

July 14, 2011

Julius Genachowski
Chairman
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: A National Broadband Plan for Our Future, GN Docket No. 09-51

Dear Chairman Genachowski:

On May 6 of this year, Public Knowledge and New America Foundation's Open Technology Initiative sent a letter urging the Wireline Competition Bureau to exercise its statutory authority to fully investigate the nature, purpose, and impact of data caps upon consumers.¹ Since then, data caps have spread further across the industry. Verizon recently announced data caps for its new 4G wireless service, and left open the possibility of data caps on its FiOS service (a possibility they had long dismissed).² The costs of data caps to consumers and society are becoming increasingly clear. We hope the Commission moves quickly to investigate what, if any, benefits balance those costs.

The case of Andre Vrignaud is a stunning illustration of how these data cap policies undercut the values espoused in the National Broadband Plan.³ After twice being informed by his ISP Comcast that he had exceeded his monthly data cap, Vrignaud has been blacklisted from Comcast for one year. In his account, Vrignaud suggests that remotely backing up two decades worth of photographs and music files is what triggered his yearlong removal from Comcast.

While we have no way to independently verify Vrignaud's account of this specific incident, we are concerned because it represents an entirely plausible and legitimate use of a residential broadband internet connection. Data caps make this type of use punishable with one year without internet access. This conflict is unsustainable.

In light of this, we are expanding our original request to include an investigation into the data cap policies of all ISPs. There does not appear to be any restraint on the

¹ Letter from Public Knowledge and New America Foundation's Open Technology Initiative to Sharon Gillett, Chief, Wireline Competition Bureau, FCC (May 6, 2011) available at <http://www.publicknowledge.org/letter-to-FCC-on-ATT-Data-Caps>.

² See Karl Bode, *Verizon 'Evaluating' Usage-Based Pricing for FiOS, DSL*, DSLReports.com, July 1, 2011 available at <http://www.dslreports.com/shownews/Verizon-Evaluating-UsageBased-Pricing-for-FiOS-DSL-114981>.

³ See Andre Vrignaud, *The Day Comcast's Data Cap Policy Killed by Internet for 1 Year*, Ozymandias.com, July 11, 2011 available at <http://www.ozymandias.com/the-day-comcast%E2%80%99s-data-cap-policy-killed-my-internet-for-1-year>.

expansion of data caps, or expectation that they will not be widely adopted. Strict data caps are an industry trend that works to undermine the benefits of broadband that this Commission so enthusiastically champions.

The National Broadband Plan specifically mentions cloud-based applications as a benefit of more pervasive, robust broadband networks.⁴ As the Plan correctly acknowledges: “[s]oftware based in the cloud may allow more small businesses and consumers to access applications that were once only available to corporations with sophisticated information technology departments in the applications and content markets.”⁵ Because of the potential of cloud computing, the Plan recommended additional federal funding to aid in its development.⁶

Interacting with cloud-based applications necessarily involves the transfer of data between a user and the cloud. As a result, increased use of cloud computing will drive a user ever closer to a data cap.

Perhaps most disturbing is the lack of clarity surrounding the legitimate purposes that data caps serve. Some data caps that charge overage fees, such as those imposed by AT&T, at least serve to enrich the ISP. Hard data caps, such as those imposed by Comcast, appear to be pointless.

In 2008, Comcast told the Commission that its data cap is “independent of, and should not be confused with” its congestion management practices.⁷ It went on to state that the “cap does not address the issue of network congestion, which results from traffic levels that vary from minute to minute.”⁸ Instead of addressing network congestion issues, Comcast’s monthly data cap is intended to curb “excessive use.”⁹

In a direct contradiction these statements, Comcast now defends its caps as necessary to protect quality of service for other users: “[i]f someone’s behavior is such that it degrades the quality of service for others nearby — that’s what this threshold is

⁴ See *Connecting America: The National Broadband Plan*, Chapter 3.1, Federal Communications Commission, (2010).

⁵ See *id.*

⁶ See *id.* at Chapter 7.4.

⁷ Letter of Comcast Corporation, *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, File No. EB-08-IH-1518; *Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading and Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet and Exception for “Reasonable Network Management,”* WC Docket No. 07-52, at p. 1, fn. 3, Sept. 19, 2008 (“Comcast Filing”).

