecommunications service.

In this proceeding, the Commission seeks to gain information related to its how it should define advanced telecommunications (*i.e.* broadband services); whether advanced telecommunications services are being deployed in a “reasonable and timely basis” to Americans; and what actions the Commission can take to encourage broadband deployment. The pace and scope of broadband deployment bear directly on the present and future welfare of New Jersey’s consumers, and on their ability to partake fully in mainstream economic and social activities.

B. SCOPE OF THE PUBLIC NOTICE

The Commission has undertaken the inquiry as part of the ongoing Section 706 requirements of the 1996 Act regarding broadband deployment. This is the Commission’s fifth inquiry. In prior inquiries, the FCC concluded that “the deployment of advanced telecommunications capability was reasonable and timely on a general, nationwide basis.”⁵ The FCC’s general issues of inquiry in this proceeding follow a framework used in earlier inquiries, and include the following questions:

- How should we define “advanced telecommunications capability”?
- Is advanced telecommunications capability being deployed to all Americans?
- Is the current level of deployment reasonable and timely?

⁵ / Notice, at para. 6.

- What actions, if any, can be taken to accelerate deployment?⁶

The Commission also seeks to explore three other areas of “potential interest to policymakers”:

- The economic considerations that support the deployment of advanced telecommunications capability;
- Consumer adoption and usage of services requiring advanced telecommunications capability; and
- The competitiveness of the broadband market and whether there is evidence of anticompetitive conduct in this market.⁷

The FCC also concurrently adopted two related items. First, the FCC released a Notice of Proposed Rulemaking in WC Docket No. 07-38 (“Broadband Data NPRM”) on April 16, 2007, seeking input regarding the improvement of broadband data collection, including comprehensive data to determine the availability of broadband deployment in all areas of the country.⁸ In a third proceeding, WC Docket No. 07-52, the Commission began a Notice of Inquiry (“Broadband Industry Practices Notice”) into the behavior of broadband market participants regarding the management of Internet traffic, rate structure issues, and the impact of industry broadband practices on consumers. The Commission is also seeking comment as part of its *Broadband Industry Practices Notice* on whether it

⁶ / *Id.*, at para. 11.

⁷ / *Id.*

⁸ / *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, *Notice of Proposed Rulemaking*, Rel. April 16, 2007 (“Broadband Data NPRM”). Initial and reply comments are due 30 days and 60 days, respectively, after publication of the *NPRM* in the Federal Register.

should revise its 2005 Internet Policy Statement to include a new principle of nondiscrimination.⁹

C. SUMMARY OF COMMENTS

Rate Counsel welcomes the opportunity to contribute to the design of national policy on broadband deployment. As the Commission and Congress have recognized upon numerous occasions, broadband deployment throughout the nation is essential to the economy's viability and to consumers' ability to connect to employment, health, entertainment, and other elements of mainstream contemporary society. Furthermore, akin to the characteristics of the public switched telephone network, broadband deployment yields substantial positive "externalities" – the aggregate societal benefits of broadband interconnectedness increase exponentially as the percentage of consumers served by broadband increases.

The Commission's goal of increasing broadband deployment is unambiguous. Furthermore, data reported by the Commission demonstrate a clear and increasing consumer demand for broadband services.¹⁰ Yet, under today's regulatory paradigm, the Commission's ability to prevent a nation of digital haves and have-nots is uncertain. In these comments, Rate Counsel identifies market imperfections and discusses recommendations for remedying these market failures.

⁹/ *In the Matter of Broadband Industry Practices*, WC Docket No. 07-52, Rel. April 16, 2007 ("Broadband Industry Practices Notice"). Initial comments are due June 15, 2007, and reply comments are due July 16, 2007.

¹⁰/ Residential demand for high-speed lines increased from 3,163,666 in June 2000 to 50,262,193 in June 2006. FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access: Status as of June 30, 2006*, January 2007 ("High Speed Services January 2007 Report"), at Table 3. Note that the data for 2000 through December 2004 is not directly comparable because only those providers with at least 250 lines per state were required to file prior to the report containing June 2005 data. *Id.*

Relying solely on market forces to achieve the nation's vision of a ubiquitous and affordable broadband network will lead to the neglect of many consumers. As is evidenced by Verizon's recent decision to seek regulatory approval to sell its operations in the three northern New England states,¹¹ incumbent local exchange carriers are focusing their operations where the profits are likely the highest.¹² Incumbent local exchange carriers ("ILEC") likely will continue to slow-roll their digital subscriber line ("DSL") service absent regulatory requirements and incentives to do otherwise. Rate Counsel urges the Commission to identify those situations where regulatory intervention is necessary, and to design appropriate policy.

Over the past years, regulators have lost some useful policy making tools. Twenty years ago, incumbent local exchange carriers' obligation to serve all consumers was undisputed. Rate-of-return regulation provided the Commission and state public utility commissions with the opportunity to oversee the industry's investment and to ensure simultaneously that companies would receive a fair return on their investment. Also, before Verizon and SBC became mega-companies, they were more accountable to their "hometown" regions. For example, in that bygone world, under the jurisdiction of state regulators, Verizon (then New England Telephone and Telegraph Company)

¹¹/ *Application of Verizon New England Inc., NYNEX Long Distance Company, Bell Atlantic Communications, Inc., Verizon Select Services Inc., Verizon Communications Inc., and Northern New England Spinc Inc., Transferors, and FairPoint Communications, Inc., Transferee, For Consent to Transfer Certain Assets and Long-Distance Customer Relationships in the States of Maine, New Hampshire, and Vermont*, FCC WC Docket No. 07-22, Consolidated Application for Consent to Transfer Assets, January 31, 2007.

¹²/ In Verizon Communications' second quarter 2006 Investor Quarterly, Ivan Seidenberg, Verizon's chairman and CEO states: "Verizon Telecom is tightly controlling costs in traditional businesses as we make the fiber network investments to accelerate growth and market expansion." Verizon Communications, *Investor Quarterly: VZ Second Quarter 2006*, August 1, 2006, at 2. In its 2006 Annual Report to investors, AT&T, Inc. states that one of its goals in 2007 is to "Strengthen our ability to compete in the video market as we scale our new video services." 2006 AT&T Annual Report, at 3. AT&T also suggests in its Annual Report that "AT&T's video entry will help drive revenue growth." *Id.*, at 11.

deployed digital switches not only in the greater Boston area (where revenues from then-new features such as call waiting clearly justified the investment), but also it replaced aging electromechanical switches in the Berkshires (where a strict cost-benefit analysis would have delayed such an investment).

Now, small communities in Massachusetts and across the nation are clamoring for access to broadband, suburban and rural alike, but, in the absence of adequate regulatory accountability, ILECs are selectively deploying broadband technology.¹³ Despite widespread consumer demand for advanced services, the nation's advanced telecommunications network is evolving in a fragmented manner, and likely will not reach precisely those consumers who are at the greatest risk of being isolated from society's economic mainstream (such as, the unemployed, the home-bound, the disabled, and those living in remote parts of the country) in a timely, affordable, and reasonable manner absent regulatory intervention.

Preliminary analyses and recommendations

- As an initial matter, the Commission's decision to investigate broadband matters in three distinct proceedings, with three separate sets of filing dates, jeopardizes the Commission's ability to define and implement a cohesive, coherent national policy. Rather than fragmenting its approach, the FCC should consider the issues together. Additionally, the Commission's schedule for this proceeding is unduly abbreviated. The Commission should allow more time to permit parties to reply to initial comments.

