

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Empowering Broadband Consumers Through) CG Docket No. 22-2
Transparency)

REPLY COMMENTS OF TECHFREEDOM

TechFreedom hereby files these Reply Comments in response to the Notice of Proposed Rulemaking (NPRM), issued January 27, 2022.¹ The NPRM was issued to begin the process of creating “nutrition label” disclosure requirements on broadband providers pursuant to the 2021 Infrastructure Act, Section 60504.² TechFreedom submits:

1. About TechFreedom

TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. We seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity.

2. The Labels Must be Simple and Understandable

Almost all commenters support the concept behind a nutrition label for broadband. Many cite to the NPRM’s findings that to be useful, labels must be simple and easy to

¹ Empowering Broadband Consumers Through Transparency, Notice of Proposed Rulemaking, CG Docket No. 22-2 (rel. Jan. 27, 2022) (“NPRM”). The NPRM was published in the Federal Register on February 7, 2022. 87 Fed. Reg. 6827 (February 7, 2022). The Federal Register Notice set the comment date as March 9, 2022, and reply comment date as March 24, 2022. These reply comments are timely filed.

² The Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, 60504(a) (2021) (“Infrastructure Act”).

understand.³ But this common ground is abandoned quickly by commenters, however, as “the Christmas tree effect”⁴ takes hold. The request for additional items to be added to the label have little, if anything, to do with the labels originally formulated in 2016. This includes everything from privacy,⁵ to the type of technology used to deliver broadband,⁶ to whether the provider participates in the Affordable Connectivity Program (ACP),⁷ to data use and retention policies,⁸ to service level guarantees,⁹ to network reliability.¹⁰

These “must haves” may comprise an irresistible smorgasbord for policy wonks inside the Beltway, but each addition makes the labels harder to read and understand. The

³ *NPRM* ¶ 1 (“Access to accurate, simple-to-understand information about broadband Internet access services helps consumers make informed choices and is central to a well-functioning marketplace that encourages competition, innovation, low prices, and high-quality service.”). *See also*, Statement of Chairwoman Jessica Rosenworcel (“the Infrastructure Investment and Jobs Act Congress gave us the support we need to require this kind of simple, common labeling for all consumer broadband service—both wireless and wireline. With these broadband nutrition labels we can compare service providers and plans, hold broadband providers to their promises, and foster more competition—which means better service and better prices.”).

⁴ “The Christmas Tree Effect” is best defined as finding a popular piece of legislation or rulemaking, and adding on more and more elements to please individual constituencies, that ultimately, like Charlie Brown’s little Christmas tree, end up toppling it over. *See, e.g., D.C. Preview: A Peek Through the Congressional Looking Glass*, CABLEFAX (Jan. 19, 2004), <https://www.cablefax.com/archives/d-c-preview-a-peek-through-the-congressional-looking-glass> (“Once there is a bill that has a reasonable chance of passage regarding telecommunications issues, there is very little to stop some member of Congress from adding a little bauble here and a garish decoration there on ‘related’ issues.”).

⁵ *See* Comments of the Open Technology Institute at 7.

⁶ *See* Comments of The Fiber Broadband Association at 3.

⁷ *See* Comments of Hughes Network Systems at 3.

⁸ *See* Comments of EPIC at 2 (“The purpose of the broadband ‘nutrition label’ template should be to ensure that consumers are given information about a provider’s data collection, data disclosure to third parties, and data retention practices so that they can easily understand and compare services.”). EPIC further states “that the Commission add two primary checkboxes to the nutrition label, indicating whether: (1) the provider discloses data about an identifiable user, device, or account to third parties, and (2) the provider collects any information about the consumer that is not essential to provide the consumer with broadband service (“non-essential data”). The label should also indicate whether consumers can opt out of each of the two data practices, and link to directions for opting out.” *Id.* at 3.

⁹ *See* Comments of National Broadband Mapping Coalition at 3.

¹⁰ *Id.* *See also* Comments of INCOMPAS at 11 (calling for the FCC to allow providers to include reliability metrics on their label, but not require them).

result: the exact opposite of “accurate, simple-to-understand information.” In other fields, such as accounting, experts have noted the careful balance that must be crafted between usefulness, reliability, and the dangers of overwhelming the reader with data.¹¹ TechFreedom submits that the usefulness of broadband nutrition labels may diminish geometrically: the addition of each new piece of information beyond the bare minimum necessary leads to a quick falloff in usefulness. Beyond the few hundred people who are experts in all aspects of broadband network engineering and broadband policy, no one will either read the labels, or be able to understand all the elements.