⁸ *Id.*

⁹ *Id.*

meant to address.”¹⁰ Public Knowledge, Future of Music Project, and New America Foundation’s Open Technology Initiative find it unlikely that uploading data to remote servers at off peak times, a behavior pattern that could easily trigger Comcast’s data cap, somehow has a significant impact on network performance for other users.

It is unclear what additional interest Comcast has in curbing “excessive usage” that does not interfere with its overall network capacity or create network congestion. Comcast’s data cap appears to be aimed at users who are using “too much” data for Comcast’s liking, but not “too much” data to actually interfere with the functioning of the network. This is not a sustainable standard to use to decide who gets access to a critical service such as broadband.

Given these amorphous criteria, it is unclear how Comcast arrived at its 250 GB cap in 2008. Furthermore it remains unclear why, after three years of investing in network upgrades to “better prevent congestion and meet [Comcast’s] customers’ ever increasing demands for bandwidth”¹¹ that cap has failed to increase. Today, customers with Comcast’s current high-speed offering could hit the 250 GB monthly cap in little more than five hours.¹²

Data caps continue to raise many more questions than they provide answers. While it is clear that they work directly against the widespread use of broadband championed in the National Broadband Plan, it is unclear what legitimate purposes they serve. As such we urge the Commission now, as we did two months ago, to request customer anonymized reports from all ISPs regarding the following:

- **Which ISP-offered services are excluded from the cap.** This should include reporting on those services, such as voice telephony and video programming, that compete with internet-delivered non-ISP controlled offerings.
- **How often the cap is enforced.** This should include the absolute number of customers who exceed the cap as well as the percentage of customers who run afoul of the limit. Additionally, it should include amount by which the customers exceeded the cap and how many of those customers are repeat cap exceeders.
- **Steps taken to warn customers.** This should include the steps taken to warn customers, and when those steps are taken. Additionally, the

¹⁰ Ryan Singel, *Comcast Bans Seattle Man From Internet for His Cloudy Ways*, Wired.com, July 13, 2011 available at <http://www.wired.com/epicenter/2011/07/seattle-comcast/>.

¹¹ *Comcast Filing* at p. 2 of cover letter.

¹² See Comcast Corporation Press Release, *Comcast Offers the Fastest Residential Internet Service to the Most Homes in the U.S.*, Apr. 14, 2011 available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=1067>.

reporting should include data on the effectiveness of these warnings in preventing overages.

- **Average penalty incurred by customers.** Caps such as AT&T's charge additional fees based on how significantly the cap is exceeded. Reporting should include data on the size of the penalties incurred by customers.
- **When and how often a penalty is waived.** In addition to the publicly announced grace periods, the Commission would be well served by understanding how often and under what circumstances reporting ISPs grant additional waivers.
- **The relationship of enforcement to times of network congestion.** If used properly, data caps can be a tool in easing network congestion. However, there is a constant threat that ISPs use network congestion as a pretext to act on other motives. The Commission would benefit from a nuanced understanding of the relationship between data cap enforcement and network congestion.
- **How data caps are set.** For example, why did AT&T choose 150GB for DSL and 250GB for U-Verse customers? What criteria are used to arrive at the cap? What criteria are used to determine appropriate overage fees?
- **How data caps are evaluated on an ongoing basis.** Data caps are often defended as necessary to address current network congestion issues. However, network technology is constantly being modernized and made more efficient. In light of this pattern of improvement, caps that are appropriate for today's network may be inappropriate in the future. How do ISPs evaluate their existing caps, and what are the conditions under which those caps could be raised and/or eliminated?

We also request that the Commission include additional inquiries regarding the impact of local, regional, and national concentration on the adoption of data caps. Reduced competition at a local level would reduce the impact of a negative consumer response to data caps, and therefore may encourage the adoption of caps.

Although this most recent incident involves Comcast, we are not asking the Commission to investigate Comcast individually. Instead, the Commission should use this incident as an opportunity to begin the process of fully educating itself about the nature and impact of data caps across the industry.

We hope that the Commission recognizes the impediment to widespread broadband use that data caps represent and moves quickly to complete its understanding of their current application.

Respectfully Submitted,

Future of Music Coalition
New America Foundation's Open Technology Initiative
Public Knowledge

/s/

Michael Weinberg
Staff Attorney
Public Knowledge

cc: Commissioner Michael Copps
Commissioner Robert McDowell
Commissioner Mignon Clyburn
Chief Sharon Gillette
Chief Rick Kaplan