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Congress Should Fund Needed Broadband Maps This Session

by

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I. Introduction and Summary

During the COVID-19 pandemic the exceptional performance of American Internet infrastructure has allowed the vast majority of U.S. residents to maintain a virtual semblance of normal life. Nations that apply a public utility-like regulatory model to broadband service have had to resort to micromanaging Internet usage in order to avoid slowdowns. In this country, by contrast, broadband networks that have been constructed with private capital and operated by the private sector with light-touch regulatory oversight have proven to be up to the challenge of handling above-normal traffic loads.

However, the migration of much of daily life – education, work, healthcare, social interaction – to the online realm has intensified focus on the expansion of coverage to those areas that remain unserved. Government-led efforts to close remaining digital divides should (1) respect broadband providers' ongoing efforts to expand their footprints, and (2) target only those rural and other high-cost locations where commercial offerings have not been viable. Accurate service availability information, in the form of broadband coverage maps, is essential to accomplishing this task.

Congress and the Federal Communications Commission are in agreement on the need for more accurate broadband mapping, but lawmakers must allocate funds – Chairman Ajit Pai has requested the relatively modest sum of $65 million – before the FCC can tackle this problem. There is still time during the current legislative session to appropriate that essential funding.

II. Targeted Government Action Requires More Accurate Broadband Maps

Two documents recently released by the FCC confirm the wisdom of our nation's longstanding (with only a brief interruption) light-touch approach to government oversight of broadband Internet service providers. The first is the October 29, 2020, *Order on Remand* responding to the D.C. Circuit Court of Appeals' decision in *Mozilla Corp. v. FCC*.[1] In it, the agency recognized how well broadband providers have responded to the increased traffic resulting from the COVID-19 pandemic, emphasizing that:

> The robustness and reliability of ISPs' networks have helped make possible the large-scale changes to daily life, including reliance on telework, digital learning, telehealth, and online communications with local and state officials. The record demonstrates that, even with unprecedented increases in traffic during the COVID-19 pandemic, broadband networks have been able to handle the increase in traffic and shift in usage patterns…. [U]nlike the European Union, which takes a utility-style approach to broadband regulation and has had to request that bandwidth intensive services such as Netflix reduce video quality in order to ease stress on its network infrastructure, the United States has not had to take similar steps, despite similar surges in Internet traffic. This country's robust and resilient broadband networks are, in significant part, the result of over two decades of almost continuous light-touch regulation, which has promoted substantial infrastructure investment and deployment.[2]

Ed Gillespie, AT&T Senior Executive Vice President of External & Legislative Affairs, rightly observed this summer that "[p]olicy makers weren't planning for the coronavirus when they decided to impose a light regulatory touch on broadband infrastructure, but good policy produces good results in unpredictable circumstances. That proved to be the case here."[3]

The second is a November 12, 2020, Press Release, based upon the most recent Form 477 data, demonstrating that, from year-2016 to year-end 2019, the number of Americans living where broadband is not available fell by 46 percent.[4] 2018 Form 477 data indicated that "nearly 18.3

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[1] *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).
[2] Order on Remand, *Restoring Internet Freedom*, WC Docket No. 17-108; *Bridging the Digital Divide for Low-Income Consumers*, WC Docket No. 17-287; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, FCC 20-151 (released October 29, 2020), at ¶ 36, available at https://docs.fcc.gov/public/attachments/FCC-20-151A1.pdf (citations omitted).
[3] Ed Gillespie, "Broadband Connectivity During the Age of COVID-19," *AT&T Public Policy Blog* (June 22, 2020), available at https://www.attpublicpolicy.com/fcc/broadband-connectivityduring-the-age-of-covid-19/ (citations omitted).
[4] *See* FCC Press Release, "2019 Broadband Deployment Data Show Digital Divide Is Closing" (November 12, 2020), available at https://docs.fcc.gov/public/attachments/DOC-368112A1.pdf.

million … lack access to fixed terrestrial advanced telecommunications capability,"[5] but by the end of 2019, that number had decreased to 14.5 million.

Thus, the benefits to consumers of broadband network construction and operation driven by private investment and competitive forces are clear: superior performance and steadily expanding coverage. Government support, therefore, should be limited to addressing high-cost gaps in broadband availability – that is, areas presently not served. That is why more accurate maps are so critical. Existing maps based upon Form 477 submissions by Internet service providers – which indicate only if fixed service is provided (or could be provided within a standard service interval) to even one household within a census block – widely are acknowledged to be inadequate.[6] As AT&T CEO John Stankey opined in September:

> First, we need to identify where broadband is unavailable with geographic precision. To close the digital divide, we must know the contours of where the divide starts and ends. We need to telescope our broadband maps from the macro, census-block level to the micro, building level to understand with more precision where broadband is unavailable. The government's existing mapping methodology is past its shelf life. Currently, it does not identify the exact number and location of households that do not have meaningful broadband service, especially in rural areas. [7]

Fortunately, this mapping process is well underway, as I described in a July 2020 *Perspectives from FSF Scholars*.[8] Chairman Ajit Pai initiated a process to modernize the Commission's maps back in 2017.[9] In August 2019, the agency adopted a *Report and Order and Second Further Notice of Proposed Rulemaking* establishing the Digital Opportunity Data Collection (DODC), which will:

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[5] 2020 Broadband Deployment Report, *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 19-285 (released April 24, 2020), at ¶ 94, available at https://docs.fcc.gov/public/attachments/FCC-20-50A1.pdf.

