

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning the Deployment of Advanced)	
Telecommunications Capability to All Americans)	GN Docket No. 16-245
in a Reasonable and Timely Fashion, and Possible)	
Steps to Accelerate Such Deployment Pursuant to)	
Section 706 of the Telecommunications Act of)	
1996, as Amended by the Broadband Data)	
Improvement Act)	

**REPLY COMMENTS OF
THE FREE STATE FOUNDATION***

I. Introduction and Summary

These reply comments are submitted in response to the Commission’s *Twelfth Broadband Progress Notice of Inquiry* regarding Section 706’s requirement that the Commission determine and report annually on “whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.” The actual facts and marketplace realities clearly show that, based on any fair assessment, broadband is being deployed to all Americans in a reasonable and timely fashion.

These reply comments emphasize the need for the Commission to provide a more predictable and less arbitrary analysis tied to everyday consumer broadband use, not imagined use. It also emphasizes the need for the Commission to pursue deregulatory measures – such as those recently proposed by Commissioner Ajit Pai on September 13, 2016, in his Digital Empowerment Agenda – to remove barriers to broadband investment. Aside from deregulatory

* These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow of the Free State Foundation. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

measures that we have long advocated – and that are along the lines of Commissioner Pai’s empowerment agenda – the Commission must not create costly new barriers for providers and consumers by adopting its proposed regulations on business data services and broadband privacy practices. Additionally, the Commission must drop its proposal for a new government-designed video navigation app and new compulsory license that jeopardizes copyrights. Simply put, each of these proposals is an investment-stifler.

Broadband deployment data overwhelmingly supports the conclusion that fixed broadband is being timely deployed to all Americans. As of June 2015, 78% of all Americans had access to fixed broadband services at speeds of 50 Mbps download/5 Mbps upload. 65% had access to fixed broadband at speeds of 100 Mbps/10 Mbps. Broadband deployment data also strongly supports the conclusion that mobile broadband is being timely deployed to all Americans. As of July 2015, 97.8% of Americans lived in census blocks served by two or more 4G LTE mobile broadband service providers. 91.5% of Americans lived in census blocks served by three or more LTE providers, and 82.2% of Americans lived in census blocks served by four or more.

In the face of overwhelming evidence of rapid broadband deployment, the Commission’s *2016 Broadband Progress Report* followed a now-predictable but nevertheless unfortunate pattern. The *2016 Report* made unjustified negative deployment findings in order to bolster the claimed case for imposing new regulations on competitive broadband services. It relied on idiosyncratic and *ad hoc* definitions for ascertaining whether broadband is “being deployed to all Americans in a reasonable and timely fashion.” The Commission’s negative glosses on broadband fail to reflect real-life year-over-year progress. By treating Section 706 as a standalone source of regulatory power triggered by negative broadband deployment findings, the

Commission has developed a vested interest in generating perpetual negative findings. This calls the credibility and usefulness of the Commission's 706 inquiries into serious question.

So far as practicable, the Commission's Section 706 inquiry ought to be conducted using standards that are predictable and rooted in the terms of the statute. The inquiry should reflect basic rule of law premises that government should act according to a clear set of equally applicable rules that are knowable in advance. Those premises are particularly relevant where, as here, the Commission's inquiry is mandated by law and its outcome triggers agency responsibilities regarding actions to remove barriers to infrastructure investment.

The Commission should retain its existing fixed broadband benchmark speed of 25 Mbps download/3 Mbps upload and reject calls for upward changes. Consistent baselines are critical to measuring broadband deployment progress. Any broadband speed benchmarks the Commission relies on should be tied to the capabilities necessary to support services and applications that are widely used by consumers. The Commission should not readjust definitions to suit services that have limited availability and low adoption rates, such as 4K ultra HD streaming video, or based on its speculations that four family members wish to watch a movie at the very same time in different rooms on different devices.

The Commission should be cautioned against establishing a 10 Mbps download/1 Mbps upload benchmark for defining mobile broadband deployment. In numerous markets, average speeds exceed – and peak speeds far exceed – 10 Mbps for downloads. Yet many popular online services – such as Netflix and YouTube – require only 5 Mbps or less. Disregarding mobile broadband services capable of delivering HD streaming video presents a distorted picture of the market that ignores consumer habits. Yet even with a 10 Mbps/1 Mbps benchmark, coverage

data supports a positive finding that broadband is being timely and reasonably deployed to all Americans.

