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FCC Must Quit Twisting Section 706 Reports

by

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Section 706 of the Communications Act requires the FCC to annually submit a report to Congress regarding the reasonable and timely deployment of advanced telecommunications services to all Americans. Unfortunately, when it comes to Section 706 Reports, *it is the Commission* that has acted unreasonably and untimely.

The Commission has previously twisted the deregulatory meaning of Section 706 in order to rationalize net neutrality regulations. It has applied narrow market definitions that understate broadband deployment and availability. And last year the Commission failed to issue a Section 706 report at all. Its *Notice* regarding the upcoming 706 Report now raises concerns about the Commission re-defining broadband in a manipulative and over-simplistic way to understate the status of broadband deployment. The *Notice* also hints the Commission may again stretch Section 706 in order to justify new regulatory powers over online privacy and security.

Starting with its upcoming 706 Report, the Commission has ample opportunity to get back on the right track. Without obviating the need for further progress in broadband deployment, the Commission should face up to the fact that advanced telecommunications services - that is, broadband Internet services - are being reasonably and timely deployed. Updating the speed thresholds and incorporating realistic latency characteristics into the next 706 Report's definition of broadband may make sense. But the Commission must maintain a baseline for measuring the tremendous progress made over time in broadband deployment. Its standards should take stock

of the real-life habits of the body of consumers, not the preferences of a few regulators. And the Commission's report findings should inform attempts to remove regulatory barriers to infrastructure deployment. That includes forbearance from legacy telephone rules in order to hasten the IP transition.

Finally, the Commission should not use Section 706 as a pretext for overextending its limited powers over online privacy. The Federal Trade Commission is better suited to that task. There is also an ongoing NTIA-facilitated multi-stakeholder process for establishing a voluntary, consensus-driven set of common standards for protecting the digital privacy of consumers, with a limited FTC enforcement mechanism.

A year ago, I published a *Perspectives from FSF Scholars* paper, "Section 706's Deregulatory Directive: Accelerate Broadband by Removing Regulatory Barriers." In that paper, I recounted the misguided conclusion of the *Eighth Broadband Progress Report* - or 706 Report - that broadband deployment was not being timely deployed to all Americans - despite Report data indicating nearly 95% of the population had access to broadband. My paper also previewed the Commission's *Ninth Broadband Progress Report*. Specifically, I highlighted more recent data indicating that, as of June 30, 2012, 98% of Americans had access to wired or wireless broadband at 3 Mbps/768kbps or greater download speeds, 91% had access to wireline broadband download speeds of 10 Mbps, and about 81% had access to wireless download speeds of 6 Mbps or more. Those numbers constituted significant improvements over what the Commission observed in the *Eighth Report*. Those positive numbers indicated that broadband really is being reasonably and timely deployed.

In the end, there was to be no *Ninth Report*. This was contrary to the clear requirement of Section 706 that the Commission annually submit a report to Congress on the deployment of advanced telecommunications services. Instead, the Commission's most significant activities supposedly pertaining to Section 706 have been its proposals for new net neutrality regulations and preemption of state restrictions on government-owned broadband networks. Both controversial proposals are purportedly based on that provision. Of course, Free State Foundation scholars as well as others have pointed out problems with the Commission's pro-regulatory interpretation of Section 706. The Commission's position appears entirely at odds with the statute's deregulatory terms. By its terms, Section 706 simply authorizes the Commission to issue an annual report to Congress and, if necessary, take action in a number of specifically enumerated ways to remove regulatory barriers to infrastructure investment.

The Commission supposedly has now turned to preparing the *Tenth Broadband Progress Report*. However, the *Notice* for the next Section 706 Report raises fresh concerns. Some comments filed in the proceeding urged the Commission to redefine broadband by setting minimum download speed thresholds of 6 Mbps, 10 Mbps, or even 25 Mbps, along with further upload speed increases. Likewise, some public comments urged the Commission to follow through with its proposal to add a 100 millisecond latency requirement and data usage aspects to its definition of broadband. Here the concern is the Commission will re-define broadband in a manipulative and over-simplistic way. By narrowing the scope of what it considers broadband, the Commission could more easily rationalize its conclusion that broadband is not being reasonably and timely

deployed. The Commission can thereby rationalize further regulatory intervention in the broadband Internet services market as necessary to accelerating deployment.

