

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

In the Matter of )  
 )  
Inquiry Concerning the Deployment of Advanced ) GN Docket No. 17-199  
Telecommunications Capability to All Americans )  
in a Reasonable and Timely Fashion )  
 )

**COMMENTS OF  
THE FREE STATE FOUNDATION<sup>1</sup>**

**I. Introduction and Summary**

These comments are submitted in response to the Commission’s 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 regarding broadband deployment clearly support an affirmative determination. And these facts point, unequivocally, to the further conclusion that the repeated refusal of the Wheeler Commission to make an affirmative finding of reasonable and timely deployment was a case of Alice-in-Wonderlandish “Sentence First – Verdict Afterwards.” Well, it’s time to depart Wonderland and put the facts first, with the conclusion to follow.

Data contained in the latest *Internet Access Services Report* (2017) indicates that speeds continue to rise: “The percentage of fixed connections with a downstream speed of at least 25 Mbps has grown from 24% (or 23 million connections) in June 2013 to 57% (or 59 million

---

<sup>1</sup> 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.

connections) in June 2016.” Over 18% of fixed wireline broadband connections offered download speeds of 100 Mbps or higher. Also, consumers have competitive choices among broadband Internet access service providers (ISPs). As of mid-2016, 42% of census blocks with housing units were served by two or more wireline broadband ISPs offering speeds of 25 Mbps or higher while 79% of census blocks with housing units were served by three or more such ISPs offering speeds of 10 Mbps or higher. Further, one industry assessment concludes that 57.5 million people – or 18% of the U.S. population – now have access to gigabit Internet capability.

Meanwhile, mobile connections constituted almost 72% of all broadband connections as of mid-2016. Mobile broadband connections “increased 10% year-over-year to 265 million in June 2016, while the number of fixed connections grew to 104 million – up 4% from June 2015.” According to data collected by the Commission, approximately 92% of U.S. consumers had access to four or more mobile ISPs offering 3G network technology or more advanced technology. And as of December 2016, about 89% of American consumers had access to four or more mobile ISPs offering 4G LTE. During the second half of 2017, mean 4G LTE download speeds reached 23.5 Mbps, while media download speed increased to 15.5 Mbps. Also, satellite broadband providers offered broadband services to 99.1% of developed census blocks at download speeds of at least 10 Mbps, as of December 2015. HughesNet now offers ubiquitous satellite broadband service with 25 Mbps download speeds.

The Commission’s prior *Broadband Progress Reports* made negative broadband deployment findings with the apparent motive of bolstering agency claims for imposing expansive new regulations. Such pre-determined outcomes were in large part rationalized using *ad hoc* standards for determining whether broadband is “being deployed to all Americans in a reasonable and timely fashion.” To reduce the inquiry’s susceptibility to future manipulation, the

Commission should take action in its *Restoring Internet Freedom* proceeding to return to its earlier understanding of Section 706 as a hortatory statement of policy regarding use of the agency's existing authority to reduce regulatory barriers to infrastructure investment rather than a delegation of independent authority.

As far as practicable, the Commission's Section 706 inquiries should be conducted with standards that are clearly stated in advance. Those standards should be altered only with ample advance notice and on an incremental basis. Any speed benchmarks adopted by the Commission should be tied to technological capabilities necessary to enable services to which a "substantial majority" of consumers actually subscribe. The Section 706 process was not intended to be a process to engage the Commission's imagination of what it might like to see in the future if it were a monarch with absolute powers – and with an absolutely unlimited royal treasury.

The Commission should thus retain its existing fixed broadband benchmark speed of 25 Mbps download/3 Mbps upload, as proposed in the Notice. And the Commission should not set a new benchmark for mobile broadband any higher than the 10 Mbps download/1 Mbps upload standard that it considers in the Notice. Mobile broadband speeds far exceed that modest threshold in numerous markets. But many popular mobile applications, including streaming video services in HD such as Netflix, require download speeds of not more than 10 Mbps or 5 Mbps.

