

ONE HUNDRED FOURTEENTH CONGRESS
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House of Representatives
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February 5, 2016

The Honorable Tom Wheeler
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Dear Chairman Wheeler:

The Communications Act requires the FCC to assess and report on the state of broadband deployment, the level of video competition, and the level of effective competition in the nation's mobile wireless market. Since 2011, it appears that the Commission has applied inconsistent definitions and analyses in making those determinations. Those reports have then been used to justify Commission actions to intervene in seemingly competitive markets. Despite the plain language of the Communications Act, the FCC's actions seem to benefit specific classes of competitors and do not promote competition. This behavior concerns us.

In the Telecommunications Act of 1996, Congress directed the FCC to study and report annually on the availability of "advanced telecommunications services." Specifically, Section 706(b) requires the FCC to conduct an annual inquiry concerning the availability of "advanced telecommunications services" and determine whether such services are being deployed to all Americans in "a reasonable and timely fashion." Congress has also directed the FCC – in the event the FCC concludes that advanced telecommunications services are not being deployed in a reasonable and timely fashion to all Americans – to take immediate action to accelerate deployment "**by removing barriers to infrastructure investment** and **by promoting competition** in the telecommunications market (emphasis added)." The plain language of Section 706 clearly states that the FCC should rely on the private sector to spur deployment – and that the FCC should help incent private investment by removing barriers and promoting competition.

Prior to 2010, the FCC had found in its Section 706 reports that broadband deployment overall was reasonable and timely, although much work still needed to be done to promote deployment for all Americans. Yet in a 2010 party-line vote, the Commission changed its definition and raised the threshold speeds for what services qualify as broadband. As a direct

result of its new definition, the FCC concluded that broadband was not being deployed in a reasonable and timely fashion.

Under your leadership, the FCC did the same thing in January 2015 when it adopted the *2015 Broadband Progress Report*. This time, the agency increased the minimum speed for broadband six-fold – from 4 Mbps downstream and 1 Mbps upstream to 25 Mbps downstream and 3 Mbps upstream. Immediately, systems that were considered broadband during the period of the report, were now excluded from being counted. Not surprisingly given the newly minted definition of broadband, the FCC concluded on a party-line vote that broadband was not being deployed in a reasonable and timely fashion.

This new definition of broadband gave Americans three different flavors of Internet access: dial-up, broadband over 25 Mbps, and other Internet access that is not broadband by the FCC's definition. This construction proved quickly inconvenient for the agency and lead to yet another definition of broadband to suit the Commission's regulatory ends. Rather than rely on the 25/3 Mbps standard adopted in January, the FCC chose an amorphous, subjective definition of broadband to regulate a broader set of services under its February 2015 *Open Internet Order*.

Instead of uniformity of definition, the Commission has instead made broadband speed a variable in the regulatory equation. This represents the latest in series of troubling actions that distort – or outright ignore – the FCC's requirements to produce honest, data-driven reports to inform policymakers and the public.

For example, the FCC is required by law to report annually on the state of competition in the wireless market. Starting in 2010, the agency determined that it was too difficult to define effective competition in the mobile wireless market, and stopped making any competitive determination at all. Last month, the agency again failed to determine whether the wireless market is effectively competitive. In fact, recent studies show that 80% of Americans have a choice of five or more wireless providers.

Moreover, the agency's claimed inability to define effective competition in the mobile wireless market stands in stark contrast to its approach to the video market, where the Commission recently adopted a presumption that cable operators are subject to effective competition. In the video market there are two nationwide providers and myriad local and regional providers. Whereas in the mobile wireless market there are four nationwide providers, more than one hundred regional providers (some of whom have overlapping coverage areas), and non-facilities based options that also provide retail competition. Interestingly, the FCC failed to present any evidence that the video market is less complex than the market for mobile wireless services or offer any data or analysis to justify treating "effective competition" differently in these two communications markets.

Just last week, the agency issued its annual Broadband Progress Report at its January 28, 2016 Open Meeting. In it, the FCC again concludes that "advanced telecommunications capability is not being deployed in a reasonable and timely fashion to all Americans." The lead factor supporting your conclusion is that "[a]pproximately 34 million Americans still lack access

to fixed broadband at the FCC's benchmark speed of 25 Mbps for downloads, 3 Mbps for uploads."

To help us understand the FCC's decision-making and the impact of the FCC's shifting definitions of broadband and effective competition, we request your responses to the following questions no later than February 19, 2016:

1. Please describe how the Commission has taken action to accelerate the deployment of broadband by removing barriers to infrastructure investment or promoting competition:
 - a. When the FCC changed the definition of broadband in 2010, what barriers to infrastructure investment were removed and how did the change promote competition? What specific improvements to broadband acceleration resulted from the FCC's actions?
 - b. In light of the Commission's conclusion that 25 Mbps broadband is not being timely deployed, what "immediate action" are you prepared to take to remove barriers to infrastructure investment and promote competition? Please describe the specific steps and your proposed timetable.
2. Please explain why the FCC settled at 25 Mbps downstream/3 Mbps upstream for the definition of broadband, including the facts about the market that led you to conclude that 25 Mbps is the appropriate minimum threshold to qualify as broadband. Please explain what specific factors led you to conclude that 4 Mbps downstream and 1 Mbps upstream was insufficient.
3. Please identify all contexts and instances in which the FCC defines broadband. Why does the Commission not have a definition of broadband that it applies consistently?
4. Please describe in detail why the Commission does not have a definition of competition that it applies consistently? How many choices in a given market would lead the Commission to find mobile wireless service effectively competitive? Please explain in detail why the Commission continues to fail to make a competitive finding for the wireless market?

We appreciate your assistance with these requests and ask for your response no later than ten days from the date of this letter. If you or your staff have any questions, please feel free to contact David Redl of the Committee staff at (202) 225-2927.

Thank you for your cooperation in this matter.

Sincerely,



Fred Upton
Chairman

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: The Honorable Frank Pallone, Jr., Ranking Member

The Honorable Anna G. Eshoo, Ranking Member
Subcommittee on Communications and Technology