

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

In the Matter of)	
)	
Inquiry Concerning the Deployment of Advanced)	
Telecommunications Capability to All Americans)	WT Docket No. 15-191
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)	

**COMMENTS OF
THE FREE STATE FOUNDATION¹**

I. Introduction and Summary

These comments are submitted in response to the Commission’s *Eleventh 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.” Indeed, without question, broadband is being deployed to all Americans in a reasonable and timely fashion. The focus of these comments is on the need for the Commission to reorient its analysis to comport with the actual facts of broadband deployment.

As of mid-2014, wireline broadband networks with download speeds of 25 Mbps or more had been deployed to 85.3% of the population, and wireless broadband networks with download speeds of 10 Mbps or more had been deployed to 98.2%. Those numbers alone are *prima facie*

¹ 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.

evidence of the reasonableness and timeliness of broadband deployment. If anything, as described more fully in the body of these comments, publicly available data reveal that wireline and wireless broadband networks are being deployed not only reasonably and on a timely basis, but ubiquitously and rapidly.

Yet in the face of overwhelming evidence of rapid broadband deployment, the Commission's *Tenth Report* nonetheless made unjustified and unsupported negative deployment findings. Unfortunately, this followed a pattern of prior negative Section 706 findings. But those negative findings owe primarily to the Commission's *ad hoc* redefinition of what constitutes broadband deployment, not to an accurate portrayal of the facts on the ground.

Agency conclusions dependent on repeatedly moving goalposts lack analytical credibility – and they diminish the agency's credibility. Changing definitional standards and simultaneously making findings about deployment based on those changed standards epitomizes arbitrariness. The Commission's goalpost-moving and idiosyncratic defining of broadband appears intended solely to rationalize negative broadband deployment findings under Section 706. Through crafty redefinition of broadband deployment, dramatic progress has been conveniently “reinterpreted” in prior 706 reports, wrongly, to paint lack of progress in broadband deployment.

It is sensible that definitions for broadband services be reviewed and revised as technological progress unfolds and everyday consumer expectations shift. But the dynamism of today's broadband market should direct the Commission's analysis away from superficially facile or arbitrary determinations that the market is failing to make progress.

Unwarranted negative 706 findings are also harmful to consumers. The Commission uses negative broadband deployment findings to give cover to unnecessary and unjustifiable regulation. To avoid such harms, the Commission must realign its Section 706 analysis to actual

competitive conditions in the market, including the substantial deployment of broadband. Where markets are characterized by innovation and competition, as is the case with broadband, consumer welfare is enhanced by a policy of market freedom. This market freedom brings about further advancements in products and services.

Regrettably, the Commission's reinterpretation of Section 706 has created a conflict of interest. Ever since the Commission reinterpreted Section 706 into a standalone source of regulatory power, its exercise of power over broadband services has come to depend, in ever increasing degrees, on negative findings under Section 706. The most conspicuous examples include the Commission's *Open Internet* regulations and its order preempting state laws that restrict municipal broadband networks. Perversely, the ostensible legal basis for those policies depends on continued negative broadband deployment findings. A positive finding would be tantamount to pulling the plug on many pro-regulatory, pro-interventionist agency initiatives. The Commission's prior actions lead to the unfortunate conclusion that it is too much to expect the agency will imperil its major policy initiatives by making positive Section 706 broadband deployment findings, regardless of changes in market conditions and broadband deployment. This state of affairs undermines the impartiality of the Commission and likewise undermines the credibility of its Section 706 findings. In order to restore the integrity of its Section 706 inquiry, the Commission should return to its own earlier interpretation of Section 706 as a directive for it to use deregulatory mechanisms to accelerate broadband deployment.

The Commission's proposal finally to consider mobile wireless broadband services in its analysis of broadband deployment is welcome – at least in theory. But it would be a serious blunder for the Commission to use its upcoming *Eleventh Report* to yet again redefine broadband deployment to mean access to *both* retail wireline and wireless broadband services. This would

necessarily result in the Commission finding broadband not deployed to areas in which one or both services, in fact, are actually deployed and utilized to deliver broadband.