The Commission should incorporate both fixed and mobile advanced telecommunications services into its Section 706 inquiry and thereby focus its inquiry on "whether some form of advanced telecommunications capability, be it fixed or mobile, is being deployed to all Americans in a reasonable and timely fashion." Although fixed and mobile broadband are distinct technologies, they are competing and potentially substitutable services. Many consumers

view the two as substitutes. A study by the National Telecommunications and Information Administration found that consumers across income levels are substituting mobile broadband for fixed broadband. For example, 29% of low-income consumers, 18% of middle-income consumers, and 15% of high-income consumers are mobile-only broadband users. Consumer adoption of mobile broadband services does not depend upon simultaneous adoption of fixed broadband services. The large number of customers that choose one or the other indicates that enough consumers consider fixed and mobile services to be substitutes and are willing to switch in response to changes in prices or quality of services. This means that the two services are providing a competitive constraint on each other and therefore should be considered to be in the same market.

Going forward, the Commission should more proactively identify and remove regulatory barriers to broadband deployment using the kinds of deregulatory mechanisms listed in Section 706. Identifying and removing rules for maintaining costly legacy services will allow broadband ISPs to invest more resources in next-generation broadband facilities deployment. The Commission should consider the concrete reform proposals we suggested in January 2017, whereby the agency can use its authority under Sections 10 and 11 to eliminate regulations that are no longer necessary due to technological advances, competitive market conditions, and consumer choice. As we suggested, by adopting rebuttable presumptions as procedural rules for implementing Sections 10 and 11, the Commission can invigorate the sensible deregulatory orientation of those sections, consistent with the deregulatory thrust of Section 706.

Streamlining deployment of small cell infrastructure and removing local government barriers to small cell deployment will also help facilitate a vibrant 5G mobile broadband future. The Commission should act with dispatch in its proceedings involving small cell and other

wireless infrastructure siting. Additionally, the supply of available commercial spectrum for mobile broadband use should be an unceasing Commission priority.

The Commission must not risk creating additional cost barriers through unwarranted new regulation of today's dynamic broadband market. And it should always 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 inquiry, that advanced telecommunications capability is being reasonably and timely deployed to all Americans.

## **II. Market Data Supports the Conclusion That Broadband Is Being Reasonably and Timely Deployed to All Americans**

Publicly available data regarding wireline, mobile, and satellite broadband availability strongly supports a positive conclusion that “advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”

According to the *Internet Access Services Report: Status as of June 30, 2016*: “The percentage of fixed connections with a downstream speed of at least 25 Mbps has grown from 24% (or 23 million connections) in June 2013 to 57% (or 59 million connections) in June 2016.”<sup>2</sup> Over 18% of fixed wireline broadband connections offered download speeds of 100 Mbps or higher.<sup>3</sup> In addition to this progress in broadband deployment and speed increases, consumers also have competitive choice among broadband providers. As of mid-2016, 42% of census blocks with housing units were served by two or more wireline broadband ISPs offering speeds of 25 Mbps or higher while 79% of census blocks with housing units were served by three or more such ISPs offering speeds of 10 Mbps or higher.<sup>4</sup> Further, one industry assessment

---

<sup>2</sup> FCC, *Internet Access Services Report: Status as of June 30, 2016* (“*Internet Access Services Report*”) (released April 2017) at 5, available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344499A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344499A1.pdf).

<sup>3</sup> *Internet Access Services Report*, at 5.

<sup>4</sup> *Internet Access Services Report*, at 6.

concludes that “the United States currently has Gigabit internet available to more people than any other country – 57.5 million consumers, or 18% of the populace.”<sup>5</sup>

Moreover, mobile connections constituted almost 72% of all broadband connections as of mid-2016. The *Internet Access Services Report* states: “Most of the growth in total Internet connections is attributable to increased mobile Internet access subscribership.”<sup>6</sup> Mobile broadband connections “increased 10% year-over-year to 265 million in June 2016, while the number of fixed connections grew to 104 million – up 4% from June 2015.”<sup>7</sup> Consumer choice among mobile broadband providers is reflected in recent data collected by the Commission. As of January 2017, approximately 92% of American consumers had access to four or more mobile service providers offering 3G network technology or more advanced technology.<sup>8</sup> And as of December 2016, about 89% of American consumers had access to four or more 4G LTE mobile service providers.<sup>9</sup> During the second half of 2017, mean 4G LTE download speeds reached 23.5 Mbps, while media download speed increased to 15.5 Mbps.<sup>10</sup>