¹³/ See e.g., "In Western Mass., still using dial-up," *Boston Globe*, Business Section, D3, April 29, 2007, in which a consumer states, among other things: "[w]e are still using 56 dial-up modems (remember those?) and waiting to get the DSL lines that Eastern Massachusetts has had for more than a decade."

- The Commission should update its definition of high-speed and advanced services and adopt a policy to redefine minimum speeds on an on-going basis.
- The Commission should consider not only whether broadband deployment is timely and reasonable, but also whether it is affordable.
- Deployment of broadband is woefully inadequate, not only in rural areas, but also in suburban areas. The use of zip codes to assess availability is misleading and unreliable: at a minimum, carriers should be required to specify the percentages of customers within a zip code that have broadband capability.
- The Commission should direct each ILEC and cable company to provide the Commission and state regulators with geographic information system (“GIS”) showing precisely where broadband access is available: detailed mapping data could then inform regulators’ and policy makers’ assessment of the status and future of broadband access.
- The Commission should ensure that the RBOCs are meeting their various merger commitments.
- The current status of broadband deployment is unacceptable.
- The current model of granting carriers deregulation in return for network modernization is not working: the Commission should look to examples in other countries for acceptable models.
- The Commission, regulators, policymakers, and consumer advocates require detailed data regarding the costs of deploying available technology in order to fashion the best solution.

- The Commission should ensure that broadband deployment does not erode the consumer protection policies and rules that federal and state regulators have devoted years to establishing.¹⁴

Rate Counsel does not attempt to address all items in the Notice, but looks forward to reviewing the comments of other parties and addressing additional issues in reply comments.

II. DEFINING “ADVANCED TELECOMMUNICATIONS CAPABILITY”

The Commission seeks comment on how it should define “advanced telecommunications capability” for the purposes of its inquiry. As noted in its Notice, the Commission has never “definitively specified” what speeds are encompassed by the term.¹⁵ Congress specified that the term “advanced telecommunications capability” in Section 706(c) of the Act should be 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.”¹⁶

The Commission states that it has in the past use the term “advanced services” to refer to services and facilities with an upstream and downstream transmission speed of more than 200 kilobits per second (kbps) and “high-speed services” to refer to services and facilities with more than 200 kbps capability in at least one direction.¹⁷ The

¹⁴ / Rate Counsel urges the Commission to consider the comments filed by Rate Counsel on January 17, 2006, and March 1, 2006 in the Commission’s broadband consumer protection proceeding. *In the Matter of Consumer Protection in a Broadband Era*, WC Docket No. 05-271.

¹⁵ / Notice, at para. 12.

¹⁶ / *Id.*, at fn 2 citing § 706(c) of the 1996 Act.

¹⁷ / *Id.*, at para. 12.

Commission's *High-Speed Services Report* also uses this definition.¹⁸ As a general matter, Rate Counsel supports the Commission's distinction between services that provide asymmetric and symmetric download and upload speeds.

The Commission asks, "Given the rapid technological changes in the marketplace, we seek comment on the need to alter the definitional framework utilized in prior inquiries."¹⁹ The Commission should consider altering the framework in order to take rapid technological change into consideration. The current speeds utilized in the definition of advanced and high-speed have become largely irrelevant. The Commission should endeavor to establish a definition that evolves, as technology evolves. Dial-up access to the Internet was once state-of-the-art but by today's standards, is intolerably slow and inadequate. The Commission's 200 kbps definition has been described as "archaic" in the trade press²⁰ and state policymakers are considering proposals to ensure speed of 1 gbps in Minnesota and 3 mbps by 2010 and 20 mbps (symmetric) by 2013 in Vermont.²¹

One report cites a prediction that "bandwidth demand for the most bandwidth-intensive households could reach 18 Mbps downstream and 3 Mbps upstream by 2008,"

¹⁸ / Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access* ("High-Speed Services Report"), released twice a year and available at: <http://www.fcc.gov/wcb/iatd/comp.html>. The *High-Speed Services Report* defines high-speed lines as services to end-user locations delivering speeds that exceed 200 kbps in at least one direction. Advanced services (a subset of high-speed lines) provide services with speeds exceeding 200 kbps in both directions. *High-Speed Services January 2007 Report*, at Notes for Tables 1-5 and Charts 1-9, Note 1.

¹⁹ / Notice, at para. 12.

²⁰ / Carol Wilson, "It's about time," *Telephony Online*, April 23, 2007.

²¹ / Ed Gubbins, "Fast enough for you?" *Telephony Online*, May 7, 2007.

and that by 2012, “bandwidth demand for the most bandwidth-intensive households could reach 23 Mbps downstream and 14 Mbps upstream.”²² Another report predicts that:

There will be a big change in the average downstream speed provided to customers. In 2004, less than 10 percent of Europe’s broadband subscribers had a downstream connection of 2 Mbit/s or more. By 2009, almost 80 percent will be receiving 2 Mbit/s or more, and almost 30 percent will be receiving more than 10 Mbit/s.²³

National broadband policy should adapt to and correspond with evolving technological requirements.

It is clear that consumers need a minimum speed for voice, data, video and internet access. Less clear, however, is how to define that speed. Bandwidth requirements vary with the intended use of the service. Rate Counsel cautions the Commission against adopting such an ambitious goal with respect to speed as to foreclose the opportunity that certain technologies may provide for access in hard-to-serve areas. Rate Counsel looks forward to reviewing proposals submitted to the Commission in this proceeding.

The most recent *High-Speed Services Report* from the FCC’s Industry Analysis and Technology Division indicates that approximately 22% of U.S. broadband connections exceed 200 kbps in only one direction; 29% have speeds between 200 kbps and 2.5Mbps; 46% have speeds between 2.5 Mbps and 10 Mbps; 3% have speeds between 10 Mbps and 25 Mbps; and a negligible percentage have speeds greater than 25

²² / “The Internet and Broadband Experience for Business Users,” Document No. 07/23, Ireland Commission for Communications Regulation, May 1, 2007, at 23-24, citing “The Broadband Stakeholder’s Group: Pipe Dreams? Prospects for Next Generation Broadband Deployment in the UK,” April 2007.

²³ / Graham Finnie, “Next Generation Broadband in Europe,” *Heavy Reading*, Volume 3, No. 5, March 2005, available at: http://www.heavyreading.com/details.asp?sku_id=752&skuitem_itemid=734&promo_code=&aff_code=&next_url=/lis.

Mbps.²⁴ Prices vary for DSL and cable modem service – the most widely used technologies for consumer Internet access. Some examples include: \$14.99 per month for 768 kbps service, and \$29.99 per month for 3 Mbps service from Verizon;²⁵ \$32.95 for 1.5 Mbps service, \$37.95 for 3 Mbps service, and \$42.95 for 6 Mbps service from AT&T (BellSouth);²⁶ \$44.99 for 1.5 Mbps service, and \$54.99 for 7 Mbps service from Qwest;²⁷ \$44.95 for 5 Mbps service from Time Warner Cable (Road Runner).²⁸

In contrast, higher speeds are available in other countries and often at lower prices. For example:

- 100 mbps service is available to 80% of Japanese households at a price of about \$30 per month;²⁹
- 100 mbps service is available in South Korea for 30,000 won per month.³⁰
- In France, 60 mbps service is available for 29.90 euros per month;³¹
- In Germany, the rate for 6 mbps service is 25 euros per month, while the rate for a 16 mbps connection is 30 euros;³²
- 8 Mbps service is available for 399 krone (“kr.”) Denmark;³³

²⁴ / *High-Speed Services January 2007 Report*, at Table 5.