Further, the Commission should no longer construe broadband deployment to mean consumer access to *both* retail fixed and mobile broadband services. Fixed and mobile broadband are technologically unique but nonetheless competing and increasingly substitutable services. As of June 2015, mobile Internet connections outnumber fixed connections by nearly 2.5 to 1. And between 2013 and 2015, the number of online households relying only on mobile broadband doubled, from 10% to 20%.

The Commission should accelerate broadband infrastructure investment by acting consistent with the deregulatory mechanisms set out in Section 706. It should reinvigorate its Section 10 forbearance and Section 11 review powers to provide relief from unnecessary and costly legacy telecommunications regulations. Removing costly rules for competitive voice services markets will enable providers to direct more resources toward next-generation broadband facility upgrades. The Commission should also be unceasing in efforts to increase the supply of commercial spectrum for mobile broadband use. Also, as Commissioner Pai recently suggested and we have previously advocated, it can provide leadership in producing a streamlined policy for deployment of small cell infrastructure, including on federal property. Removing spectrum resource and infrastructure construction barriers will hasten the arrival of the 5G mobile broadband future.

Finally, the Commission must not create costly new barriers to broadband investment and deployment. Its proposed price regulations of business data services would reduce incumbent and cable entrant returns on investment by requiring cable operators to lease their facilities to other competitors at government-approved prices rather than market prices. Such regulation

undermines incentives for competing providers to invest in advanced broadband facilities. The Commission's proposed privacy regulations would discourage ISPs from offering consumers targeted marketing deals for reduced cost or no cost options for services. By eliminating consumer choice for inexpensive or free services, the proposed privacy regulations would create cost barriers to adoption for price-sensitive consumers, thereby discouraging broadband consumer demand and undermining Section 706's purposes in promoting infrastructure deployment. Removal of burdensome old regulatory barriers in order to even further accelerate broadband investment always should be a primary goal. This holds even if the Commission finds, as it should in this case, that broadband is being reasonably and timely deployed to all Americans.

II. The Commission Should Find That Broadband Is Being Reasonably and Timely Deployed To All Americans

On its face, publicly available data clearly demonstrates the reasonableness and timeliness of broadband deployment to all Americans. As of June 2015, 78% of all Americans had access to fixed broadband services at speeds of 50 Mbps download/5 Mbps upload.¹ 65% had access to fixed broadband at speeds of 100 Mbps/10 Mbps.² Meanwhile, as of July 2015, 97.8% of Americans lived in census blocks served by two or more providers of 4G LTE mobile broadband services.³ 91.5% of Americans lived in census blocks with LTE access offered by three or more providers, and 82.2% of Americans lived in census blocks with LTE access by four

¹ *Twelfth Broadband Progress Notice of Inquiry*, GN Docket No. 16-245, at 7, ¶ 15 (rel. Aug. 4, 2016).

² *Notice*, at 7, ¶ 15.

³ *Eighteenth Report* (“*Eighteenth Wireless Competition Report*,”) WT Docket No. 15-125, at 30 (Chart III.A.5) (rel. Dec. 23, 2015).

or more providers.⁴ Progress in deployment of high-speed fixed and mobile broadband facilities has surely improved nationwide consumer access over the past year.

III. The Commission Must Apply Predictable Standards, Not Engage in Arbitrary Analysis

Unfortunately, the Commission's *2016 Broadband Progress Report* – or *Eleventh Report* – followed a now-predictable pattern of making unjustified negative deployment findings in order to bolster agency claims to ever-expanding regulatory power. The pre-determined outcome of the *2016 Report* was rationalized primarily by the Commission's resort to idiosyncratic and *ad hoc* definitions for determining whether broadband is “being deployed to all Americans in a reasonable and timely fashion.” The Commission's negative glosses on broadband deployment in its *2016 Report* and in its prior reports fail to reflect the actual year-over-year progress.

The *2016 Report* and its recent predecessors arrived at negative broadband deployment findings by engaging in analytical goalpost-moving.⁵ Those findings are unjustifiable by any common sense review of the actual deployment data. Moreover, such a manipulative inquiry process lacks credibility. Altering definitional standards while simultaneously making findings about deployment based on those changed standards epitomizes arbitrariness.

Regrettably, the Commission's current interpretation of Section 706 has created an institutional conflict of interest. By treating Section 706 as a standalone source of regulatory power predicated on negative broadband deployment findings,⁶ the Commission has developed a vested interest in generating perpetual negative findings that bolster its regulatory initiatives.