Instead, the FCC’s lodestar should be what it says it wants: labels that “display[] terms in plain language that [are] easy to understand without overwhelming consumers with too much information.”¹² While the FCC is directed by Congress to begin this proceeding with the 2016 labels as a starting point, the Commission must undertake a full analysis of any “information contained in the 2016 labels that is no longer necessary to serve the goals of the Infrastructure Act or the Commission, *or might overwhelm consumers with too much information.*”¹³

For instance, TechFreedom certainly supports a label that allows a consumer to comparison-shop as between providers as to the fundamental attributes about which they

¹¹ See, e.g. Financial Accounting Standards Boards (FASB), Statement of Financial Accounting Concepts No. 2 at 1, 4 (2008), <https://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175820900526&blobheader=application%2Fpdf> (“The characteristics of information that make it a desirable commodity can be viewed as a hierarchy of qualities, with usefulness for decision making of most importance. Without usefulness, there would be no benefits from information to set against its costs. . . Information cannot be useful to decision makers who cannot understand it, even though it may otherwise be relevant to a decision and be reliable.”).

¹² NPRM ¶ 7.

¹³ *Id.* ¶ 17 (emphasis added).

are most concerned: (1) pricing; (2) monthly data allowance; (3) overage charges; (4) equipment fees; (5) other monthly fees; (6) one-time fees; (7) early termination fees, (8) speed¹⁴; and (9) latency.¹⁵

We strongly suggest eliminating the two other data points suggested in paragraph 16: packet loss and network management practices.¹⁶ Packet loss appears to be of far less importance to consumers than any of the other “top 9” issues, and given the overall network architecture of the Internet, which is designed to recover from packet losses, we believe that this data is not useful.¹⁷

We do not believe that network management practices lend themselves to a concise label. The 2016 label merely leaves a space for an ISP to “provide a brief description and a link to a full discussion” of network management practices. Depending on how the FCC plans on enforcing its labeling requirements,¹⁸ or simply fearing consumer complaints, ISPs may err on the side of piling in a lot more than a “brief description,” ballooning the overall size of

¹⁴ Speed certainly needs to be displayed based on realistic metrics. There are a number of different suggestions. TechFreedom generally supports the proposal of SpaceX, of measuring during a “peak usage period,” between 6:00 pm to 12:00 am, and measuring data speeds “between the customer premise of an active subscriber and an FCC-designated IXP.” Comments of SpaceX at 7-8.

¹⁵ See *NPRM* ¶ 16.

¹⁶ The Commission clearly has the discretion to modify the labels proposed in 2016. Section 60504 requires the Commission to “promulgate regulations to require the display of broadband consumer labels, as described in the Public Notice of the Commission;” if Congress had intended the Commission to require the specific labels proposed in that Public Notice, with all their categories, it would have said so. Instead, it requires the Commission to implement an overall labeling scheme.

¹⁷ See, e.g., *Declaratory Ruling, Report and Order, and Order, Restoring Internet Freedom* ¶¶ 225-226, 33 FCC Rcd 311 (2018) (“2018 RIFO Order”) (“consumers have little understanding of what packet loss means.”). See also, Comments of Verizon at 12 (calculating and reporting packet loss “involved thousands of hours of employee time, while offering consumers little additional benefit relative to those concrete costs.”). If the FCC moves forward with the concept of a label that includes a feature visually showing what types of services a consumer can expect to be able to access with the broadband connection, as discussed below, then the issue of packet loss might play into whether or not an ISP could claim that a tier with high packet loss reliably could be used for videoconferencing or gaming, for example.

¹⁸ See *NPRM* ¶¶ 30-31.

the label. TechFreedom seriously doubts that the FCC can somehow “bumper sticker” categories of network management practices into concise statements that ISPs can use. Critically, including a “brief description” of network management practices on the label will not change the ability of the Federal Trade Commission or state attorneys general to enforce ISPs’ representations about their network management practices; it is enough that the FCC requires ISPs to describe their practices on their websites.¹⁹

Adding an “all-in cost” line on the label, as suggested by several commenters, appears to be a valuable addition, assuming the Commission can establish a single equation that produces a number that is reliable and accurate. Our concern, however, is that with all the variables that would need to go into the “all-in cost” number across a bevy of technologies that exist today for delivering broadband, it may not be possible to come up with a single equation that delivers a true “apples-to-apples” number. If the result of the analysis is that the “all-in cost” number ends up being a set of numbers, or a range of numbers without sufficient specificity, then the number is neither useful nor reliable, and hence should be discarded.

3. The Labels Must Be Capable of Being Implemented Without Undue Burdens

Although the NPRM makes some reference to specific compliance burdens that ISPs will have to shoulder,²⁰ it fails to address this issue more generally. There is always a compliance cost for any new regulation, and the nutrition labels are no different. And compliance costs are always passed down to the consumer. Do consumers really want to pay for these labels through increased costs, especially if those cost result from the addition of

¹⁹ 2018 RIFO Order ¶ 142.

