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

In the Matter of	)	
Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans 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	)	GN Docket No. 11-121

COMMENTS OF

THE FREE STATE FOUNDATION[*]

I. Introduction and Summary

The focus of these comments is on the deregulatory context and purpose of Section 706 and how that understanding of Section 706 should inform the Commission in fulfilling its ongoing obligation to inquire into and encourage the deployment of broadband on a reasonable and timely basis to all Americans.

Section 706 is a statement of Congressional policy to guide the Commission in carrying out its other statutory responsibilities in a manner that will encourage the reasonable and timely deployment of broadband to all Americans, and to accelerate that deployment through immediate action where dynamic market conditions call for speedier removal of legacy regulatory restraints. Both the text and the context of Section 706 reveal it to be a provision for effectuating a broader transition from monopoly-era regulation to an environment characterized by convergence and

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free market competition in advanced telecommunications services, especially including broadband.

Unfortunately, recent Commission actions have improperly turned Section 706 into a pretext for raising new barriers to broadband infrastructure investment, imposing new regulations in the name of Section 706. Re-interpreting statutory terms in such a way as to provide support for its pro-regulatory proclivities almost certainly, over time, will have adverse consequences. The costs imposed on broadband providers by increased regulations, such as the recently adopted net neutrality and data roaming mandates, likely will have the effect of discouraging private investment.

For its next Section 706 report, the Commission should return to its prior understanding of the provision as deregulatory policy that guides its exercise of forbearance authority and other means for reducing or eliminating regulatory burdens. At the very least, the Commission certainly should stop invoking Section 706 as the basis for new regulations. Instead, it should put a priority on finding ways to remove barriers through its regulatory review process, through regulatory forbearance actions taken on its own initiative, by reducing regulatory uncertainty concerns related to Title II, by reducing the regulatory costs and burdens on consumers and providers relating to the Universal Service Fund and Intercarrier Compensation regimes, and by taking action to locate and make available more spectrum for flexible commercial use.

The Commission should also ensure that its next Section 706 report focuses on a plain reading of the statute and the ordinary use of terms. It should return to the practice of its earlier reports and make its analysis and determination regarding broadband deployment focus on actual deployment instead of obscuring its inquiry by examining adoption or other considerations.

The Commission's next Section 706 report should also include wireless broadband

deployment in its analysis and determination. A platform-neutral approach is called for by the statute. And given the already significant and increasing importance of wireless broadband, any inquiry that fails to take wireless into account does not present a credible or reliable picture of the reasonableness and timeliness of broadband deployment to all Americans.

II. Section 706 Supports Removing Barriers to Broadband Infrastructure Investment and Deployment by Deregulation

In 1996, Congress amended the Communications Act of 1934 to take account of the developing marketplace competition as telephone companies, cable and satellite operators, and mobile-phone firms began to invade each other's turf. Anticipating that this trend would continue, Congress stated right in the new statute's preamble that it intended for the FCC to "promote competition and reduce regulation."[1] And, in the principal legislative report accompanying the Telecommunications Act of 1996, Congress stated its intent to provide for a "de-regulatory national policy framework."[2]

Congress adopted a statute with a deregulatory thrust, correctly concluding that the development of more competition and more consumer choice should lead to reduced regulation. To this end, the 1996 Act included two related deregulatory tools that are generally not found in other statutes governing regulatory agencies. The first provision states the Commission "shall forbear" from enforcing any regulation if the agency determines it is not necessary to ensure that telecommunications providers' charges and practices are reasonable, or necessary to protect consumers or the public interest.[3] The second requires periodic reviews of regulations so that the commission may determine "whether any such regulation is no longer in the public interest as a

[1] Preamble, 110 Stat. 56; see also H. R. Conf. Rep. No. 104 — 458, at 1 (1996).
[2] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).
[3] 42 U.SC. § 160(c).

result of meaningful economic competition between providers of such service."[4] The agency is required to repeal or modify any regulation it determines to be no longer in the public interest.

It is against this deregulatory backdrop that Section 706 should be understood. Section 706(a) provides that the Commission:

> shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[5]

And in Section 706(b) the Commission is charged conducting an annual inquiry into the state of broadband deployment, pursuant to which:

> the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.[6]

Thus, regardless of any determination about the reasonable timeliness of broadband deployment, Section 706(a) imposes an ongoing, mandatory obligation on the Commission to encourage broadband deployment through regulatory forbearance or similar means. And a negative determination by the Commission pursuant to Section 706(b) triggers an immediacy imperative in removing regulatory barriers to infrastructure investment.