²⁵ / <http://www22.verizon.com/content/consumerdsl/plans/all+plans/all+plans.htm>.

²⁶ / <http://www.bellsouth.com/consumer/inetsrvcs/index.html>.

²⁷ / <http://www.qwest.com/residential/internet/pricing.html>.

²⁸ / <http://www.rr.com/rdrun/>.

²⁹ / Thomas Bleha, “Down to the wire,” *Foreign Affairs*, May/June 2005 (“Bleha”). (available at <http://www.foreignaffairs.org/20050501faessay84311/thomas-bleha/down-to-the-wire.html>, at 4.

³⁰ / http://en.wikipedia.org/wiki/Broadband_Internet_access_in_Asia. As of May 4, 2007, 1 won equals \$0.00108. 30,000 won equals \$32.36.

³¹ / http://en.wikipedia.org/wiki/Broadband_Internet_access_in_Europe. As of May 4, 2007, 1 euro equals \$1.36. 29.90 euros equals \$40.67.

³² / *Id.* 25 euros equals \$34; 30 euros equals \$40.80.

- In the Netherlands, KPN offers 6 Mbps service for 39.95 euros per month;³⁴ and
- Saunalahti offers 8 Mbps service in Helsinki for 44.90 euros per month, or 24 Mbps service for 49.90 euros per month.³⁵

Rate Counsel urges the Commission to examine the regulatory framework of other countries to determine which, if any, regulatory policies warrant consideration for the United States. For example, according to a Staff Report for the Commission of the European Communities, the five leading member states of the European Communities, in terms of penetration (Netherlands, Denmark, Finland, Sweden, and Belgium) have “a high roll-out of cable and have arrangements in place which allow alternative operators to gain access to the existing telecoms (sic) networks.”³⁶ The report also concludes that “[i]n the absence of competition between different platforms, national regulatory policies are critical in setting the right conditions for competition to development by means of access to the incumbent’s infrastructure, in particular through unbundling and bitstream access products.”³⁷ This finding supports the importance of the Commission ensuring that ILECs provide alternative providers with unfettered, reasonably priced access to their unbundled DSL offerings. As discussed in these comments, ILECs lack the economic

³³ / <http://www.cybercity.dk/produkter/privat/bredbaand/priser>. As of May 4, 2007, one Danish krone equals \$0.1819. 399 kr. equals \$72.58.

³⁴ / <http://www.kpn.com/kpn/show/id=1163210>. 39.93 euros equals \$54.33.

³⁵ / <http://saunalahti.fi/internet/adsl/adslhinnat.php?areaid=134&search=Hae>. 44.90 euros equals \$61.06. 49.90 euros equals \$67.86.

³⁶ / Commission of the European Communities, Commission Staff Working Document Annex to the Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Electronic Communications Regulation and Markets, 2006 (12th Report”, Volume 1, March 29, 2007, at 32. Available at: http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/annualreports/12threport/sec_2007_403.pdf.

³⁷ / *Id.*, at 33.

incentive to provide unbundled, stand-alone DSL to other carriers on a reasonably priced and provisioned manner, and, therefore, regulatory intervention and oversight are essential. The FCC should require cable companies to offer stand alone broadband to consumers.

The Commission notes the providers' provision of "tiered service schemes," which provide "entry level" and higher bandwidth services over the same facilities.³⁸ To the extent that the marketplace is not fully competitive and relies on bottleneck suppliers, the Commission should ensure that "entry level" subscribers are not subsidizing the build out for "more sophisticated" customers. Also, the Commission should take price tiers into account when it examines prices. Prices should not be averaged over services with different speeds. Rate Counsel recommends that the Commission seek data regarding pricing from reporting entities including cable companies on a form similar to form 477 and that the information be disaggregated by type of service and by speed tier.³⁹

The Commission seeks information on whether cross-ownership of wireless companies by companies "with substantial wireline broadband and public switched telephone network (PSTN) facilities" has affected the development of the wireless broadband marketplace.⁴⁰ Wireless access to broadband does not yet provide a feasible alternative to wireline access for most consumers, although it does provide some promise in rural areas. Rate Counsel recognizes that this technology is evolving, however. Numerous municipalities are seeking to deploy wireless-based access to residents. Cross-ownership raises cross subsidization concerns, particularly regarding whether residential

³⁸ / Notice, at para. 19.

³⁹ / *Id.*

⁴⁰ / *Id.*, at 12.

customers of wireline and wireless services are subsidizing networks used for multiple services. Additionally, wireline companies that own wireless companies may have less incentive to introduce and deploy wireless broadband services than those companies that offer solely wireless service.

III. IS ADVANCED TELECOMMUNICATIONS CAPABILITY BEING DEPLOYED TO ALL AMERICANS?

The Commission seeks comment on “whether advanced telecommunications capability is being deployed to all Americans.” Specifically, the Commission seeks comment with respect to three areas of inquiry: (1) the *availability* of advanced telecommunications and the change in availability since the Fourth Report; (2) the “*economics underlying investment* in advanced infrastructure and service deployment”; and (3) *technological improvements* in advanced services.⁴¹ The industry is not deploying advanced telecommunications capability to all Americans. Incumbents have been making promises for years about deploying state-of-the-art networks and have yet to follow through on these promises. Furthermore, the Commission should focus not only on whether broadband is being deployed, but also on whether it is affordable.

The Commission should modify its data collection methodology.

The Commission has been collecting data on advanced services deployment since 2000; however, prior to June 2005, smaller entities were not required to report data to the Commission.⁴² The Commission describes the link between subscription and deployment in the following manner: “Given the association between subscription and deployment, such data collection [*i.e.*, asking carriers to report the number of broadband lines]

⁴¹ / *Id.*, at para. 13 (emphasis added).

⁴² / *Id.*, at fn 20.

provides a means to assess the pace at which advanced telecommunications capabilities are being made available in different parts of the country and across different demographic groups.”⁴³ Beginning in June 2005, the Commission also requires that ILECs report the “extent to which their DSL broadband connections are available to the households to whom they can provide local telephone service” and similarly requires cable companies to report the “extent to which their cable modem service is available to the households to whom they can provide cable TV service.”⁴⁴

The Commission seeks comment on the “significant time series” that has been developed from December 1999 through June 2006 regarding high-speed and advanced services.⁴⁵ Although the semiannual collection of data provides an excellent resource for trend analyses, the Commission should exercise caution in drawing conclusions from the data. The change in reporting requirements post-2004 appears in the data for the first time in the *High-Speed Services Report* released in April 2006 (data as of June 30, 2005). The addition of small providers to the data may create the impression of trends that do not exist. As noted in the April 2006 edition of the High-Speed Services Report, “[s]mall providers of high-speed connections, many of whom serve rural areas with relatively small populations, were therefore unrepresented in the earlier data. More than twice as many holding companies and unaffiliated entities reported information about high-speed connections in June 2005 as had reported six months earlier.”⁴⁶

⁴³ / *Id.*, at para. 14.