The *Notice*'s proposal appears to rest on the faulty premise that wireline and wireless broadband are somehow distinct, non-competing, and non-substitutable services. Yet wireline and wireless are platforms for providing the same type of service: broadband. Wireline platforms differ among themselves and likewise differ from wireless platforms. Even individual providers may have unique characteristics in their network management protocols. But those variations do not change the underlying service being offered or their substitutability.

Thus, the *Notice*'s proposal appears to be setting up more arbitrary goalpost-moving. It is another instance of manufacturing a negative 706 finding in order to justify regulation of the dynamic broadband market. The Commission should not adopt such a manipulative means of ratcheting up regulation, particularly where it can identify no instances of market power or market failure. Wireless broadband should be incorporated into the Section 706 analysis in a manner that recognizes wireless as a substitute or potential substitute for wireline – in other words, as another provider in the same broadband marketplace.

II. Broadband Is Being Reasonably and Timely Deployed to All Americans

The actual facts about broadband deployment should be encouraging to any reasonable, fair-minded, and disinterested observer. As of mid-2014, wireline broadband networks with download speeds of 25 Mbps or more had been deployed to 85.3% of the U.S. population, and wireline networks with speeds of 10 Mbps or more had been deployed to 92.9% of the U.S. population.² Also, as of that same date, wireless broadband networks with download speeds of

² See NTIA, National Broadband Map (data as of June 30, 2014), available at: <http://www.broadbandmap.gov/summarize/nationwide>.

10 Mbps or more had been deployed to 98.2% of the population.³

These numbers have undoubtedly improved across the board during the past two years. Significantly, next-generation wireless network upgrades continue to increase speeds and capacity of wireless networks, making wireless an increasingly viable competitor to wireline broadband. Average LTE speeds range between 30 and 40 Mbps, enabling a wide range of video viewing functionalities.⁴ Far and away, most consumers now have wireless access to high-capacity wireless broadband services capable of streaming HD video. Indeed, mobile consumption of digital media through apps and mobile web browsing has already surpassed desktop-based digital media consumption, 60% to 40%.⁵ Future developments in next-generation technology will enable continued growth, with increasing choices and sources of value for consumers in the wireless market.

Even this cursory glance at the state of broadband deployment evidences the state of broadband deployment progress. When separated from the Commission's opinions and biases, the clearest and strongest conclusion to be reached is that broadband "is being deployed to all Americans in a reasonable and timely fashion."

III. Prior Negative Deployment Findings Rest on Arbitrary Criteria Intended to Produce Pre-Determined Result

In the face of the overwhelming evidence of rapid broadband deployment, the Commission's *Tenth Report* nonetheless made negative deployment findings. The *Tenth Report's* findings fit with a pattern of prior negative Section 706 findings in the *Sixth* through

³ See *id.*

⁴ See, e.g., Lynn La, "4G LTE Showdown: How Fast is Your Carrier?" CNet (Aug. 5, 2014), available at: <http://www.cnet.com/news/4g-lte-showdown-how-fast-is-your-carrier/>.

⁵ See Sarah Perez, "Majority of Mobile Digital Media Consumption Now Takes Place In Mobile Apps," Techcrunch.com (Aug. 21, 2014) (summarizing ComScore's "The U.S. Mobile App Report" (2014)), available at: <http://techcrunch.com/2014/08/21/majority-of-digital-media-consumption-now-takes-place-in-mobile-apps/>.

Eighth Reports. But those negative findings owe little to the facts; they owe far more to the Commission's *ad hoc* redefining of what services constitute broadband deployment.

Agency conclusions dependent on the agency repeatedly moving goalposts lack analytical credibility. Changing definitional standards and simultaneously reaching conclusions about deployment based on those changed standards epitomizes arbitrariness. In the end, the Commission's Section 706 analysis appears little more than an exercise in rationalizing a predetermined outcome.