²⁰ See NPRM ¶ 25, n.7.

information that only a small subset of users really want? In all things related to the Internet, the FCC would be wise to remember what Congress declared in the 1996 Telecommunications Act:

It is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.²¹

If the labels are limited to the items mentioned above, compliance should not be overly burdensome. But in the same way that each additional piece of information makes the label less useful, that same additional piece of information comes with an increased compliance cost. We especially support the NPRM's suggestion that the Commission not require providers to create labels for "grandfathered" tiers that are no longer available to new subscribers or subscribers switching tiers.²² The FCC must fully explore the compliance costs for additional item requested by commenters, and weigh that against the marginal additional usefulness of that measure.

Increased compliance costs always favor large incumbents by raising barriers to entry. In the process, they handicap innovative competitors. TechFreedom therefore urges the FCC to implement the new broadband labels with as few compliance costs as possible,

²¹ 47 U.S.C. § 230(b)(2).

²² NPRM ¶ 15. *See also*, Comments of ACA Connects at 8. For example, assume that a small provider has been providing broadband for a decade. During that period, it has developed a number of tiers of service to which it has many subscribers. Requiring the creation of potentially dozens of different labels might prompt a provider to cancel one or more of those tiers, potentially subjecting subscribers to increased costs, or the purchase of more bandwidth than they actually need. *See, infra*, Section 4. On the flip side, existing customers, if introduced to the labels for tiers offered to the general public, may find a tier that better serves their needs, and could even be cheaper, given that broadband prices, on a per-megabit basis, continue to decrease. *See* Rich Young, *Great news for consumers: New study reveals broadband prices declined over past five year*, Verizon (Mar. 3, 2022), <https://www.verizon.com/about/news/new-study-broadband-prices-declined-over-five-year> (since 2016 the price of the most popular service tiers have declined between 14 and 42 percent, with the sharpest declines coming in the highest speed tiers).

and work with smaller providers to identify which requirements come with the greatest compliance burdens. To the extent that the Commission wishes to layer on additional implementation requirements, including specific coding requirements such as machine readability and search engine optimization, it should either exempt smaller providers from this requirement, or provide additional time for implementation.²³ The Commission asks if it has the discretion to “adopt a different implementation timeline or temporary exemption for smaller providers.”²⁴ Such policies are commonplace,²⁵ and Section 60504 does not preclude them. At best, Section 60504 is ambiguous as to both what kinds of labels the Commission should require and as to which providers should be required to implement them, for which plans, and on what timeline. In all these respects, the Commission would receive deference under the familiar framework of *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837 (1984), in interpreting Section 60504’s commandment that the Commission “promulgate regulations to require the display of broadband consumer labels, as described in the [2016] Public Notice.”

4. Any Attempts to Describe What a Consumer Needs Must Be Truthful

At its March 11, 2022 “Broadband Consumer Labels Virtual Public Hearing,” several participants suggested broadband labels should include a description of the types of devices

²³ See *NPRM* ¶ 33 (“Should the Commission adopt a different implementation timeline or temporary exemption for smaller providers to allow them more time to come into compliance with the labels’ requirements, and do we have the discretion to do so?”).

²⁴ *NPRM* ¶ 10.

²⁵ In implementing transparency requirements of the 2015 Open Internet Order, for example, the FCC provided “temporary exemptions” for providers with fewer than 100,00 subscribers, *Protecting and Promoting the Open Internet* ¶ 173, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (2015 Order). Such exemption was extended and expanded further in 2017. *Small Business Exemption From Open Internet Enhanced Transparency Requirements*, GN Docket No. 14-28, Order, FCC 17-17 (2017).

and services that a consumer can expect a given broadband connection to support.²⁶ One panelist described the situation of an elderly woman who used her broadband connection for emails and few other services, but who subscribed to the provider's highest (and most expensive) tier, and suggested that a label could have kept her from oversubscribing.

We are certainly sympathetic to these concerns. The longstanding debate over the definition of "broadband" has been rife with hyperbole and misinformation. For some, *everyone* "needs" a gigabit connection, full stop.²⁷ For others, broadband isn't true broadband unless download and upload speeds are the same (symmetrical) and at least 100/100 Mbps.²⁸ The data simply do not support this "nobody has enough" approach to broadband, however. While average broadband usage did increase during the COVID pandemic, and many people both worked and educated their children from home, data indicate that few consumers had connections that were inadequate for their needs.²⁹ All those Zoom calls we

²⁶ For video of that meeting, see FCC, *Broadband Consumer Labels Virtual Public Hearing* (Mar. 11, 2022), <https://www.fcc.gov/news-events/events/2022/03/broadband-consumer-labels-virtual-public-hearing>.

