April 23, 2012

The Honorable John D. Rockefeller IV
Chairman
Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

The Honorable Kay Bailey Hutchison
Ranking Member
Committee on Commerce, Science and Transportation
United States Senate
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Chairman Rockefeller and Ranking Member Hutchison:

Innovation in communications technology markets has progressed at a rapid pace over the last decade. Because of developments in the electronics manufacturing sector, increased capacity of consumer Internet networks, and innovations in broadcasting business models, consumers now have more choices in the video market than ever before. Increasingly, consumers can pay to watch certain video programming at whatever time they choose, be it through the purchase of a single program or through monthly subscriptions. And consumers are watching these programs on laptops, smartphones and tablets in addition to traditional television sets.

Business models used by a new generation of distributors such as Netflix, AmazonPrime, Aereo or SlingBox represent innovative and money-saving alternatives to the forced bundle model used by traditional multichannel video distributors. However, these developments in online video distribution, as well as the emergence of the cloud computing market, are threatened by economically unjustified limitations and restrictions on data usage imposed by certain broadband Internet access providers. How can bold new models for online video and cloud computing continue to develop if consumers are discouraged from using broadband by arbitrary limits on their use, and harsh penalties for exceeding those limits?

Internet access, since the mid-1990s, typically has been offered in an "unlimited" fashion. ISPs encouraged consumers to spend as much time as possible online, since they had a glut of capacity to fill and capital investments to recoup. With the development of wireless Internet networks, which face different congestion issues than wired networks do, unlimited data plans have slowly given way to monthly data caps – even for wired service. In 2008, for example, Comcast began imposing a non-metered 250 gigabyte (GB) cap on its cable modem subscribers, and certain DSL providers such as AT&T have followed suit.

Broadband providers attempt to justify the nationwide imposition of these flat data caps on their subscribers by suggesting that such limits mitigate broadband traffic "congestion." However, it is widely accepted amongst analysts and network engineers that congestion on current wired networks is virtually non-existent, and that in any event monthly caps are a very crude instrument for dealing with congestion. During the rare occasions when congestion occurs, it exists only in specific locations and is temporary (usually in the evenings when most people are online).

Further data caps may be particularly punitive for rural consumers, who reside in less dense areas where there are far fewer customers competing for shared network resources.

For these reasons, most broadband providers already have better, more consumer-friendly methods in place for congestion management. In 2008, prior to upgrading its network capacity to current levels, Comcast deployed its "fairshare" method for dealing with localized congestion. This approach looks for actual congestion, and then throttles connection speeds in real time for subscribers using the most bandwidth in the congested area. "[T]he effect of this technique," Comcast notes, "is temporary and **has nothing to do with a customer's aggregate monthly data usage**. Rather, it's dynamic and based on prevailing network conditions."(Emphasis added)

Data caps do have a very real impact on consumer behavior. Data caps dampen the use of broadband generally and discourage high-bandwidth applications, like online video, specifically. This dynamic has been illustrated in letters submitted to the Federal Communications Commission last year by public interest groups [including signatories to this letter].[1]

If data caps had a legitimate economic justification, they might be just a necessary annoyance. But they do not have such a justification. Arbitrary caps and limits are imposed by multichannel video providers that also provide broadband Internet access, because the providers have a strong incentive and ability to protect their legacy, linear video distribution models from emerging online video competition.

Recently, Comcast began offering an Internet-enabled streaming service through Microsoft's Xbox device, for customers that subscribe to both Comcast's monthly cable television package *and* its monthly broadband service. This online video offering will not count against consumers' monthly broadband data caps, even though the service is provisioned over the very same networks that Comcast claims are so prone to congestion.

This development casts additional doubt on the justification for data caps. That two identically sized data streams traveling over the same infrastructure could produce such disparate outcomes for the consumer provides an indication of the true motivation for these caps: discouraging consumers from using the online video services that compete with Comcast's monthly cable package.

We are excited to see the Senate Commerce Committee taking a look at the trends in online video distribution, taking the time to understand the way these developments are benefitting consumers, and asking questions about where the market is headed. We urge you to use Tuesday's hearing as an opportunity to take a closer look at the justification for data caps in the Internet ecosystem, and their impact on innovation and consumer broadband use.

Sincerely,

/s/
Joel Kelsey
Free Press

/s/
Parul Desai
Consumers Union

/s/
Harold Feld
Public Knowledge

/s/
Ben Lennett
New America Foundation

[1] *See* Letter from Future of Music Coalition, New America Foundation's Open Technology Initiative, and Public Knowledge to FCC Chairman Julius Genachowski, July 14, 2011, *available at* http://www.publicknowledge.org/files/docs/GenachowskiDataCapLetter.pdf