Also, satellite broadband providers offered broadband services to 99.1% of developed census blocks at download speeds of at least 10 Mbps, as of December 2015.<sup>11</sup> HughesNet now

---

<sup>5</sup> VIAVI Solutions, Press Release: “VIAVI Reveals U.S. States with Most Gigabit Internet Availability” (September 7, 2017) (discussing “The State of US Gigabit Deployments” report), available at: <http://www.prnewswire.com/news-releases/viavi-reveals-us-states-with-most-gigabit-internet-availability-300515334.html>.

<sup>6</sup> *Internet Access Services Report*, at 2.

<sup>7</sup> *Internet Access Services Report*, at 2.

<sup>8</sup> FCC, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 17-69, *Twentieth Report* (Public Draft) (released September 7, 2017), at ¶ 7 (internal cite omitted).

<sup>9</sup> *Twentieth Report* (Public Draft), at ¶ 7 (internal cite omitted).

<sup>10</sup> *Twentieth Report* (Public Draft), at ¶ 8 (internal cite omitted).

<sup>11</sup> *Internet Access Services Report*, at 6.

offers ubiquitous satellite broadband service with 25 Mbps download speeds.<sup>12</sup> Further increases in overall fixed wireline connections and consumer choice for high-speed broadband services have certainly occurred over the past year to bolster the conclusion that advanced telecommunications capability is being reasonably and timely deployed to all Americans.

### **III. Restore the Integrity of the Broadband Deployment Inquiry by Returning to a Sound Interpretation of Section 706 and by Applying Predictable Standards**

Unfortunately, the Commission's unpersuasive re-interpretation of Section 706 as a standalone source of regulatory power that is triggered by negative deployment findings compromises the impartiality of its inquiries.<sup>13</sup> The Commission's prior *Broadband Progress Reports* made negative broadband deployment findings with the apparent motive to bolster agency claims for imposing expansive new regulations, including through its *Title II Order* (2015) and *Municipal Broadband Preemption Order* (2015).<sup>14</sup>

Further, those pre-determined outcomes were in large part rationalized using *ad hoc* definitions or standards for determining whether broadband is "being deployed to all Americans in a reasonable and timely fashion." Resorting to analytical goalpost moving undermines the credibility of the Commission's inquiry.<sup>15</sup> That is, adopting new definitions or other

---

<sup>12</sup> Hughes, Press Release: "Hughes Announces HughesNet Gen5 High-Speed Satellite Internet Service" (March 7, 2017), available at: <https://www.hughes.com/who-we-are/resources/press-releases/hughes-announces-hughesnetgen5-high-speed-satellite-internet?locale=en>.

<sup>13</sup> 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>.

<sup>14</sup> FCC, Protecting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order ("*Title II Order*") (released March 12, 2015); City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq., WC Docket No. 14-115, The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601, WC Docket No. 14-116, Memorandum Opinion and Order ("*Municipal Broadband Preemption Order*") (February 26, 2015).

<sup>15</sup> 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>.

measurement standards and at the same time making deployment findings based on those new standards is characteristically arbitrary.

To reduce the problem of partiality in preparing future *Broadband Progress Reports*, the Commission should restore its earlier understanding of Section 706 as a statement of policy regarding how it should use its existing authority to reduce regulatory barriers to infrastructure investment. The Commission should return to its prior and sound understanding of Section 706 in its *Restoring Internet Freedom* proceeding.<sup>16</sup> By doing so, the Commission will reduce the inquiry's susceptibility to being manipulated in order to rationalize new exercises of regulatory power and thereby help ensure the inquiry's analytical soundness.