⁴ *Eighteenth Wireless Competition Report*, at 30 (Chart III.A.5).

⁵ See Comments of the Free State Foundation, GN Docket No. 15-191 (Sept. 15, 2015) (describing the Commission's use of arbitrary and *ad hoc* redefinitions to arrive at unjustifiable negative broadband deployment findings in prior broadband progress reports), available at: <https://ecfsapi.fcc.gov/file/60001324051.pdf>.

⁶ See Comments of the Free State Foundation, GN Docket No. 11-121 (Sept 5, 2011) (describing the deregulatory intent of Section 706 and critiquing the Commission's reinterpretation of that section as a standalone grant of regulatory power), available at: <https://ecfsapi.fcc.gov/file/7021707056.pdf>.

This calls the impartiality and credibility of the Commission's broadband deployment findings into serious question.⁷

So far as practicable, the Commission's Section 706 inquiry ought to be conducted using standards that are predictable and rooted in the terms of Section 706. This inquiry should thereby reflect basic rule of law premises that government should act according to a clear set of equally applicable rules that are reasonably ascertainable in advance. Those premises are particularly relevant where, as here, the Commission's inquiry is mandated by law and its outcome triggers agency responsibilities regarding actions to remove barriers to infrastructure investment.

The Commission should therefore retain its existing fixed broadband benchmark speed of 25 Mbps download/3 Mbps upload, as proposed in the Notice.⁸ It should reject the calls of some commenters that seek a dramatic upward change to that benchmark.⁹ Avoiding frequent alterations of standards and maintaining a consistent baseline are critical to measuring broadband deployment progress. Further, it is decidedly unreasonable for the Commission to make sudden redefinitions of standards clearly calculated to generate negative broadband deployment findings. Any broadband speed benchmarks the Commission relies on should, at the very least, be tied to the capabilities necessary to support edge services and applications that enjoy widespread everyday usage by consumers.¹⁰

The Commission should not readjust definitions to suit high-intensity services – like 4K ultra HD streaming video – that have only minimal availability and low levels of adoption.¹¹ Nor should it redefine its standards by refusing to consider broadband services that involve usage-

⁷ Comments of Tech Freedom, GN Docket No. 16-245, at 3-4; *See also* Comments of the Free State Foundation, GN Docket No. 15-191, *supra* note 6.

⁸ Notice, at 6, ¶ 13. *See also* Comment of National Cable & Telecommunications Association (NCTA), GN Docket No. 16-245, at 4.

⁹ Comments of New America's Open Technology Institute, GN Docket No. 16-245, at 2.

¹⁰ Comments of NCTA, at 4.

¹¹ Comments of Tech Freedom, at 12-14. *See also* Comments of New America, at 4.

based pricing.¹² Such pricing options allow low-volume and cost-conscious consumers to pay for only for the level of services that they prefer to use.

IV. Mobile Broadband Deployment Should Reflect Widespread Consumer Usage of Applications and the Commission Should No Longer Define Broadband Deployment As Access to Both Fixed and Mobile Services

With respect to mobile broadband services, the Commission should be cautioned against establishing a 10 Mbps download/1 Mbps upload benchmark for defining broadband deployment. Undoubtedly, mobile broadband speeds far exceed that modest threshold in numerous markets. And mobile broadband speeds are on the cusp of further increases due to providers' leveraging of multiple bands in offering 4G LTE services. But as pointed out in comments, many popular online services – such as Netflix, YouTube, HuluPlus, and HBO Go – require download speeds of only 5 Mbps or less.¹³ Disregarding the availability of mobile broadband services capable of delivering HD streaming video present a distorted picture of the market. Yet even if the Commission adopts a 10 Mbps/1 Mbps benchmark for mobile broadband, network coverage data still supports a positive finding that broadband is being timely and reasonably deployed to all Americans. Indeed, based on a series of tests performed during the first half of 2015, the average LTE download speed was 11.2 Mbps, while the average upload speed was 3.25 Mbps.¹⁴ Of course, the average download and upload speeds do not necessarily represent the speeds at which consumers have access. Many opt for less expensive plans that offer lower speeds than are otherwise available.

¹² Comments of New America, at 15-16.

¹³ Comments of Mobile Future, GN Docket No. 16-245, at 4-7. *See also* Comments of New America, at 4.

¹⁴ *Eighteenth Competition Report*, at 82, ¶89 (Table VI.C.1) (internal cite omitted).