While court precedents – and all agency precedents until late – do not treat Section 706 as an independent source of authority, the Section's terms do define how the Commission should exercise its authority. Section 706's explicit reference to the Commission's regulatory forbearance authority, in particular, signals the deregulatory approach the Commission is to take

[4] 42 U.SC. § 161.
[5] 42 U.SC. § 1302(a).
[6] 42 U.SC. § 1302(b).

in carrying out and meeting its obligations.

Congress's inclusion of forbearance authority in Section 10 of the 1996 Act is highly consequential. One immediate indicia of its significance is the apparent fact that no other regulatory agency has been granted forbearance authority such as that possessed by the Commission. And having in mind the FCC's pre-1996 Act history of frustrated attempts to exercise inherent forbearance authority, Congress surely intended that forbearance be employed by the Commission as circumstances warrant to effectuate what Congress described as the 1996 Act's "pro-competitive, de-regulatory" framework.[7] This is especially so as Congress similarly made Section 10 forbearance mandatory — the FCC "shall forbear" — if certain conditions are met.

From Congress's highly consequential grant of regulatory forbearance authority it follows that Congress's express reference in Section 706 to the Commission's unique regulatory forbearance authority is also highly consequential, providing the deregulatory mechanism and the overall deregulatory thrust of the Commission's mandatory obligation to encourage broadband deployment on a reasonable and timely basis to all Americans. As policy directive for broadband deployment, Section 706 is therefore best understood as a deregulatory provision, and a pro-forbearance provision, in particular.

III. Recent Commission Action Improperly Twists Section 706 into a Policy for Raising Barriers to Broadband Infrastructure Investment and Deployment

Unfortunately, through its recent actions, the Commission has read Section 706 with a pro-regulatory lens, inverting its meaning. A closer reading of a stronger set of agency and judicial precedents as well as basic considerations of policy, however, shows that this pro-regulatory reading is incorrect.

[7] *See* Randolph J. May, "Why Forbearance History Matter," Perspectives from FSF Scholars, Vol. 3, No. 11 (June 17, 2008), available at: http://www.freestatefoundation.org/images/Why_Forbearance_s_History_Matters.pdf.

The Commission has erroneously re-interpreted Section 706 as a standalone source of regulatory power and imposed new regulations on that basis. This pro-regulatory misreading of Section 706 was the centerpiece of the Commission's order imposing an expansive slate of network neutrality regulations.[8] It was repeated by the Commission in its order establishing data roaming regulations.[9] The Commission's Notice of Inquiry similarly identifies both sets of regulations as Section 706-inspired.[10]

As explained earlier, a plain reading of Section 706's text, particularly within the deregulatory context of the 1996 Act and its emphasis on regulatory forbearance, strongly weighs against the Commission's pro-regulatory revisionist approach to Section 706. As a general matter, it strains credulity to think Congress tucked in a major source of new regulatory authority into Section 706, a provision encouraging broadband deployment. "Congress," the U.S. Supreme Court has held, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."[11]

A closer look at the statutory language confirms that the provision is deregulatory in its thrust. Section 706(b)'s proviso that upon a negative finding the Commission "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market," is best understood with reference to Section 706(a). The prior provision mandates the Commission utilize "price cap regulation, regulatory forbearance, measures that promote competition in the

[8] *See* Report and Order ("Open Internet Order"), *In the Matter of Preserving the Open Internet*, GN Docket No. 09-91, WC Docket No. 07-52 (December 23, 2010), at 64-68, paras. 117-123.
[9] *See* Second Report and Order, Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265 (April 7, 2011), at 32-33, para. 64.
[10] Eighth Broadband Progress Notice of Inquiry, In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans 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, GN Docket No. 11-121(August 5, 2011), at 3, para. 3.
[11] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." These actions enumerated in Section 706(a) refer to the easing or removal of regulatory restrictions and barriers to entry in local and long distance voice services as well as in information services. According to standard canons of statutory interpretation, that enumeration also gives a limiting, deregulatory meaning to the term "other regulating methods that remove barriers to infrastructure investment." Specifically, the interpretive canons of *noscitur a sociis* and *ejusdem generis* provide that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[12]

Prior Commission precedents recognized that Section 706 is not an independent grant of agency authority but a deregulatory policy statement meant to guide agency action under other statutory sections. The Commission's 1998 *Advanced Services Order*, in particular, concluded that "the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority."[13]