Also, to reduce the problem of arbitrariness, as far as practicable, the Commission's Section 706 inquiries should be conducted with standards that are clearly stated in advance. The Commission should change those standards only with ample advance notice and on an incremental basis. It should not adopt dramatic upward changes to its benchmarks. Nor should the Commission alter its benchmarks to suit data-intensive services or applications that are only minimally available and minimally adopted, such as 4K ultra HD streaming video. The Commission's adoption of broadband speed benchmarks should be based on capabilities needed to support online services and applications that enjoy relatively wide everyday use by consumers. There should be a connection between the speed benchmarks adopted by the Commission and those services that enable services to which a "substantial majority" of consumers actually subscribe, as contemplated in the Notice.<sup>17</sup>

---

<sup>16</sup> FCC, *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking (released May 23, 2017), at ¶ 101.

<sup>17</sup> Notice, at ¶ 24 (citing universal service eligibility requirements under 47 U.S.C. § 254(c)(1)(b)).



With these considerations in mind, the Commission should retain its existing fixed broadband benchmark speed of 25 Mbps download/3 Mbps upload, as proposed in the Notice.<sup>18</sup> Moreover, since the Commission has not previously set a mobile speed benchmark, it should be cautioned against establishing a benchmark any higher than the 10 Mbps download/1 Mbps upload standard that it considers in the Notice.<sup>19</sup>

Undoubtedly, mobile broadband speeds far exceed that modest threshold in numerous markets. As indicated in Section II, during the second half of 2017, mean 4G LTE download speeds reached 23.5 Mbps, while media download speed increased to 15.5 Mbps.<sup>20</sup> Many popular mobile applications, including online video services and HD viewing capabilities, such as Netflix, YouTube, HuluPlus, and HBO Go – require download speeds of not more than 10 Mbps or 5 Mbps.

Importantly, the Commission must not arbitrarily exclude from its definition of “broadband” or other “advanced telecommunications services” those offerings that meet or exceed its speed thresholds but that involve usage-based pricing, free data plans, paid prioritization or other innovative service or pricing options that benefit consumers with cost savings or guaranteed service quality levels. These types of innovative services can benefit consumers.<sup>21</sup> It makes no sense to treat consumers as unserved because they choose to adopt such services and derive value from them.

---

<sup>18</sup> Notice, at ¶ 12.

<sup>19</sup> Notice, at ¶ 18.

<sup>20</sup> *Twentieth Report* (Public Draft), at ¶ 8 (internal cites omitted).

<sup>21</sup> See, e.g., Theodore Bolema, “Allow Paid Prioritization on the Internet for More, Not Less, Capital Investment,” Free State Foundation (May 1, 2017), available at: [http://www.freestatefoundation.org/images/Allow\\_Paid\\_Prioritization\\_on\\_the\\_Internet\\_for\\_More,\\_Not\\_Less,\\_Capital\\_Investment\\_050117.pdf](http://www.freestatefoundation.org/images/Allow_Paid_Prioritization_on_the_Internet_for_More,_Not_Less,_Capital_Investment_050117.pdf); Michael Horney, “Zero-Rating Promotes Upward Mobility for Minority and Low-Income Consumers, *FSF Blog* (May 13, 2016), available at: <http://freestatefoundation.blogspot.com/2016/05/zero-rating-promotes-upward-mobility.html>.

#### **IV. The Commission Should Focus on Whether Some Form of Advanced Telecommunications Capability Is Being Timely and Reasonably Deployed**

Although fixed and mobile broadband are distinct technologies,<sup>22</sup> they are competing and potentially substitutable services. The Commission should therefore adopt its proposal to incorporate both fixed and mobile advanced telecommunications services into its Section 706 inquiry and thereby focus its inquiry on “whether some form of advanced telecommunications capability, be it fixed or mobile, is being deployed to all Americans in a reasonable and timely fashion.”<sup>23</sup>