²⁷ See, e.g., Comments of INCOMPAS in GN Docket No. 18-238 at 6 (Aug. 17, 2018), <https://www.incompas.org/Files/filings/2018/09-17-18%20FINAL%20INCOMPAS%20Section%20706%20Broadband%20Deployment%20Comments%209.17.2018.pdf> ("It is time for the Commission to adopt a future proof definition of broadband for our nation. Accordingly, the FCC should set the fixed broadband speed definition at 1 Gig.").

²⁸ See, e.g., Michael Kan, *Senators: Broadband Speed Minimum Should Be 100Mbps for Downloads and Uploads*, PCMag (Mar. 4, 2021), <https://www.pcmag.com/news/senators-broadband-speed-minimum-should-be-100mbps-for-downloads-and-uploads>.

²⁹ See, e.g., Doug Brake & Alexandra Bruer, *Broadband Myth Series: Do We Need Symmetrical Upload and Download Speeds?*, Information Technology & Information Foundation (May 12, 2021), <https://itif.org/publications/2021/05/12/broadband-myth-series-do-we-need-symmetrical-upload-and-download-speeds>; *The Asymmetric Nature of Internet Traffic*, NCTA (Mar. 22, 2021), <https://www.ncta.com/whats-new/the-asymmetric-nature-of-internet-traffic>; *You've been Served: Defining Broadband as 100/100 is Not 100*, Technology Policy Institute (Mar. 29, 2021), <https://techpolicyinstitute.medium.com/youve-been-served-defining-broadband-as-100-100-is-not-5eefcb50905a> ("the calls to define broadband as a connection offering symmetric, 100 Mbps download and 100 Mbps upload bandwidth (100/100) are arbitrary, with no evidence supporting these numbers. Every application commonly used for key services, as well as popular entertainment streaming services, rely on far less than 100 Mbps.").

made during the pandemic, for example, didn't eat all our bandwidth: Zoom recommends just 4 Mbps even for massive group calls.³⁰ And even streaming at 4K/Ultra HD (UHD), Netflix recommends no more than 15 Mbps.³¹ Even adding up multiple such simultaneous streams, only a very tiny percentage of American households would come anywhere near the 100 Mbps threshold many insist upon as a minimum speed threshold for defining "broadband." The FCC's own data indicate that, where gigabit speeds are available, only four percent of consumers subscribe to that level of service.³²

In theory, labels could help consumers make more informed choices about predicting broadband needs. But to do so, the label would have to show consumers *realistic* assessments of what how much speed other consumers *like them* currently need — rather than, as has been the case in debates over broadband definition, what some think consumers *should* need somewhere in the indefinite future. In practice, we are skeptical both that such assessments would be realistic and that such labels would actually be usable for consumers. Even if a label projected median use per an *average* consumer, consumers vary widely in their broadband use and in their technological circumstances. Many consumers may assume that their broadband speed is to blame for their "slow" Internet experience when, in fact, the issue may relate to the age of their device hardware, the outdated software on that device,

³⁰ See Zoom system requirements: *Windows, macOS, Linux*, ZOOM (Feb. 7, 2022), <https://support.zoom.us/hc/en-us/articles/201362023-Zoom-system-requirements-Windows-macOS-Linux>, where Zoom lists the following bandwidth requirements for their videoconferencing services. For example, even for group video calling in "gallery" mode with 49 views, the bandwidth required was 4.0 Mbps.

³¹ See NETFLIX, <https://help.netflix.com/en/node/306> (last visited Mar. 23, 2022).

³² FCC, 2020 Broadband Deployment Report ¶ 14 (April 24, 2020), available at <https://docs.fcc.gov/public/attachments/FCC-20-50A1.pdf> ("The Commission's data shows that in the areas where gigabit service is available, only 4% of Americans living in those areas are in fact subscribing to it.").

or problems with Wi-Fi connection, either as the result of interference from close neighbors, the placement of their Wi-Fi router, or the age and strength of the router.

Overly simplistic “what you can do with this connection” labels may create frustration among consumers, either because the performance is not what they expected, or because they come to believe that they have subscribed to a faster connection than they ultimately need. They will not blame the inadequacies or vagueness of the label, nor will they blame the FCC for not getting the label quite right. They will blame the provider, who had virtually no input into that part of the label. This puts providers in an impossible position, without clearly benefitting consumers.

In the end, because each consumer’s home setup is unique, because each consumer’s needs are unique, it is unrealistic to expect that any label could effectively convey to consumers what they could do with their connection — unlike actual quantifiable metrics as suggested in the NPRM, a “what you can do with this connection” does not lend itself to a simple label. The Commission should reject the temptation to include it in the final label.

CONCLUSION

TechFreedom supports the concept of a nutrition label for broadband. TechFreedom rejects, however, attempts to layer on label requirements that go beyond the minimum information necessary for consumers in favor of information that pushes one regulatory agenda or another.

Respectfully submitted,

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