The Commission's conclusion in its order imposing network neutrality regulations that Section 706(a) "provides the Commission a specific delegation of legislative authority to promote the deployment of advanced services, including by means of the open Internet rules," and its conclusion that "to the extent that any prior order does suggest a construction [of Section 706 as exclusively deregulatory], we now reject it," are not persuasive.[14] The Commission did not adequately explain its departure from precedent, nor is that departure justified by the text and

[12] *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (citations omitted). *See also* Open Internet Order, at 65, para. 118 (explaining the 1998 Advanced Services Order "honored the interpretive canon that '[a] specific provision…controls one[] of more general application'").
[13] Opinion and Order and Notice of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability et al., ("Advanced Services Order"), 13 FCC Rcd 2401 (1998), para 77.
[14] Open Internet Order, at 67, para. 122; *id.* at 122, fn. 381.

context of Section 706.

Nor does the Commission find any support for a pro-regulatory authority view of Section 706 from court precedents. In his statement dissenting the Commission's order imposing network neutrality regulations, Commissioner McDowell noted the Commission's misplaced reading of the D.C. Circuit's decision in *Ad Hoc Telecommunications Users Committee v. FCC*[15] – a decision upholding a deregulatory action by the Commission based on its Section 10 forbearance authority that was guided by section 706.[16] As the D.C. Circuit ruled in *Comcast v. FCC*, "[n]owhere did [the D.C. Circuit] question the Commission's determination that section 706 does not delegate any regulatory authority.[17]

Moreover, imposing new regulatory restraints constitutes a counterproductive policy approach to accelerating broadband deployment by removing barriers to infrastructure investment. In the *International Journal of Communication*, Gerald R. Faulhaber and David J. Farber analyzed the issue of investment efficiency and claims that new regulation can increase the potential value of Internet-related assets in light of direct empirical evidence from spectrum markets and the Commission's March 2008 auction for the 700MHz spectrum of the C block.[18] Since no network neutrality regulatory conditions were attached to the A or B blocks of the 700MHz spectrum, Faulhaber and Farber concluded that the auction created "[a] perfect natural experiment of the effect of the value of a telecoms asset of imposing network neutrality regulation."[19] According to the empirical evidence resulting from this experiment, "Verizon paid $0.76/MHZ-Pop for the encumbered spectrum; the mean winning bid price of the A and B block

[15] 572 F.3d 903 (D.C.Cir. 2009).
[16] See Dissenting Statement of Commissioner Robert M. McDowell, Open Internet Order, at 190, esp. fn 39.
[17] 600 F.3d 642, 609 (D.C.Cir. 2010).
[18] Gerald R. Faulhaber and David J. Farber, "The Open Internet: A Customer-Centric Framework," *International Journal of Communication* 302 (2010), available at: http://ijoc.org/ojs/index.php/ijoc/article/viewFile/727/411
[19] *Id.* at 311.

spectrum was $1.89/MHz-Pop."[20] As Faulhaber and Farber explain:

> regulation thus decreased the value of the spectrum asset by 60%. The evidence speaks loudly and eloquently: imposing network neutrality regulation reduces the value of the affected telecommunication asset and thus reduces the incentive to invest in such assets.[21]

The authors contend that if increased competition is desired, the better policy approach is to look for ways to improve competitive conditions rather than impose unnecessary new rules.

IV. To Accelerate Broadband Deployment, the Commission Should Remove Barriers through Regulatory Forbearance and Other Deregulatory Means

Even if the Commission were to choose to leave untouched its pro-regulatory re-interpretation of Section 706 – which it should not – the Commission should still put a priority on taking deregulatory action to implement Section 706's broadband deployment goals. The Commission should explore all possible avenues of deregulatory or at least non-regulatory action to remove barriers to broadband infrastructure investment.

The Commission should be guided by Section 706 in conducting its review of outdated agency regulations that deserve to be eliminated. It should also be guided by Section 706 in utilizing its forbearance authority by granting forbearance *sua sponte*, rather than simply wait for parties to submit petitions.

Similarly, the Commission should take actions promptly that will remove barriers to broadband infrastructure investment by reducing regulatory uncertainty. For instance, the Commission can close its Title II reclassification of broadband docket.[22] Likewise, the Commission could reduce regulatory uncertainty by clarifying that text messaging and other

[20] *Id*. at 311 (internal cite omitted).
[21] *Id.* at 311.
[22] *See* Notice of Inquiry, In the Matter of Framework for Broadband Internet Service, GN Docket No. 10-127 (June 17, 2010).

short messaging services are information services and not subject to more onerous regulatory burdens. [23] And it could rescind its yet-to-become effective order initiating network neutrality regulation of ISPs.[24]

In its Notice of Inquiry, the Commission rightly points to comprehensive universal service and intercarrier compensation reform as an action it is currently pursuing to reduce barriers to broadband infrastructure investment.[25] To the extent that USF surcharges (taxes) burden consumers, rate-of-return regulations and related subsidies discourage providers from upgrading their systems to all-IP and from deploying broadband, and access charges or other regulatory costs related to the ICC system burden broadband ISPs and divert resources away from broadband deployment, those outdated systems constitute regulatory barriers that can be reduced, and – in the case of the USF high-cost fund and access charges – eventually eliminated.