As indicated in Section II, as of January 2017, 92% of American consumers had access to four or more 3G mobile service providers, and as of December 2016, 89% had access to four or more 4G LTE providers.<sup>24</sup> Moreover, speeds will continue to increase, as mobile broadband providers continue to leverage multiple spectrum bands for faster 4G speeds and as providers begin rolling out 5G networks. Average speeds for 5G mobile networks will be up to 10 times faster than 4G networks, with peak speeds that are up to 100 times faster.<sup>25</sup> Moreover, mobile connections represent nearly 72% of all broadband connections,<sup>26</sup> double the amount of fixed broadband connections. And mobile connections continue to grow at a faster rate than fixed broadband connections.<sup>27</sup>

While some consumers may perceive fixed and mobile services as complements, the data shows that many consumers view the two as substitutes. A study by the National

---

<sup>22</sup> Notice, at ¶ 5.

<sup>23</sup> Notice, at ¶ 5, ¶ 10.

<sup>24</sup> *Nineteen Twentieth Report* (Public Draft), at ¶ 7 (internal cite omitted).

<sup>25</sup> See Thomas K. Sawanobori & Paul V. Anuszkiewicz, *High Band Spectrum: The Key to Unlocking the Next Generation of Wireless*, CTIA, at 5 (June 13, 2016), available at <http://www.ctia.org/docs/default-source/default-document-library/5g-high-band-white-paper.pdf>.

<sup>26</sup> *Internet Access Services Report: Status as of June 30, 2016*, Industry Analysis and Technology Division, Wireline Competition Bureau, (April 2017) at 16, Figure 12, available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344499A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344499A1.pdf).

<sup>27</sup> *Internet Access Services Report*, at 2.

Telecommunications and Information Administration found that consumers across income levels are substituting mobile broadband for fixed broadband. For example, 29% of low-income consumers, 18% of middle-income consumers, and 15% of high-income consumers are mobile-only broadband users.<sup>28</sup>

A common hallmark of complementary goods or services is that consumer use of one is dependent upon consumer use of the other. But the data regarding mobile-only consumers reflects the obvious fact that consumer adoption of mobile broadband services does not depend upon simultaneous adoption of fixed broadband services. The large proportion of customers that choose one or the other indicates that enough consumers consider fixed and mobile services to be substitutes and are willing to switch in response to changes in prices or quality of services.<sup>29</sup> This means that the two services are providing a competitive constraint on each other and should be considered to be in the same market.

In sum, evidence of the competitive effects of ongoing cross-platform competition and mobile broadband substitutability for fixed broadband supports adoption of the Notice proposal to focus the Commission's Section 706 inquiry on whether some form of advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.

---

<sup>28</sup> Giulia McHenry, "Evolving Technologies Change the Nature of Internet Use," *NTIA*, (April 19, 2016), Figure 2, available at: <https://www.ntia.doc.gov/blog/2016/evolving-technologies-change-nature-internet-use>.

<sup>29</sup> *See, e.g.*, U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (August 19, 2010), at § 4 (describing the agencies' market definition as focused solely on "demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service"); *see also id.* at § 4 ("Customers often confront a range of possible substitutes for the products of the merging firms. Some substitutes may be closer, and others more distant, either geographically or in terms of product attributes and perceptions").

## **V. The Commission Must Remove Regulatory Barriers to Broadband Infrastructure Investment, Not Impose New Barriers in Competitive Markets**

The Notice rightly emphasizes the need to remove regulatory barriers to broadband infrastructure investment so that these barriers do not unnecessarily impede the deployment of broadband to Americans.<sup>30</sup> Going forward, the Commission should more proactively identify and remove such regulatory barriers using the kinds of deregulatory mechanisms listed in Section 706. Identifying and removing rules for maintaining costly legacy services will allow broadband ISPs to direct more investment resources toward next-generation broadband facility upgrades and deployments.

The Commission should consider reform proposals we suggested in January 2017, whereby the agency can use its authority under Sections 10 and 11 to eliminate regulations that are no longer necessary due to technological advances, competitive market conditions, and consumer choice. By adopting rebuttable presumptions as procedural rules for implementing Sections 10 and 11, the Commission can invigorate the sensible deregulatory orientation of those sections, consistent with the deregulatory thrust of Section 706.