[6] *See, e.g.*, Statement of Commissioner Jessica Rosenworcel, Approving in Part, Dissenting in Part, Second Report and Order and Third Further Notice of Proposed Rulemaking, *Establishing the Digital Opportunity Data Collection*, WC Docket No. 19-195; *Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, FCC 20-94 (released July 17, 2020), available at https://docs.fcc.gov/public/attachments/FCC-20-94A5.pdf (stating that "when a major trade association studied the accuracy of our existing data and maps, it found an error rate of nearly two in five"); Report and Order and Second Further Notice of Proposed Rulemaking, *Establishing the Digital Opportunity Data Collection*, WC Docket No. 19-195; *Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, 34 FCC Rcd 7505 (2019), at ¶ 10, available at https://docs.fcc.gov/public/attachments/FCC-19-79A1.pdf ("It has become increasingly clear that the fixed and mobile broadband deployment data collected on the Form 477 are not sufficient to support the specific imperative of our USF policy goals.") (citation omitted).

[7] John Stankey, "A Game Plan to – Finally – Connect Every American to Broadband," *Politico* (September 8, 2020), available at https://www.politico.com/news/agenda/2020/09/08/a-game-plan-to-finally-connect-every-american-409171.

[8] *See* Andrew Long, "Legislative 'Best Practices' to Expand and Accelerate Broadband Coverage," *Perspectives from FSF Scholars*, Vol. 15, No. 42 (July 29, 2020), at 5-7, available at https://freestatefoundation.org/wp-content/uploads/2020/07/Legislative-Best-Practices-to-Expand-and-Accelerate-Broadband-Coverage-072920.pdf.

[9] *See generally* Further Notice of Proposed Rulemaking, *Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, 32 FCC Rcd 6329 (2017), available at https://docs.fcc.gov/public/attachments/FCC-17-103A1.pdf.

> [R]equire all fixed providers to submit broadband coverage polygons depicting the areas where they actually have broadband-capable networks and make fixed broadband service available to end-user locations. The filings must reflect the maximum download and upload speeds actually made available in each area, the technology used to provide the service, and a differentiation between residential-only, business-only, or residential-and-business broadband services. Fixed providers in the new collection must submit a broadband coverage polygon for each combination of download speed, upload speed, and technology.[10]

The DODC will generate maps depicting where broadband is available through the use of a number of data sources, in particular: (1) "granular and detailed coverage data" provided by Internet service providers in the form of the coverage polygons described above; (2) a master list of the universe of "locations that are, or could be, serviced by a broadband connection" – identified as the "Broadband Serviceable Location Fabric" – over which ISP-provided coverage polygons will be laid; (3) feedback from state, local, and Tribal government entities on the accuracy of the data submitted by ISPs,[11] and (4) crowdsourced information provided by the public.[12]

In March of this year, Congress passed the Broadband Deployment Accuracy and Technological Availability (DATA) Act,[13] which " largely codif[ied] the Commission's overall approach to the Digital Opportunity Data Collection."[14]

However, that legislation did not appropriate the funding needed for the FCC to implement the DODC. Chairman Pai expressed the reality of the situation in the following stark terms: "Congress must give us the resources we need to implement the Broadband DATA Act. Or to put it another way, we need money before maps, dollars before data."[15]

To date, that money has not materialized. But there remains an opportunity during the 116th Congress for an appropriations bill to pass. USTelecom – The Broadband Association, along with a number of rural and agricultural groups, on November 9, 2020, wrote to congressional leaders supporting the appropriation of $65 million, arguing that "[i]f we are going to make

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[10] *See* Report and Order and Second Further Notice of Proposed Rulemaking, *Establishing the Digital Opportunity Data Collection*, WC Docket No. 19-195; *Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, 34 FCC Rcd 7505 (2019), at ¶ 12, available at https://docs.fcc.gov/public/attachments/FCC-19-79A1.pdf.

[11] Second Report and Order and Third Further Notice of Proposed Rulemaking, *Establishing the Digital Opportunity Data Collection*, WC Docket No. 19-195; *Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, FCC 20-94 (released July 17, 2020), at ¶ 1, available at https://docs.fcc.gov/public/attachments/FCC-20-94A1.pdf (*Second Report and Order*).