In its *Tenth Report* and prior reports, the Commission's exercise appears intended to rationalize negative broadband deployment findings under Section 706. Through tactful redefinition of broadband deployment, dramatic progress in the deployment of broadband has been conveniently reinterpreted by the Commission to mean increasingly dire lack of progress in broadband deployment.

As embodied in the *Tenth Report* and prior reports, the Commission's approach to its Section 706 inquiry appears unconstrained by any limiting principles or meta-principles. The Commission can always change the goalposts for broadband deployment and at the same time conclude that the goals have been missed. This is precisely what the Commission has done in past reports:

- In its *Sixth Report*, the Commission issued a negative finding after raising broadband download speed thresholds from 200 kbps to 4 Mbps.
- In its *Seventh Report*, the Commission issued a negative finding after refusing to consider wireless broadband – including 3G wireless networks – that could meet its speed thresholds.
- In its *Eighth Report*, the Commission issued a negative finding after reinterpreting deployment to include adoption and despite data in the Report showing approximately 95% of all Americans had access to broadband services. That

number would have increased to more than 98% if the Report had not ignored 3G wireless broadband services.

- (The Commission failed its statutory obligation by not issuing a *Ninth Report*.)
- In its *Tenth Report*, the Commission issued a negative finding after increasing wireline broadband threshold speeds from 10 Mbps to 25 Mbps – levels considered compatible for 4K ultra HD TV. This despite the fact that few consumers have ultra HD TV sets, online video content offerings in ultra HD are still minimal, and no over-the-air TV networks broadcast in ultra HD.

There may be no truly objective way to adjust standards of analysis to dynamic technology markets. And it is sensible that the Commission's definitions for broadband services be reviewed and revised as technological progress unfolds and everyday consumer expectations shift. But market dynamism should direct the Commission's analysis away from easy or arbitrary determinations that the market is failing to make progress.

There is ample evidence of the broadband market's dynamism. Putting negative glosses on the tremendous ongoing progress in the broadband deployment market is unreasonable in itself. But the Commission's negative 706 findings are also potentially harmful. Negative broadband deployment findings misleadingly point up a need for unnecessary regulation. According to the Commission's re-interpretation of Section 706, negative findings supply a source of broad regulatory power. As discussed below, the Commission's negative findings supply its ostensible legal basis for imposing new regulatory restrictions on broadband services that are unjustified by actual market conditions.

Regulation of dynamic markets is particularly prone to causing harm to consumers. Where markets are characterized by innovation and competition, consumer welfare is enhanced by a policy of market freedom to bring about further advancements in product and service. Regulation restricts the freedom of broadband market participants to fully exercise their

entrepreneurial knowledge and skills in deploying and delivering broadband services to consumers. To avoid such potential harms, the Commission must realign its Section 706 analysis to actual competitive conditions in the market, including the substantial and rapid deployment of broadband.

IV. The Integrity of the Commission's Inquiry Is Undermined by Dependence on Negative Findings to Pursue Its Policy Ambitions

The Commission has reinterpreted Section 706 into a grant of nearly unbounded authority to regulate broadband Internet services and the breadth of the advanced telecommunications market. This reinterpretation is incorrect and regrettable. It is incorrect because it runs contrary to a plain reading of the statute's terms and the rules of statutory interpretation. And it is regrettable because it has undermined the integrity of the of the Commission's Section 706 inquiry. The Commission's reinterpretation of Section 706 has created a conflict of interest.

The conflict lies in the fact that Section 706 findings are no longer just about deployment but about regulatory power. Ever since the Commission has reinterpreted Section 706 into a standalone source of regulatory power, its exercise of power over broadband services has come to depend, in ever increasing degrees, on negative broadband deployment findings. This includes the Commission's *Open Internet* rules and its order preempting state laws concerning municipal broadband networks. The Commission now has an institutionally vested interest in maintaining those policies. The ostensible legal basis for those policies depends on continued negative Section 706 findings. And a positive finding would be tantamount to pulling the plug on its many policy initiatives. The potential peril of a positive broadband deployment finding to the continuation of the Commission's own regulatory policies makes a positive finding by the Commission almost too much to expect, regardless of changes in market conditions and

broadband deployment. This state of affairs undermines the impartiality of the Commission and likewise undermines the credibility of its Section 706 findings.