Further, the Commission should no longer construe broadband deployment to mean consumer access to *both* retail fixed and mobile broadband services.¹⁵ This can result in nonsensical findings that broadband is not deployed to consumers in a given area who otherwise have one or more choices among fixed or mobile broadband services. Although fixed and mobile broadband have unique technological characteristics, they are competing and potentially substitutable services. There are almost two and a half times more mobile connections as there are fixed connections, and mobile connections are growing at a faster rate.¹⁶ Data collected by NTIA also indicated that the proportion of online households that relied exclusively on mobile broadband service at home doubled between 2013 and 2015, going from 10% up to 20%.¹⁷ Due recognition of the competitive effects of ongoing cross-platform competition means the Commission should discard its requirement that an area be served by both fixed and mobile broadband service providers.

V. The Commission Must Remove Regulatory Barriers to Broadband Infrastructure Investment, Not Erect New Barriers Through Proposed Regulations

Going forward, the Commission can also alleviate conflict of interest and arbitrariness concerns about its broadband deployment analyses by removing barriers to broadband investment consistent with the deregulatory mechanisms spelled out in Section 706. The Commission should be proactive in the use of its Section 10 forbearance authority to provide relief from outdated, unnecessary, and costly legacy telecommunications regulations that are no longer necessary due to the emergence of competition in voice services markets. It should also

¹⁵ Comments of NCTA, at 7-8; Comments of Mobile Future, at 4-5.

¹⁶ *Internet Access Services: Status as of June 30, 2015* (“*Internet Access Services Report*”), Wireline Competition Bureau (Aug. 2016), at 2.

¹⁷ Giulia McHenry, *Evolving Technologies Change the Nature of Internet Use*, National Telecommunications & Information Administration (Apr. 19, 2016), at: <http://www.ntia.doc.gov/blog/2016/evolving-technologies-change-nature-internet-use>.

pursue a more searching Section 11 review of legacy regulations in order to identify outdated, unnecessary, and costly rules for repeal. Identifying and removing rules that make maintenance of legacy services costlier will enable providers to direct more of their resources toward next-generation broadband facilities deployment. Increasing the supply of available commercial spectrum for mobile broadband use should be an unceasing Commission priority.¹⁸ The Commission can also provide leadership in producing a streamlined policy for deployment of small cell infrastructure, including on federal property – thereby laying the tracks for a vibrant 5G mobile broadband future.¹⁹

Finally, the Commission must not risk creating additional cost barriers through unwarranted new regulation of today’s dynamic broadband market. The Commission’s proposed price regulations of business data services – or special access services – would reduce incumbent and cable entrant provider returns on investment by requiring them to lease their facilities to other competitors at government-approved prices rather than market prices. Such regulation undermines incentives for competing providers to invest in advanced broadband facilities deployments. Also, the Commission’s proposed privacy regulations – and its nearly ubiquitous “opt-in” requirements regarding personally identifiable information, in particular – would discourage ISPs from offering consumers targeted marketing deals, selling advertisements to personally design consumer experiences, or offering sponsored data as well as free data or zero-rated plans.²⁰ Such deals could potentially benefit consumers by giving them reduced cost or no cost options for services. The Commission’s contemplated ban on certain “financial inducement

¹⁸ Comments of Competitive Carrier Association (CCA), GN Docket No. 16-245 at 19-23; Comments of CTIA, GN Docket No. 16-245 at 31-34; Comments of Mobile

¹⁹ Comments of CTIA, at 37-38; Comments of CCA, at 28-29.

²⁰ See Comments of CCA, at 25-28. For further critical analysis of the Commission’s proposed privacy regulations, see Comments of the Free State Foundation, WC Docket No. 16-106 (May 27, 2016), available at:

<https://ecfsapi.fcc.gov/file/60002078862.pdf>.

practices,” such as offering discounts for use of PII, would similarly deprive low income and other price sensitive consumers of their choice to enjoy free or inexpensive services. Eliminating such choice through proposed privacy regulations would pose a cost barrier to adoption, thereby discouraging broadband consumer demand and undermining Section 706’s purposes in promoting infrastructure deployment.

It always should be a Commission goal to remove burdensome old regulatory barriers in order to accelerate broadband investment. This holds even if the Commission finds, as it should in this case, that broadband is being reasonably and timely deployed to all Americans.

VI. Conclusion

For the foregoing reasons, the Commission should find that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion and act in accordance with the views expressed herein.

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September 19, 2016