[12] *See id*. at ¶¶ 62-77.

[13] *See generally* Broadband Deployment Accuracy and Technological Availability (DATA) Act, Public Law 116-130 (March 23, 2020), available at https://www.congress.gov/116/plaws/publ130/PLAW-116publ130.pdf.

[14] *Second Report and Order* at ¶ 2. At its March 2020 Open Meeting, the Commission adopted the *Second Report and Order*, which implements key provisions of the Broadband DATA Act. *See generally id*.

[15] Statement of Chairman Ajit Pai, Second Report and Order and Third Further Notice of Proposed Rulemaking, *Establishing the Digital Opportunity Data Collection*, WC Docket No. 19-195; *Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, FCC 20-94 (released July 17, 2020), available at https://docs.fcc.gov/public/attachments/FCC-20-94A2.pdf.

progress to close the digital divide, we need better, more granular and more accurate maps showing where broadband currently exists – and crucially, where it does not."[16]

One pending piece of legislation that would provide the FCC with the necessary funds is the Rural Broadband Acceleration Act,[17] which would provide a total of $88 million: $25 million in 2020, $9 million in 2021 through 2027.[18] There may well be other legislative vehicles that could be used to fund the mapping process.

III. Conclusion

The unprecedented events of 2020 have revealed two things about the availability of broadband Internet service in America. The first is that the competition and investment made possible by a light-touch regulatory approach best ensure sufficient capacity and footprint expansion. This has been demonstrated, doubly so, in the face of a public-health crisis resulting in substantially more time spent at home and online. The second is that lack of connectivity in areas where construction costs are prohibitive is of even greater concern as core activities – work, healthcare, and, especially, education – migrate to the virtual world.

In 2021, we can expect even greater public focus on efforts to close remaining digital divides. At the same time, it should be acknowledged that the private sector continues to connect areas as yet unserved at an impressive pace. Government intervention in the marketplace must respect and encourage that private investment. Accurate information as to where service is and is not presently available is critical to preventing the use of limited government resources to overbuild existing, commercially operated networks. The FCC has a plan to produce more accurate and granular broadband coverage maps. Congress should recognize the importance of this vital project and promptly provide the funds needed to make it a reality.

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Further Readings

Seth L. Cooper, "Net Neutrality Is Dead, and the Internet Is Much Better Off for It," *Perspectives from FSF Scholars*, Vol. 15, No. 61 (November 18, 2020).

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[16] Letter from American Agri-Women, *et al*. to Senators McConnell and Schumer and Representatives Pelosi and McCarthy (November 9, 2020), available at https://www.ustelecom.org/wp-content/uploads/2020/11/USTelecom-RACA-Broadband-Mapping-Letter-11.9.20.pdf.

[17] A bill to direct the Federal Communications Commission to take certain actions to accelerate the Rural Digital Opportunity Fund Phase I auction, and for other purposes, S. 4201, § 2, available at https://www.congress.gov/116/bills/s4201/BILLS-116s4201is.pdf. *See also* Press Release, "Portman, Brown, Braun, Bennet, Jones, Upton & Clyburn Introduce Bipartisan, Bicameral Legislation to Accelerate Broadband Access Nationwide (July 2, 2020), available at https://www.portman.senate.gov/newsroom/press-releases/portman-brown-braun-bennet-jones-upton-clyburn-introduce-bipartisan.

[18] *See id*. at subsection (a) (adding § 807 to Title VIII of the Communications Act of 1934). As introduced, the Rural Broadband Acceleration Act directed the FCC to create updated maps by October 1, 2020 (that is, prior to the commencement of the RDOF Phase I auction). That deadline has since passed.

Seth L. Cooper, "The FCC Should Reaffirm Its Successful Internet Freedom Policy: Broadband Consumers Are Better Off Now Than Three Years Ago," *Perspectives from FSF Scholars*, Vol. 15, No. 55 (October 21, 2020).

Seth L. Cooper, "Timely Action Will Expand Broadband Amidst the Pandemic," *Perspectives from FSF Scholars*, Vol. 15, No. 44 (August 11, 2020).

Andrew Long, "Legislative 'Best Practices' to Expand and Accelerate Broadband Coverage," *Perspectives from FSF Scholars*, Vol. 15, No. 42 (July 29, 2020).

Randolph J. May, "Don't Regulate the Internet as a Public Utility!" *Perspectives from FSF Scholars*, Vol. 15, No. 29 (June 3, 2020).

Andrew Long, "ISPs, FCC Rise to COVID-19 Challenge: Congress Can, Too," *Perspectives from FSF Scholars*, Vol. 15, No. 24 (May 13, 2020).

Comments of the Free State Foundation, *Restoring Internet Freedom*, WC Docket No. 17-108; *Bridging the Digital Divide for Low-Income Consumers*, WC Docket No. 17-287; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42 (April 17, 2020).