⁴⁴ / *Id.*

⁴⁵ / *Id.*, at para. 15.

⁴⁶ / *High-Speed Services April 2006 Report*, at 2. The report further notes that there were 552 reporting entities as of December 31, 2004 and 1,270 reporting entities as of June 30, 2005. In addition, small business lines were included in residential data through December 2004. *Id.*, at Table 3.

Current data collection methods are insufficient to support the Commission's task set out by Section 706. The data that the FCC collects is not sufficiently comprehensive and disaggregated to provide a complete picture about the deployment of broadband throughout the country. Among other things, Rate Counsel urges the Commission to improve upon its current use of zip codes to analyze broadband deployment. As noted by Commissioner Copps:

If the Commission had prudently invested in better broadband data-gathering a decade ago, I believe we'd all be better off—not just the government, but more importantly, consumers and industry. We'd have a better handle on how to fix the problem because we'd have a better understanding of the problem. We would already have granular data, reported by carriers, on the range of broadband speeds and prices that consumers in urban, suburban, exurban, rural and tribal areas currently face. We would know which factors—like age, gender, education, race, income, disability status, and so forth—most affect consumer broadband decisions. We would understand how various markets respond to numerous variables. We could already be using our section 706 reports to inform Congress and the country of the realities of the broadband world as the basis for charting, finally, a strategy for the ubiquitous penetration of truly competitive high-speed broadband.

Deployment of broadband is woefully inadequate, not only in rural areas, but also in suburban areas. The use of zip codes to assess availability is misleading and unreliable. By way of illustration, if broadband is available to consumers in only a single neighborhood within a zip code, under today's reporting, it would appear that *all* consumers in a zip code could avail themselves of broadband services. At a minimum, carriers should be required to specify the percentages of customers within a zip code that have broadband capability.

The Commission should require data to be reported in a more granular fashion or to develop a database that would map zip codes to a more meaningful telecommunications designation. As the Commission stated: "Ideally, we would have

information about the choices available to consumers on a house-by-house and business-by-business basis.”⁴⁷ The Commission seeks comment on how it can best approach that ideal. Rate Counsel urges the Commission to explore alternative geographic designations such as the wire center, and census blocks. At a minimum, given that carriers already report zip code information on Form 477 that they derive from billing addresses, it should be fairly straightforward and inexpensive to report information on a zip code +4 basis, thus providing additional detail.

Also, geographic information systems provide invaluable tools for mapping broadband availability and demand. Companies have billing records that include consumer addresses: consumer demand provides important information about availability since, by definition, consumers can only subscribe to service where it is offered. The Commission should explore options for obtaining detailed information in electronic format, compatible with a common geographic information system database from the industry about the geographic availability of broadband services.

Consumers, in many cases, do not have a choice of broadband providers, and where they do have a choice, the market is dominated by the cable-telco duopoly.

The Commission seeks information on the extent to which consumers have a choice of broadband services and providers.⁴⁸ Yet, as discussed above, it is difficult to determine the true availability of competitive alternatives for individual consumers given the excessive aggregation of the data. Anecdotal evidence suggests that many consumers do not have access to more than one provider (much less one provider, in some cases)

⁴⁷ / Notice, at para. 16.

⁴⁸ / *Id.*

despite the fact that Commission data indicates that there is one or more providers offering service in the customer's zip code.

Furthermore, if one puts aside the for a moment the continued gaps in service by geographic area and customer class, the FCC's national data corroborates press, regulator, and consumer advocate descriptions of the U.S. broadband market as a duopoly.⁴⁹ The FCC's *High Speed Services Report* indicates that the U.S. had over 64 million high-speed lines in service as of June 2006, of which just over 50 million were for residential customers.⁵⁰ As of June 2006, cable modem and ADSL technology

⁴⁹ / Policymakers, analysts and consumer advocates have been raising concerns about the broadband duopoly for some time now. A Congressional Research Service report released in 2006 concluded: "With only limited alternatives to the cable and telephone broadband duopoly for the foreseeable future, and with the cable and telephone companies both pursuing largely the same business plan, the broadband providers might have both the incentive and the ability to exploit their control over access to end users to restrict competition (and the innovation it might bring) and harm consumers." (Charles B. Goldfarb, *Access to Broadband Networks*, Congressional Research Service, CRS Report for Congress, Order Code RL33496, June 29, 2006, at 17). FCC Commissioner Adelstein, in his statement regarding the FCC's approval of the merger between AT&T Inc. and BellSouth Corporation, also has taken note of the cable-telco duopoly, referring to "a market in which telephone and cable operators control nearly 98 percent of the market." (Statement of Commissioner Jonathan S. Adelstein, Concurring, Re: *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, *Memorandum Opinion and Order*, December 29, 2006.) Mark Cooper, Director of Research for the Consumer Federation of America described the cable-telco duopoly in detail in testimony before the United States Senate Committee on Commerce, Science and Transportation in hearings regarding Competition and Convergence on March 30, 2006. His testimony is available at <http://commerce.senate.gov/pdf/cooper-033006.pdf>. Dr. Cooper noted that "there are only two local, last mile communications networks that can provide a fully functional broadband network to the residential consumer – the incumbent local telephone companies and the incumbent cable operators. Two is not a sufficient number to ensure vigorous competition, and both sets of incumbents have a miserable record of anticompetitive, anti-consumer behavior." (*Id.*, at 4.) The Chairman of the House Subcommittee on Telecommunications and the Internet, U.S. House of Representatives, referred to the broadband, or digital, duopoly at a conference in January 2007, stating, in part, "[t]he second piece of bad news is that broadband service to residential consumers in the United States is dominated by a 'digital duopoly' of two technologies – cable modem and telephone company DSL service . . . the cable industry's cable modem and the telephone companies' DSL technologies are going to be a digital duopoly into residential homes for the foreseeable future. This has implications for affordability, for innovation, and for the need for sensible rules for network neutrality to safeguard the Internet." (Congressman Ed Markey (7th District Massachusetts) Statement at the Voice On the Net (VON) Conference, January 18, 2007, Boston, Massachusetts, available at http://markey.house.gov/index.php?option=com_content&task=view&id=2116&Itemid=46.)

⁵⁰ / *High Speed Services January 2007 Report*, at Tables 1 and 3.

represented 55.2% and 40.1%, respectively of residential high-speed lines.⁵¹ Thus, the cable and telephone companies control at least 95% of the broadband pipes to homes in the United States.⁵²

The evolution of a duopoly consisting of the telecommunications incumbent and the cable incumbent does not provide sufficient consumer protection, as described in more detail in the attached report (Attachment A).⁵³ The semblance of broadband competition in the converging cable and telecommunications industries is misleading. A cable-telco duopoly controls 95 percent of the nation's broadband connections to the Internet, and, therefore, dominates the state's "pipes" over which households and businesses make telephone calls, access the Internet, locate information, conduct business, and obtain entertainment. As the attached report concludes: "Under today's deregulatory paradigm, where true competition has not yet arrived, but new services are unregulated, consumers are vulnerable to two distinct harms as the incumbent telephone companies roll out new technology: (1) some consumers will be left behind as the telco-cable duopoly races to attract and to lock in high-revenue customers; and (2) precisely

⁵¹ / *High-Speed Services January 2007 Report*, at Chart 6. Additionally, optical fiber to the subscriber's premises (*e.g.* Fiber-to-the-Home) – presumably served by the telecom companies – represents 0.9% of the market and SDSL and other wireline technologies represent 0.2% of the residential high-speed line market. *Id.*

⁵² / As noted above the telephone companies also provide fiber and wireline technologies for high-speed access. The FCC reports that *incumbent* local exchange carriers provided 96.7% of the reported ADSL lines and 52.8% of the traditional wireline connections. "When all technologies are considered, incumbent LECs reported 49.5% of total high-speed connections. *Id.*, at 3.