The Commission's Notice of Inquiry also rightly identifies its current undertaking to make more spectrum available for commercial use as part of its efforts to fulfill the policy purposes behind Section 706.[26] Given the increasingly important role of wireless delivery of broadband services, freeing up additional spectrum for commercial use and allowing for more flexibility in the use of such spectrum are critical non-regulatory steps that can effectively remove barriers to broadband investment.

V. The Commission's Inquiry Should Be Disciplined by a Plain Reading of Statutory Terms that Focuses on Deployment and Includes Wireless Broadband

In conducting its analysis and rendering its judgment regarding the reasonable and timely deployment of broadband to all Americans, the Commission should be guided by the plain

[23] Public Notice Seeking Public Comments, In the Matter of the Petition of Public Knowledge *et al.* for Declaratory Ruling Stating that Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules, WT Docket No. 08-7 (January 14, 2008).
[24] *See* note 8, *infra*.
[25] Notice of Inquiry, at 3, para. 4.
[26] *Id*. at 4, para. 4.

meaning of the words rather than by infusing into its consideration issues that possibly may be related but ultimately not what Congress authorizes the Commission to address.

First and foremost, the Commission's Section 706 inquiry into broadband deployment should, in fact, be focused on *deployment*, not subscription or adoption or other matters. "Deployment," as included in Section 706, is not an ambiguous term. The text plainly calls for an inquiry regarding deployment of physical infrastructure. Unfortunately, the Commission's most recent report suggests the agency now factors into its "reasonableness" and "timeliness" determination – in an amorphous, unconstrained way – various s professed concerns about the rate of "adoption."[27] Adoption is a separate concept involving dynamics such as consumer demand and perceptions. The Commission's novel re-interpretation of Section 706 is almost certainly incorrect, especially since no similar interpretation of "deployment" appeared in previous reports. This expansive reinterpretation also suggests that the Commission is looking for pretexts to impose new regulations in the name of accelerating broadband deployment – even when broadband is being deployed in a reasonable and timely manner to all Americans – by substituting adoption concerns for actual deployment. The Commission should not morph adoption into its definition and determination regarding broadband deployment.

Second, the Commission's 706 inquiry should include wireless broadband deployment into its next determination. Inclusion of wireless broadband is compelled by the statute itself, which states in Section 706(d) that "advanced telecommunications capability" is to be defined "without regard to any transmission media or technology."[28] In light of the fact that growing numbers of

[27] *See* Seventh Broadband Progress Report and Order on Reconsideration ("Seventh 706 Report"), In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans 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, GN Docket No. 10-159 (May 20, 2011), at 13-14, paras. 18-20.
[28] 47 U.S.C. § 1302(d).

consumers are utilizing wireless for data services, including Internet access, and some 25% or more of households are now wireless-only,[29] the most recent 706 report's dismissal of wireless 3G presented an incomplete and therefore inaccurate picture of the current and future state of broadband deployment.[30]

This disregard of wireless broadband similarly suggests the Commission may be looking for pretexts to impose new regulations in the name of accelerating broadband deployment. Such a concern is heightened by the Commission's own reference to its data roaming regulations (not to mention its network neutrality regulations that apply to wireless) as a means of implementing Section 706. In other words, the Commission has imposed regulations on wireless broadband in the name of Section 706 while excluding wireless from the analysis Congress required it to make. This disconnect between Section 706-based regulation of wireless broadband and the absence of Section 706-based inquiry into wireless broadband deployment notwithstanding, the Commission should include wireless broadband deployment in the analysis it conducts as part of its next Section 706 inquiry.

[29] *See, e.g.*, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services ("Fifteenth Wireless Competition Report"), WT Docket No. 09-66 (Released June 27, 2011), at 207, para. 365 (citing a National Health Interview Survey indicating that 26.6% of households are now wireless-only and pointing out that a Nielsen Company survey shows similar numbers regarding 'cut the cord' households).

[30] *See* Seventh 706 Report, at 19-20, para. 33.

VI. Conclusion

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

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September 6, 2011