Unfortunately, there appears little way out of the conundrum created by the Commission's pro-regulatory reinterpretation of Section 706 and indebtedness to negative deployment findings. In order to restore the integrity of its Section 706 inquiry, it can and should return to its earlier interpretation of the provision. The Commission's earlier precedent interpreted Section 706 as a directive in using deregulatory mechanisms to accelerate broadband deployment. Although the D.C. Circuit Court of Appeals upheld the Commission's pro-regulatory reinterpretation of Section 706 in *Verizon v. FCC* (2014), it is more correct to say that the Court deferred to the Commission's interpretation. The Court did not demand a particular interpretation. So the Commission has ample authority to return to its earlier, correct precedent regarding Section 706's meaning.

V. The Commission's Proposal to Consider Wireless Broadband in Its Analysis Is Misguided and Must Be Revised to Reflect Wireless Substitution

As part of its analysis of the wireless market, the Commission needs to account for wireless substitution and intermodal competition.

The Commission's proposal to finally consider mobile wireless broadband services in its analysis of broadband deployment is entirely welcome. Indeed, it is well past time that the Commission takes stock of wireless broadband. Prior reports have been skewed by the exclusion of wireless from the Commission's inquiry. Publicly available data confirms that consumers are increasingly relying on wireless for Internet access. And wireless offers increasing value to consumers and to the overall economy.

However, it would be a serious blunder on the part of the Commission to analyze mobile

wireless broadband in the precise manner it has proposed in its *Notice*. For its *Eleventh Report*, the Commission proposes another new definition of broadband deployment, whereby broadband is *not* deployed to an area unless consumers have access to *both* retail wireline and wireless broadband services.

By its proposal, the Commission would turn the Section 706 inquiry on its head. The proposal would effectively treat mobile as a liability, since broadband would only be considered deployed where consumers have access to both wireline and mobile wireless. That is, broadband would only be considered deployed to those areas where both wireline and wireless services meets the Commission's preferred speed thresholds. This would necessarily result in the Commission finding broadband not deployed to areas in which one or both services are actually deployed.

Wireless broadband is already ubiquitous. But the Commission proposes to ignore widespread wireless broadband deployment by resorting to narrow definitions tied to its own views about what consumers should want, rather than by actual deployment data. This would almost certainly result in a significant underestimation of the state of actual broadband deployment.

The proposal to treat broadband as deployed only in areas where both wireline and mobile wireless broadband have been deployed also appears to be premised on the faulty premise that wireline and wireless broadband are somehow distinct, non-competing, and non-substitutable services. But the assumed dichotomy between wireless and wireline broadband is based on hair-splitting. Wireline and wireless are platforms for providing the same type of service: broadband service. And the increasing capabilities of wireless networks make the case for wireless substitution even stronger.

The Commission now proposes another empty, arbitrary rationale intended to ensure future negative deployment findings. Its proposal repeats the problem of analysis owing principally to goalpost moving. And its proposal appears to be yet another instance of manufacturing a negative Section 706 finding in order to justify regulation of the dynamic broadband market. In fact, the proposal appears intended as a means of rationalizing increasing regulation of wireless broadband. But pre-determined negative findings that expressly involve wireless broadband hardly make a convincing case for the Commission to leverage its claimed Section 706 powers to overcome Section 332's restrictions on subjecting mobile information services to common carrier regulation.

The Commission should not adopt such a manipulative means of ratcheting up regulation of wireless broadband, particularly where it can identify no instances of market power or market failure according to a disciplined and recognized antitrust-like analysis. It should incorporate wireless broadband into the Section 706 analysis, but do so in a manner that recognizes wireless as a competitor and substitute or potential substitute for wireline broadband.

VI. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

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