⁵³ / Susan M. Baldwin, Sarah M. Bosley and Timothy E. Howington, "The Cable-Telco Duopoly's Deployment of New Jersey's Information Infrastructure: Establishing Accountability," White Paper prepared for the Public Advocate of New Jersey Division of Rate Counsel, January 19, 2007 ("Cable-Telco Duopoly White Paper"). The Cable-Telco Duopoly White Paper was prepared on behalf of the Public Advocate of New Jersey Division of Rate Counsel and originally submitted in the New Jersey Board of Public Utilities proceeding considering new cable rules. *In the Matter of the Board's Regulations of Cable Television, Proposed Readoption with Amendments and New Rules: N.J.A.C. 14:18-14 and 15*, New Jersey BPU Docket Nos. CX06030141 and CX06080580, Proposal Number: PRN 2006-384 ("Proposed Regulations"). Section 2.5 discusses the evidence, economics and implications of the cable-telco duopoly for consumers.

those consumers who are left behind will be forced to subsidize new services.”⁵⁴ Furthermore, anticompetitive conduct may be the inevitable result.⁵⁵

Broadband availability is increasing, but is not yet sufficiently widespread at affordable rates.

The Commission seeks data from external sources that will allow it “to make informed judgments about whether advanced telecommunications capability is being made available to consumers in a reasonable and timely manner.”⁵⁶ Several organizations collect such data, each attempting to estimate broadband deployment and subscription rates based on geographic area and/or demographics.

As the Commission’s Notice recognizes, the United States Government Accountability Office (“GAO”) released a report in May 2006 entitled *Broadband Deployment is Extensive Throughout the United States, But It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas*.⁵⁷ The GAO reported that as of spring 2005, 28% of U.S. households subscribed to broadband service, just below the 30% using dial-up access. Forty-one percent reported no Internet access at all. Consumers in urban and suburban areas were far more likely to subscribe to broadband service than were those in rural areas. GAO found that 29% of urban households, and 28% of suburban households had broadband access, while only 17% of rural households subscribed.⁵⁸

⁵⁴ / Cable-Telco Duopoly White Paper, at iii.

⁵⁵ / Notice, at para. 16. The Commission seeks comment on examples of anticompetitive conduct.

⁵⁶ / Notice, at para. 16.

⁵⁷ / United States Government Accountability Office, *Broadband Deployment is Extensive Throughout the United States, But It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas*, GAO-06-426 (May 2006) (“GAO 2006 Broadband Report”).

⁵⁸ / GAO 2006 Broadband Report, at 13.

Recent data compiled by the Organization for Economic Co-operation and Development (OECD) show the extent to which the United States has fallen behind in deploying broadband technology. As of December 2006, The U.S. ranked 15th in broadband subscribership, at 19.6 subscribers per 100 inhabitants. In comparison, Denmark and the Netherlands, the highest ranking countries, achieved subscription rates of 31.9 and 31.8 connections per 100 inhabitants, respectively.⁵⁹ However, concerns have been raised about the degree to which the country rankings make a fair comparison among the various countries.⁶⁰

In March 2006, the American Consumer Institute (“ACI”) published its report, *Who Uses Information Technology Services? A Demographic Analysis of American Consumers*. The study represents the results of ACI’s January 2006 *Consumer Pulse* survey of 1,000 heads of household. The goal of the survey is to determine how usage of different technologies varies based on demographics. Among the findings relating to broadband are the following:

- 68% of the households surveyed have Internet access.
- Of the households with Internet access, 61% report having high-speed Internet access.
- Of those households with Internet access, high-speed access increases with increasing income, from 54% for households with income under \$25,000, to 77% for households with income greater than \$75,000.

⁵⁹ / OECD reserves the term “broadband” for those connections with speeds of at least 256 kbps.

⁶⁰ / See, e.g., Testimony of George S. Ford, PhD, Chief Economist Phoenix Center for Advanced Legal & Economic Public Policy Studies Before the House Committee on Commerce and Energy - Subcommittee on Telecommunications and the Internet Hearing on “Digital Future of the United States: Part IV: Broadband Lessons from Abroad,” April 24, 2007. Other ranking places the United States closer to the top in terms of digital connectedness. Of course, any ranking involves a subjective decision regarding the criteria used to rank countries. See, e.g., Economist Intelligence Unit, *The Economist*, “The 2007 e-readiness rankings: Raising the bar,” A white paper from the Economist Intelligence Unit, 2007.

- Of those with Internet access, the group “Hispanics, Asian, and Other” are more likely (67%) to have high-speed Internet access than either Caucasians (61%) or African-Americans (60%).
- High-speed Internet access generally (except for the 30 to 39 year old age range) declines with the age of the head of household, from 72% for the 29 and under group, to 42% for the over 65 group.
- About 67% of urban and suburban households with Internet access subscribe to high-speed Internet services in comparison with only 47% of rural households who subscribe to high-speed Internet services.

Home Broadband Adoption, a report published in May 2006 by the Pew Internet Project,⁶¹ is based on two surveys – one conducted in late 2005, and the other conducted from February to April 2006.⁶² The report describes the shifting demographics in broadband adoption, how people are using the Internet, and consumer choice in the provision of broadband services. The Pew Internet Project determined that, as of March 2006, 42% of Americans had broadband connections at home, up from 30% the previous year. Much of the increase in broadband subscribership results from dial-up users upgrading their service. However, among current dial-up Internet users, about 60% indicated that they are not interested in changing to broadband service. Other findings in the report include:

- From March 2005 to March 2006, broadband adoption grew 68% for households with income on the range of \$40,000 to \$50,000. Adoption by Blacks grew by 121%, while adoption by Hispanics and Whites grew by 46% and 35%, respectively.

⁶¹ / John Horrigan, Pew Internet & American Life Project, *Home Broadband Adoption 2006*, May 28, 2006 (available at www.pewinternet.org).

⁶² / An earlier report, published in September 2005, the Pew Internet Project paper *Broadband Adoption At Home In The United States: Growing But Slowing*, stated that the rate of broadband adoption was slowing in the United States. The Pew Internet Project’s survey results from May 2005 indicated that 53% of home Internet users subscribed to broadband services, compared to 50% in December 2004. The report also found that 32% of the adult population did not use the Internet.

- Rural adoption of broadband service still trails urban and suburban adoption, but increased by 39% in the past year.
- 25% of broadband users report having only one broadband provider to choose from. In rural areas, 35% of survey respondents indicate that they have only one choice for broadband.⁶³

In April 2006, Broadband Everywhere,⁶⁴ released its report entitled *A Picture Is Worth a Thousand Words*,⁶⁵ which presents data regarding the Bell operating companies' deployment of fiber to the home. By examining company announcements about neighborhoods slated for fiber, and matching those communities to census data, Broadband Everywhere concludes that the Bells are intentionally underserving low-income customers and minorities, and, instead, deploying "fiber-to-the-rich." The report examines data from ten states, which together represent planned fiber installation to 507 target neighborhoods. Of those neighborhoods, 438 have median income above the median income of the state in which they are located.⁶⁶ Only eighteen of the neighborhoods with planned fiber installation have African Americans or Latinos as majority populations.⁶⁷

⁶³ / John Horrigan, Pew Internet & American Life Project, *Home Broadband Adoption 2006*, May 28, 2006 (available at www.pewinternet.org).

