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# THE FREE STATE FOUNDATION

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## Media Advisory

September 17, 2018

Contact: Randolph May at 301.984.8253

## **FSF Comments: Advanced Telecommunications Capability Is Being Deployed to All Americans in a Reasonable and Timely Fashion**

**Free State Foundation President Randolph J. May and Senior Fellow Seth L. Cooper submitted [comments](#) today in response to the Federal Communications Commission's request for comments regarding Section 706's requirement that the agency report annually regarding "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." The comments demonstrate that the Commission should make an affirmative determination.**

**Below is the Introduction and Summary** of the Free State Foundation's comments submitted today.

**A PDF of these FSF comments, with footnotes, is [here](#).**

### **Introduction and Summary**

These comments are submitted in response to the Commission's Notice of Inquiry regarding Section 706's requirement that the agency determine and report annually on "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." These comments demonstrate that available data supports another affirmative deployment determination in the Commission's upcoming report. Further, these comments support continued use of the 25 Mbps upload/3 Mbps download speeds for defining fixed broadband services and for using LTE coverage with minimum speeds of 5 Mbps upload/1 Mbps download for defining mobile broadband services.

The Commission should not change benchmarks based on aspirations that do not reflect widespread consumer demand and that are not grounded in the text of Section 706. Additionally, these comments show that mobile wireless and wireline services compete for consumers and are substitutable. The Commission's upcoming report should analyze the degree to which those platforms are substitutes for purposes of making the required determination.

Market data available thus far for 2017 supports an affirmative determination that broadband is being reasonably and timely deployed to all Americans. For example, Form 477 data contained in the FCC's updated Broadband Map indicates that, as of June 30, 2017, 94.22% of the U.S. population had access to fixed broadband Internet services offering speeds of at least 25 Mbps/3 Mbps, and 72.57% of the U.S. population were served by 3 or more fixed broadband providers offering speeds of at least 25 Mbps/3 Mbps. As of that date, 93.86% of the population were served by 3 or more providers offering speeds of 10 Mbps/1 Mbps.

Based on annual reports of thirteen large providers, Free State Foundation Research Fellow Michael Horney estimated total annual broadband capital investment increased 13.95% from the end of 2016 to the end of 2017. Ookla speed tests reveal that average mobile download speeds increased to 27.40 Mbps in July 2018, up from 23.05 Mbps a year earlier. Average fixed broadband speeds increased to 96.91 Mbps in July 2018, up from 70.75 Mbps in 2017. The newly-released Form 477 data for 2017 shows further progress in broadband deployment that exceeds 2016 and 2015 – spurred by the current Commission majority's repeal of anti-investment Title II public utility-style regulation.

For purposes of defining “advanced telecommunications capability,” the Commission should retain its fixed broadband benchmark speeds of 25 Mbps/3 Mbps and its mobile broadband benchmark of LTE service with advertised minimum speeds of 5 Mbps/1 Mbps. The Commission should decline to take up Commissioner Jessica Rosenworcel's idea of suddenly ramping up its benchmark to 100 Mbps based on her claim that 25 Mbps is “insufficiently audacious.” The text of Section 706 does not direct the report to be “audacious” or to shoot for the moon. Instead, Section 706 commands a realistic analysis of data regarding deployment of advanced capabilities. Speed benchmarks should reflect capabilities for widely demanded applications. Netflix, Hulu, and Amazon Prime require not more than 10 Mbps for HD streaming or 5 Mbps for standard definition streaming. Sudden arbitrary changes would distract from Section 706's concern with facts about deployment.

Substantial evidence indicates fixed and mobile broadband convergence. For instance: About 60% of global mobile data traffic was offloaded onto fixed networks via Wi-Fi or femtocells in 2016. Comcast and Charter have launched hybrid Wi-Fi/cellular mobile services. DISH Networks has plans for Internet-of-Things (IoT) and 5G services. Ligado Networks has proposed an integrated satellite/terrestrial IoT network.

Mobile data demand continues to rise, particularly for video viewing. A 2017 AOL study found 57% of consumers globally watch videos daily via mobile. Ericsson Mobility expects video to account for 73% of mobile data traffic by 2023. Data from NTIA indicates wireless-only broadband households reached 20% in 2015. And NIH's survey found 54% of U.S. homes were wireless-only for voice services in late 2017.

These data points undermine the *2018 Broadband Progress Report's* conclusion that mobile services are not currently full substitutes for fixed services because they “provide different functionalities” and are “tailored to serve different consumer needs.” Correctly, Commissioner Michael O’Rielly disputed that conclusion: “[M]any consumers view the two as substitutes.” Consumer demands are not heterogeneous for purposes of analyzing reasonable and timely deployment progress. As Commissioner O’Rielly observed: “[C]onsumers, especially in the less affluent and younger populations, are willing to trade speed for flexibility.”

Singular focus on “full substitution” fails to fully take stock of substitution-related data that plainly exists. Rather than fall back on a binary conclusion on full substitution, the Commission's next report should broadly analyze mobile and fixed competition and the degree to which those technologies are substitutable given varying consumer interests. And even if the Commission determines – as it must – that advanced telecommunications capability is being reasonably and timely deployed to all Americans, the Commission proactively should continue to remove regulatory barriers to spur additional infrastructure investment.

**A PDF of the full FSF comments, with footnotes, is [here](#).**

**Randolph J. May**, President of the Free State Foundation, is a former FCC Associate General Counsel and a former Chairman of the American Bar Association's Section of Administrative Law and Regulatory Practice. Mr. May is a past Public Member and a current Senior Fellow of the Administrative Conference of the United States, and a Fellow at the National Academy of Public Administration.

Mr. May is a nationally recognized expert in communications law, Internet law and policy, and administrative law and regulatory practice. He is the author of more than 250 scholarly articles and essays on communications law and policy, administrative law, and constitutional law. Most recently, Mr. May is the co-author, with FSF Senior Fellow Seth Cooper, of the recently released [A Reader on Net Neutrality and Restoring Internet Freedom](#), and [#CommActUpdate - A Communications Law Fit for the Digital Age](#) as well as [The Constitutional Foundations of Intellectual Property](#), and is the editor of the book [Communications Law and Policy in the Digital Age: The Next Five Years](#). He is the author of *A Call for a Radical New Communications Policy: Proposals for Free Market Reform*. And he is the editor of the book, *New Directions in Communications Policy* and co-editor of other two books on communications law and policy: *Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated* and *Communications Deregulation and FCC Reform*.

**Seth L. Cooper** is a Senior Fellow at the Free State Foundation. He previously served as the Telecommunications and Information Technology Task Force Director at the American Legislative Exchange Council (ALEC), as a Washington State Supreme Court judicial clerk and as a state senate caucus staff counsel. He is an attorney, and he graduated from Seattle University School of Law with honors. Mr. Cooper's work has appeared in such publications as *CommLaw Conspectus*, the *Gonzaga Law Review*, the *San Jose Mercury News*, *Forbes.com*, the *Des Moines Register*, the *Baltimore Sun*, the *Washington Examiner*, the *Washington Times*, and *The Hill*.

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