This is not an unfounded concern. As mentioned, the Commission has previously been criticized for concluding that broadband is somehow not being reasonably and timely deployed to all Americans despite some 95% having access to broadband according to the Commission's own definitions. That number reaches 98% when 3G wireless networks are included. By itself, a redefinition of broadband could bring those numbers down and misleadingly indicate that broadband deployment is slowing or otherwise inadequate.

Echoing the *Eighth Report*'s exclusion of 3G wireless, the *Notice*'s proposal to add a 100 millisecond latency requirement would exclude satellite broadband networks from the *Tenth Report*'s definition of broadband. According to commenting satellite providers, signals travelling at light speed from geostationary satellites cannot physically traverse the distance from earth to space in less than 100 milliseconds. Rather, a typical latency range of 250-750 millisecond is still sufficient to allow customers to send and receive email, upload pictures, stream audio, communicate via social networks, make voice calls, browse the Web, and even stream video or video conference.

Such a possible narrowing redefinition in the *Tenth Report* comes at a time when the Commission is proposing net neutrality regulations and likewise proposing to preempt state law restrictions on government-owned broadband networks based on Section 706 and the need to accelerate broadband deployment. The *Notice* also hints that the Commission could use a negative broadband deployment finding - based on a narrower definition of broadband - in order to rationalize some kind of future regulatory action regarding information privacy and security.

Paragraph 47 of the *Notice* cites a Commission staff paper finding of a "significant positive correlation between high levels of worries about personal privacy and non-adoption" of broadband. The *Notice* sought comments on the staff paper's findings and asked: "What is the relevance of privacy and/or security to our section 706(b) determination?" It posed further questions about the information security obligations of broadband providers and the relationship between online privacy and broadband adoption.

It's difficult to fathom - let alone justify - the Commission invoking Section 706 as the basis for new regulations of online privacy in the name of promoting broadband adoption. Regulation of digital information privacy and security is nowhere mentioned in that provision. For that matter, Section 706 is directed to deployment, not adoption.

Under existing law, the Commission has limited regulatory authority over telephone subscriber privacy (Section 222), over cable subscriber privacy (Section 551), and over DBS subscriber privacy (Section 338 of the Satellite Home Viewing Improvement Act). But it would be yet another misuse of Section 706 to invoke it as the basis for new online privacy regulations. And as FSF President Randolph May and I have argued: "Any New Privacy Regime Should Mean An End To FCC Privacy Powers." In the digital and IP-based converging market, the Federal Trade Commission is better suited as an enforcer of common privacy standards. If any federal agency is to address the personal data collection and use practices of all communications and information

service providers and media companies, it should be the FTC. There is also an ongoing NTIA-facilitated multi-stakeholder process for establishing a voluntary, consensus-driven set of common standards for protecting the digital privacy of consumers, with a limited FTC enforcement mechanism.

Regardless of when the next 706 Report is released, the Commission has ample opportunities *now* to help accelerate broadband deployment by acting in ways that don't involve adding new regulatory burdens. For starters, here are three things the Commission can do to remove regulatory barriers to infrastructure investment and deployment.

First, the Commission can forbear from enforcing analog-era, legacy telephone regulations. Those regulations were premised on monopolistic conditions and impose a financial drag that diverts resources from broadband services. A process of elimination can start with removal of remaining *Computer Inquiry III* rules regarding narrowbanding enhanced services.

Second, the Commission can promptly approve trials to facilitate the ongoing IP transition. Relieving broadband providers from costly requirements to maintain old copper-based networks will free up resources for next-generation Internet Protocol-based technologies. To this end, the Commission can set a sunset date for the public switched telephone network (PSTN). A deadline would focus the efforts of the FCC and providers to better ensure that the IP-transition and PSTN retirement process is prompt.

Third, the Commission can take targeted steps to remove regulatory barriers to cell site construction. The Commission has set its October public meeting for a vote on its rulemaking regarding removal of state and local regulatory barriers to approving cell tower siting and collocation. It's important that the Commission follow through with those plans and issues its report and order. As prior Wireless Competition Reports have acknowledged, local government cell siting and collocation applications are the most significant regulatory barrier to wireless infrastructure. To the extent the Commission can clarify federal requirements with its report and order, it can help ensure more rapid permit approval processing and thereby promote construction of infrastructure supporting wireless broadband services.

Those steps are important. In all events, the Commission must fulfill its statutory duty to annually issue Section 706 Reports. *The Commission must do so* in a reasonable and timely manner.

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