⁶⁴ / Broadband Everywhere describes its organization as follows: "Broadband Everywhere's founding organizations are the American Cable Association and nearly 15 small cable operators, the Hispanic Federation, the National Congress of Black Women, and the National Cable & Telecommunications Association (NCTA). Broadband Everywhere has received financial support from NCTA and expects to receive additional support from NCTA, ACA and other sources." http://www.broadbandeverywhere.org/About_Us/WhoWeAre.ashx

⁶⁵ / Broadband Everywhere, *A Picture Is Worth a Thousand Words: How the Bell Business Model Leaves Much of America Behind*, April 4, 2006, available at www.broadbandeverywhere.org.

⁶⁶ / In comments filed in 2006, Rate Counsel raised similar concerns about ILECs' fiber deployment. See, e.g., *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *High-Cost Universal Service Support*, WC Docket No. 05-337, Rate Counsel Comments, March 27, 2006, Appendix A, Table 2, "Verizon's FTTP Roll-Out Favors Affluent Communities."

⁶⁷ / Broadband Everywhere, *A Picture Is Worth a Thousand Words: How the Bell Business Model Leaves Much of America Behind*, April 4, 2006, available at www.broadbandeverywhere.org.

The Commission concluded in its Fourth Report that “incentives to invest in the infrastructure for most high-speed and advanced service markets remained strong, and that the market would continue to expand while availability increases.” Rate Counsel cautions the Commission against relying solely on market forces to achieve a ubiquitous broadband network. Because the industry rationally will invest its capital first in those parts of the country with the highest anticipated revenue stream and the lowest per-unit cost, many communities may remain unserved for an intolerably long period of time, absent regulatory intervention. Also, because ILECs are focusing major efforts on business customers, they may postpone upgrading networks to deliver DSL to residential customers in rural and suburban areas. The ILECs’ failure to deploy DSL in a timely, reasonable, and affordable manner creates a significant missed opportunity: consumers have already financed the deployment of a public switched network through the rates they pay to ILECs for noncompetitive regulated services. ILECs require relatively limited incremental investment to be capable of providing DSL, yet, in many communities lack the incentive to do so. Society’s priorities – to narrow the digital divide – do not coincide with industry’s priorities – which are to invest where the returns are greatest.⁶⁸

The positive externalities associated with broadband deployment combined with the industry’s focus on high-profit customers contribute to market failure in serving the mass market with advanced services. Rate Counsel urges the Commission to obtain detailed cost data for diverse forms of technology to assess what rates of return on equity are reasonable and appropriate to lead to broadband deployment. The Commission

⁶⁸ / See, e.g., discussion of Verizon’s sale of lines in Vermont, Maine and New Hampshire below.

should issue an information and data request to carriers to seek detailed cost data about the upfront network costs for diverse technologies (including such costs at equipment purchase, installation and operating systems, etc.).

As noted by the National Association of State Utility Consumer Advocates (“NASUCA”), Rate Counsel, and the Maine Office of the Public Advocate in the FCC’s pending investigation of “separations” in Docket No. 80-286⁶⁹: the “ILECs want to have their cake and eat it too: they successfully lobbied for the ability to deny broadband access to competitors and to exclude VoIP and broadband services from state regulatory oversight, yet they now want to preclude state regulators from ensuring that consumers of intrastate regulated services do not foot the bill for these new services and technology.”⁷⁰ The Commission’s separations proceeding bears directly on regulators’ ability to prevent and to detect improper cross-subsidization, particularly as carriers use extensive common network and resources as an invaluable strategic and physical platform from which to enter unregulated lines of business, such as digital subscriber line service, bundled offerings, and FiOS-based Internet and video services.⁷¹ The ILECs’ successful DSL sales yield them substantial profits, in large part, because, as a result of the under-

⁶⁹ / *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, FCC CC Docket No. 80-286, *Order and Further Notice of Proposed Rulemaking*, Rel. May 16, 2006.

⁷⁰ / Reply Comments of the National Association of State Utility Consumer Advocates, the New Jersey Division of Rate Counsel and the Maine Office of the Public Advocate in CC Docket No. 80-286, November 20, 2006, at 39. *See, also*, Comments of the National Association of State Utility Consumer Advocates, the New Jersey Division of Rate Counsel and the Maine Office of the Public Advocate in CC Docket No. 80-286, August 22, 2006; Affidavit of Susan M. Baldwin on behalf of the New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates in CC Docket No. 80-286, August 22, 2006; Affidavit of Robert Loube on behalf of the Maine Office of the Public Advocate and the National Association of State Utility Consumer Advocates, August 22, 2006.

⁷¹ / The Commission declared DSL to be an information service and also determined that the RBOCs do not need to offer unbundled fiber to competitors. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, et al., *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005).

assignment of common costs to this line of business, DSL gets a “free ride” over the basic loop.⁷² Incumbents have failed to demonstrate that they require any additional subsidies to deploy advanced services to consumers. Consumers, through rates paid for regulated offerings, have provided ILECs with a steady stream of revenues that has financed the deployment of a ubiquitous public network. Although consumers throughout states (*i.e.* in urban, suburban, and rural areas) have paid for broadband deployment through improperly inflated intrastate regulated rates, many are still unable to obtain broadband service.

Furthermore, the present regulatory structure lacks the requisite incentives (*i.e.*, profit motive) for telecommunications and cable carriers to deploy broadband ubiquitously. Regulatory inaction harms the many consumers who still lack access to broadband services. Rate Counsel urges the Commission to recognize that during the past ten to fifteen years, carriers sought and obtained state and federal regulatory freedom, based in part on the premise that they would modernize networks. Despite the ILECs’ promises, the anticipated network modernization has occurred at a snail’s pace in many regions of the country. Now, left to its own, the industry rationally will seek to maximize profits by deploying and marketing triple-play bundled offerings in densely populated regions and to “high value” consumers, further entrenching a societal digital divide. Rate Counsel urges the Commission to take steps to prevent the disparate deployment of advanced telecommunications services in the United States.

^{72/} See, Comments of the National Association of State Utility Consumer Advocates, the New Jersey Division of Rate Counsel and the Maine Office of the Public Advocate in CC Docket No. 80-286, August 22, 2006, at 5-9; Reply Comments of the National Association of State Utility Consumer Advocates, the New Jersey Division of Rate Counsel and the Maine Office of the Public Advocate in CC Docket No. 80-286, November 20, 2006, at 30-34; Affidavit of Susan M. Baldwin on behalf of the New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates in CC Docket No. 80-286, August 22, 2006, 66-73.