Under Section 10, the Commission “shall forbear” from applying any regulation or provision of the Act to a telecommunications carrier or service “if the Commission determines” enforcement is not necessary to ensure that charges or practices are just and reasonable or necessary to protect consumers, and if it determines that forbearance is consistent with the public interest. In a *Perspectives from FSF Scholars* titled “[A Proposal for Improving the FCC’s Forbearance Process](#),” we recommended that the Commission adopt a procedural rule to implement Section 10’s forbearance requirement: “In making forbearance determinations, absent clear and convincing evidence to the contrary, the Commission shall presume that enforcement

---

<sup>30</sup> Notice, at ¶ 47.

of such regulation or provision is not necessary to ensure that a telecommunications carrier's charges or practices are not unreasonable or unreasonably discriminatory or necessary for the protection of consumers and is consistent with the public interest.”<sup>31</sup>

Section 11 requires the Commission periodically to review telecommunications regulations and states that the agency “shall repeal or modify any regulation it determines to be no longer necessary in the public interest.” In a *Perspectives* titled “[A Proposal for Improving the FCC’s Regulatory Reviews](#),” we recommended that the Commission adopt a similar procedural rule for implementing Section 11’s retrospective review: “Absent clear and convincing evidence to the contrary, the Commission shall presume that regulations under review are no longer necessary in the public interest as a result of meaningful competition among providers of such service.”<sup>32</sup>

Language for these proposed procedural rules track with the terms of Sections 10 and 11, specifying the applicable criteria for deciding whether to grant regulatory relief. Adoption of these procedural rules would not change the substantive criteria of Sections 10 and 11 and thus not be outcome determinative in any specific situation. Rather, these rules would establish rebuttable evidentiary presumptions that match today’s competitive market realities.

Importantly, the D.C. Circuit’s legal reasoning in *NATOA v. NCTA* (2017) bolsters the Commission’s statutory authority to adopt rebuttable presumptions as procedural rules for

---

<sup>31</sup> Randolph J. May and Seth L. Cooper, “A Proposal for Improving the FCC’s Regulatory Reviews,” *Perspectives from FSF Scholars*, Vol. 12, No. 1 (January 3, 2017), available at: [http://www.freestatefoundation.org/images/A\\_Proposal\\_for\\_Improving\\_the\\_FCC\\_s\\_Regulatory\\_Reviews\\_010317.pdf](http://www.freestatefoundation.org/images/A_Proposal_for_Improving_the_FCC_s_Regulatory_Reviews_010317.pdf). See also Reply Comments of the Free State Foundation, 2016 Biennial Review of Telecommunications Regulations, CG Docket No. 16-124, EB Docket No. 16-120, IB Docket No. 16-131, ET Docket No. 16-127, PS Docket No. 16-128, WT Docket No. 16-138, WC Docket No. 16-132 (January 3, 2017), available at: [https://ecfsapi.fcc.gov/file/10103299930129/FSF%20Reply%20Comments%20Sec%2011%20-%20Final\\_2.pdf](https://ecfsapi.fcc.gov/file/10103299930129/FSF%20Reply%20Comments%20Sec%2011%20-%20Final_2.pdf).

<sup>32</sup> Randolph J. May and Seth L. Cooper, “A Proposal for Improving the FCC’s Forbearance Process,” *Perspectives from FSF Scholars*, Vol. 12, No.4 (January 17, 2017), available at: [http://www.freestatefoundation.org/images/A\\_Proposal\\_for\\_Improving\\_the\\_FCC\\_s\\_Forbearance\\_Process\\_011717.pdf](http://www.freestatefoundation.org/images/A_Proposal_for_Improving_the_FCC_s_Forbearance_Process_011717.pdf).

implementing Sections 10 and 11.<sup>33</sup> In *NATOA v. FCC*, the D.C. Circuit upheld the Commission’s adoption of a rebuttable presumption of effective competition in local cable markets in its *Effective Competition Order* (2015).<sup>34</sup> The D.C. Circuit concluded that Congress had not spoken directly to the question of whether the Commission may use rebuttable presumption in lieu of case-by-case findings of fact in applying Section 543. It therefore applied *Chevron*’s deferential standard of review in upholding the Commission’s construction of the statute.