Verizon's proposed sale of its properties in the three northern New England states is evidence of its abandonment of less-profitable territories.⁷³ Whether FairPoint Communications, Inc. will actually deploy broadband quickly and more broadly in sparsely populated New England regions when Verizon (a company with far greater resources) has failed is uncertain. Furthermore, Verizon may continue to seek to sell off other service territories instead of deploying DSL,⁷⁴ and if it continues to pursue this strategy of "shedding" low-profit territories, it should be required first to demonstrate a commitment to deploying affordable broadband throughout its territories. In those instances where ILECs do not sell off "unwanted" territories, they will likely simply neglect them, absent regulatory intervention.

IV. IS DEPLOYMENT REASONABLE AND TIMELY?

The Commission seeks comment with respect to Section 706's requirement that the FCC determine whether deployment is "reasonable and timely." The Commission also seeks comment on whether it should modify its analytical framework used to address Section 706.⁷⁵ As noted above, the definition in terms of speed has not changed as technology has advanced. While a consumer may have access to some type of high-speed service, the old definitions make it difficult to determine whether that service is

⁷³ / *Application of Verizon New England Inc., NYNEX Long Distance Company, Bell Atlantic Communications, Inc., Verizon Select Services Inc., Verizon Communications Inc., and Northern New England Spincor Inc., Transferors, and FairPoint Communications, Inc., Transferee, For Consent to Transfer Certain Assets and Long-Distance Customer Relationships in the States of Maine, New Hampshire, and Vermont*, FCC WC Docket No. 07-22, Consolidated Application for Consent to Transfer Assets, January 31, 2007.

⁷⁴ / *See, e.g., In the Matter of the Application of Paradise Mergersub, Inc., GTE Corporation, Verizon Hawaii Inc. Bell Atlantic Communications, Inc. and Verizon Select Services Inc. for Approval of a Merger Transaction and Related Matters*, Hawaii Public Utilities Commission Docket No. 04-0140, Decision and Order No. 21696, March 16, 2005.

⁷⁵ / Notice, at para. 24.

comparable to what is available in urban or high-income areas. Furthermore, in addition to addressing whether broadband deployment is reasonable and timely, the Commission should also focus on whether the services deployed are affordable.

In the Fourth Report, the Commission examined several groups of consumers (including business, residential, rural, K-12 students, low-income, minority, and persons with disabilities). Rate Counsel recommends that the Commission continue to examine these groups separately in this inquiry.⁷⁶ In seeking specific comment regarding deployment to *rural and hard to serve areas*, the Commission notes that its data show that the “gap between the numbers of densely and sparsely populated zip codes that have high-speed subscribers has shrunk.”⁷⁷ The Commission seeks an explanation for this change, including the extent to which the change in data is attributable to the changes in the data that the Commission collects. The Commission should analyze the data more closely to identify more precisely where broadband is not available, and should enhance the quality of the analysis, which presently relies on limited data based on zip codes.

Rate Counsel urges the Commission to modify and improve its data analysis. As these comments explain above, at a minimum, carriers should be required to specify the percentages of customers within a zip code that have broadband capability because the mere fact that broadband services are available to households residing on a few streets conveys insufficient information to the Commission and state regulators about the actual ubiquity of broadband services. Also, as these comments explain earlier, the industry

⁷⁶ / *Id.*, asking whether the Commission should examine these separate categories in the instant proceeding.

⁷⁷ / *Id.*, at para. 25.

should provide more geographic pinpointing of broadband availability by providing regulators with GIS-based information.

Broadband deployment is not reasonable, timely, or affordable. Furthermore, consumers' access to broadband services depends not on their relative interest in or willingness to pay for broadband services, but rather on a regulatory roll of the dice. The Commission has investigated many telecommunications mergers in recent years, yet, only in its most recent merger decision has the Commission conditioned its approval of a transaction on the acquiring company's commitment to offer affordable, ubiquitous broadband service. The consequence is that those consumers who do not reside in the "right" ILEC territories lack access to reasonable, timely, and affordable broadband services. This uneven and disparate access to broadband services – which have become an increasingly integral component of today's society – is untenable.

Specifically, consumers in Verizon-served territory lack the benefit of the commitment to affordable broadband that the recent AT&T/BellSouth merger conditions provide to consumers in the regions of the 22 states served by AT&T. Yet clearly there is no inherent reason that AT&T customers are more "deserving" of broadband services than are Verizon's or Qwest's customers. Furthermore, Verizon's promises to deploy the pricier FiOS platform⁷⁸ will not provide benefits to consumers seeking more affordable ways to access the Internet. Consumers pay \$39.99 for stand-alone FiOS-based access to the Internet.⁷⁹ By comparison, Verizon's DSL-based Internet is offered at a promotional

⁷⁸ / Thomson Street Events, Conference Call Transcript, Verizon FiOS Briefing Session (September 27, 2006) at 4 available at: <http://investor.verizon.com/news/20060927/>.

⁷⁹/ FiOS prices start at \$39.99 for up to 5 Mbps/2 Mbps; \$49.99 for up to 15 Mbps/2 Mbps; and \$179.95 for up to 30 Mbps/5 Mbps connection speeds. FiOS prices accessed online May 10, 2007. (<http://www22.verizon.com/content/consumerfios/packages+and+prices/packages+and+prices.htm>).

rate of \$14.99,⁸⁰ and AT&T's new DSL rate is \$10.00.⁸¹ Cable companies should be required to offer a stand alone broadband product to consumers.

Although FiOS offers superior speed and capability, some customers seek a lower capacity and more affordable way to access the Internet. Verizon's push to deploy FiOS will likely distract it not only from installing and repairing basic telephone service in a timely manner, but also from deploying DSL at an affordable rate, as evidenced by its recent plan to sell its operations in Maine, New Hampshire, and Vermont.

V. WHAT ACTIONS CAN ACCELERATE DEPLOYMENT?

Approval of mergers and spin-offs that is contingent upon broadband deployment in a timely manner at affordable rates should continue.

The Commission's successful efforts to integrate broadband commitments with its review and approval of AT&T's acquisition of BellSouth should be lauded, and the Rate Counsel urges the Commission to replicate this approach in its review and deliberations on the public interest of pending and future transactions. AT&T has made specific commitments to increase the deployment of affordable retail and unbundled DSL as part of its merger with BellSouth. The commitments, outlined in the Commission's order approving the transaction, include the following:

- By December 31, 2007, AT&T/BellSouth will offer broadband Internet access service (*i.e.*, Internet access service at speeds in excess of 200 kbps in at least one direction) to 100 percent of the residential living units in the AT&T/BellSouth in-region territory. To meet this commitment, AT&T/BellSouth will offer broadband

^{80/} Verizon is offering a promotional one-year term plan for \$14.99/mo. for a one year plan with speeds of 768 kbps/128 kbps and a "power plan" priced at \$19.99/mo. for the first six months and \$29.99 for months 7 through 12 with speeds of 3.0 Mbps/768kbps. DSL prices accessed May 10, 2007 (<http://www22.verizon.com/content/consumerdsl/plans/all+plans/all+plans.htm>).

^{81/} *In the Matter of AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74, *Memorandum Opinion and Order*, Rel. March 26, 2007 ("AT&T/BellSouth Merger Order"), Appendix F ("AT&T/BellSouth Merger Conditions").

Internet access services to at least 85 percent of such living units using wireline technologies (the “Wireline Buildout Area”). AT&T/BellSouth will make available broadband Internet access service to the remaining living units using alternative technologies and operating arrangements, including but not limited to satellite and Wi-Max fixed wireless technologies. AT&T/BellSouth further commits that at least 30 percent of the incremental deployment after the Merger Closing Date necessary to achieve the Wireline Buildout Area commitment will be to rural areas or low income living units.

- AT&T/BellSouth will provide an ADSL modem without charge (except for shipping and handling) to residential subscribers within the Wireline Buildout Area who, between July 1, 2007, and June 30, 2008, replace their AT&T/BellSouth dial-up Internet access service with AT&T/BellSouth’s ADSL service and elect a term plan for their ADSL service of twelve months or greater.
- Within six months of the Merger Closing Date, and continuing for at least 30 months from the inception of the offer, AT&T/BellSouth will offer to retail consumers in the Wireline Buildout Area, who have not previously subscribed to AT&T’s or BellSouth’s ADSL service, a broadband Internet access service at a speed of up to 768 Kbps at a monthly rate (exclusive of any applicable taxes and regulatory fees) of \$10 per month.
- Within twelve months of the Merger Closing Date, AT&T/BellSouth will deploy and offer within the BellSouth in-region territory ADSL service to ADSL-capable customers without requiring such customers to also purchase circuit switched voice grade telephone service. AT&T/BellSouth will continue to offer this service in each state for thirty months after the “Implementation Date” in that state. For purposes of this commitment, the “Implementation Date” for a state shall be the date on which AT&T/BellSouth can offer this service to eighty percent of the ADSL-capable premises in BellSouth’s in-region territory in that state. Within twenty days after meeting the Implementation Date in a state, AT&T/BellSouth will file a letter with the Commission certifying to that effect. In all events, this commitment will terminate no later than forty-two months after the Merger Closing Date.
- AT&T/BellSouth will extend until thirty months after the Merger Closing Date the availability within AT&T’s in-region territory of ADSL service, as described in the ADSL Service Merger

Condition, set forth in Appendix F of the *SBC/AT&T Merger Order* (FCC 05-183).

- Within twelve months of the Merger Closing Date, AT&T/BellSouth will make available in its in-region territory an ADSL service capable of speeds up to 768 Kbps to ADSL-capable customers without requiring such customers to also purchase circuit switched voice grade telephone service (“Stand Alone 768 Kbps service”). AT&T/BellSouth will continue to offer the 768 Kbps service in a state for thirty months after the “Stand Alone 768 Kbps Implementation Date” for that state. For purposes of this commitment, the “Stand Alone 768 Kbps Implementation Date” for a state shall be the date on which AT&T/BellSouth can offer the Stand Alone 768 Kbps service to eighty percent of the ADSL-capable premises in AT&T/BellSouth’s in-region territory in that state. The Stand Alone 768 Kbps service will be offered at a rate of not more than \$19.95 per month (exclusive of regulatory fees and taxes). AT&T/BellSouth may make available such services at other speeds at prices that are competitive with the broadband market taken as a whole.
- AT&T/BellSouth will offer to Internet service providers, for their provision of broadband Internet access service to ADSL-capable retail customer premises, ADSL transmission service in the combined AT&T/BellSouth territory that is functionally the same as the service AT&T offered within the AT&T in-region territory as of the Merger Closing Date. Such wholesale offering will be at a price not greater than the retail price in a state for ADSL service that is separately purchased by customers who also subscribe to AT&T/BellSouth local telephone service.⁸²

These commitments represent significant progress in achieving the national goal of broadband deployment, but also raise several policy concerns. First, the commitments do not provide any benefit to consumers in the 28 states and District of Columbia, which AT&T does not serve (nor in the portions of the 22-state AT&T territory where AT&T is not the ILEC). Second, education, monitoring and sanctions are critically important to ensure that the intended benefits flow through to consumers.

⁸² / AT&T/BellSouth Merger Conditions (footnotes omitted).

The Commission should seek to establish legally enforceable ways to require *all* ILECs and cable companies to deploy broadband at affordable rates and a timely fashion. The Commission presently is reviewing Verizon's proposed sale of its operations in the northern New England states to FairPoint Communications, Inc.⁸³ The proposed sale to FairPoint provides compelling evidence of Verizon's potential neglect of non-urban areas. To offset that harm, conditions are necessary to protect Verizon's customers located in less profitable markets. Rate Counsel urges the Commission to condition its approval of Verizon's sales on Verizon's commitment to adopt the AT&T/BellSouth broadband conditions in the jurisdictions which Verizon continues to serve. FairPoint has stated its intention to more widely deploy broadband service in the three northern New England states.⁸⁴

If the Commission were to condition its approval of Verizon's sale of its operations on such commitments, and if FairPoint follows through on its stated intent to more widely deploy DSL in Maine, New Hampshire, and Vermont, the nation would achieve significant progress in achieving the goal of reasonable and timely access to broadband services. Specifically, consumers in many states (all but Hawaii, Alaska, the 14 Qwest states and areas served by independent ILECs) would then have access to affordable DSL and to the possibility of competitive alternatives that depend on access to the ILECs' stand-alone DSL. Monitoring and sanctions are essential, however, to ensure

⁸³ / *Application of Verizon New England Inc., NYNEX Long Distance Company, Bell Atlantic Communications, Inc., Verizon Select Services Inc., Verizon Communications Inc., and Northern New England Spincor Inc., Transferors, and FairPoint Communications, Inc., Transferee, For Consent to Transfer Certain Assets and Long-Distance Customer Relationships in the States of Maine, New Hampshire, and Vermont*, FCC WC Docket No. 07-22, Consolidated Application for Consent to Transfer Assets, January 31, 2007.

⁸⁴ / *Id.*, at 18. The Applicants state, "FairPoint plans to increase broadband availability from current levels in Maine, New Hampshire, and Vermont within twelve months after the completion of the merger by expanding investment and offering quality broadband-based services."

that benefits occur. Also, comprehensive consumer education is essential to ensure that consumers are aware of and understand evolving technological options.

Rate Counsel recognizes that the 14 states that Qwest serves, and Alaska and Hawaii, which include many sparsely populated regions, would not benefit from these conditions. Therefore, today's regulators' must find alternative ways to encourage and/or require broadband deployment. One such option is to require cable companies to offer stand alone broadband for the same reason the FCC requires stand alone DSL. The health of the country's economy and the well-being of its citizens depend on the Commission's leadership in this proceeding and in the related Dockets 07-52 and 07-38.

Furthermore, the Commission should monitor carriers' deployment, quality, and pricing of their unbundled, stand-alone broadband. Unless and until carriers' wholesale and retail operations are separate, carriers' economic incentive continues to be to discriminate against their competitors.

VI. CONCLUSION

Rate Counsel applauds the Commission's efforts to address broadband deployment in the United States. As discussed in detail in these comments, and in the attached detailed report on the cable-telecommunications duopoly, existing market forces are insufficient to yield ubiquitous access to affordable, reasonable, and timely broadband services. Regulatory intervention and leadership are essential to ensure that the United States can compete successfully in today's increasingly global economy and to ensure that all segments of society have comparable alternatives for advanced services. Rate Counsel urges the Commission to consider the specific measures for increasing broadband deployment at affordable rates.

Respectfully submitted,

RONALD K. CHEN
PUBLIC ADVOCATE

Kimberly K. Holmes, Esq.
Acting Director

By: *Christopher J. White*
Christopher J. White, Esq.
Deputy Public Advocate

Economic Consultant:
Susan M. Baldwin

Dated: May 16, 2007