Similarly, Congress has not spoken directly to whether the Commission may use rebuttable presumptions in conducting its analyses under Section 10 and 11. Consistent with *NATOA v. FCC*, the Commission’s adoption of rebuttable presumptions as procedural rules for implementing those sections most likely would be upheld as permissible statutory constructions. This would also be consistent with other prior rulings, such as *Ad Hoc Telecommunications Users Committee v. FCC* (2009) and *Cellco Partnership v. FCC* (2004), which applied *Chevron* to the Commission’s decisions interpreting Sections 10 and 11 more generally.<sup>35</sup>

Additionally, providing a streamlined policy for deployment of small cell infrastructure and removing local government barriers that unduly burden small cell deployment will also help facilitate a vibrant 5G mobile broadband future, consistent with Section 706’s purposes. The Commission should therefore act with dispatch in its current proceedings involving small cells

---

<sup>33</sup> Randolph J. May and Seth L. Cooper, “D.C. Circuit Ruling Supports FCC’s Use of Deregulatory Presumptions,” *Perspectives from FSF Scholars*, Vol. 12, No. 24 (July 27, 2017), available at: [http://www.freestatefoundation.org/images/D.C. Circuit Ruling Supports FCC s Use of Deregulatory Presumptions\\_072717.pdf](http://www.freestatefoundation.org/images/D.C._Circuit_Ruling_Supports_FCC_s_Use_of_Deregulatory_Presumptions_072717.pdf).

<sup>34</sup> *NATOA v. FCC*, No. 15-1295 (D.C. Cir. July 17, 2017); Amendment to the Commission’s Rules Concerning Effective Competition, Report and Order (“Effective Competition Order”), MB Docket No. 15-53 (rel. June 3, 2015)

<sup>35</sup> 573 F.3d 209 (D.C. Cir. 2009); 357 F.3d 88 (D.C. Cir. 2004).

and other wireless infrastructure siting.<sup>36</sup> The supply of available commercial spectrum for mobile broadband use should also be an unceasing Commission priority.

Further, the Notice requests comment on whether there any “market or regulatory obstacles” that stand in the way of investment, innovation, and entrepreneurship.<sup>37</sup> The Commission should recognize market obstacles only in those instances where it has conducted an economically informed analysis and concluded there is an existing or likely market power problem that also results in actual or likely consumer harm. And even if those prerequisites are satisfied, the Commission should consider new regulatory burdens on broadband ISPs or other infrastructure providers as a means for eliminating such market obstacles only to the extent that they are narrowly targeted to such harms and that the likely quantifiable benefits of such regulation would exceed the likely costs.

Finally, it should always be a Commission goal to remove burdensome old regulatory barriers in order to accelerate broadband investment. This holds even if the Commission determines – as it should in this inquiry – that advanced telecommunications capability is being reasonably and timely deployed to all Americans.

---

<sup>36</sup> See Reply Comments of the Free State Foundation, Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declarator Ruling, WT Docket No. 16-421 (April 7, 2017), available at: <https://ecfsapi.fcc.gov/file/1040730794013/FSF%20ReplyCmt%20SmallCell%20040717.pdf>; Comments of the Free State Foundation, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79 (June 15, 2017), available at: <https://ecfsapi.fcc.gov/file/1061589503265/FSF%20Comments%20Re%20Accelerating%20Wireless%20Broadband%20Deployment%20by%20Removing%20Barriers%20to%20Infrastructure%20Investment%20061517.pdf>.

<sup>37</sup> Notice, at ¶ 48.

## **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.

Respectfully submitted,

Randolph J. May  
President

Seth L. Cooper  
Senior Fellow

Free State Foundation  
P.O. Box 60680  
Potomac, MD 20859  
301-984-8253

September 21, 2017