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**Two Wrongs Don't Make a Right:  
NTIA's Endorsement Can't Save the FCC's Flawed Read of Section 706**

by

**Andrew Long \***

In an [ex parte letter dated December 26, 2023](#), the National Telecommunications and Information Administration (NTIA) voiced its support for Federal Communications Commission Chairwoman Jessica Rosenworcel's radical rejection of the plain meaning of [Section 706 of the Communications Act](#). As Free State Foundation scholars hammered home in their [comments](#), Section 706 directs the FCC to complete a narrowly tailored, process-focused task – that is, to assess annually "the *availability* of [broadband] to all Americans" and determine whether it "*is being deployed* to all Americans in a reasonable and timely fashion" (emphasis added). The [Notice of Inquiry](#), however, moved the goalposts to require nothing short of immediate, universal access in order to champion out-of-scope Biden Administration policy priorities such as "affordability," "adoption," and "equitable access."

NTIA's *ex parte* letter, which summarizes a December 21<sup>st</sup> meeting with Commission staff, tees up similarly unavailing reasons to disregard Section 706's unambiguous and well-accepted meaning. In doing so, it falls neatly in line with other Biden Administration efforts to achieve – through administrative agencies and departments, including [Agriculture](#), [Treasury](#), and [NTIA](#) itself – policy objectives (say, the ["fiber-first" agenda](#) laid out in a [March 2021 White House Fact](#)

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[Sheet](#)) to which I and other Free State Foundation scholars collectively refer to as the "[Biden Broadband Plan](#)." (For additional examples, please see the extensive *Further Readings* section, below.) As Christopher Cole wrote in a [Law360 article](#) (subscription required), NTIA's involvement in this proceeding is evidence that "[t]he Biden administration is unifying behind a Federal Communications Commission plan to scrutinize not just physical infrastructure, but metrics like affordability in determining if Americans have equal access to broadband service."

Strength in numbers, perhaps? For NTIA's submission does nothing substantively to bolster the FCC's untenable claim that "anything less than universal *access* [can] be sufficient to reach a positive finding under section 706" (emphasis added). To the contrary, the letter links to analyses *performed by NTIA itself* demonstrating that (1) "[a majority – 58% – of the 24 million offline households express no interest or need to be online,](#)" and (2) [75 percent of offline households would not take an Internet connection even if it were offered for free.](#)

As Commissioner Brendan Carr wrote in his [Separate Statement](#):

During the prior Administration, the FCC's Section 706 reports properly read the statute as directing the Commission to measure the *progress* that providers of advanced telecommunications capability are making in deploying those capabilities to all Americans and to determine whether such progress is reasonable and timely. Reading Section 706 as directing the Commission to determine whether advanced telecommunications capability has already been deployed to 100% of Americans reads the "reasonable and timely" language out of the statute and is inconsistent with Congress's use of the present progressive tense "is being deployed."

And yet, that is precisely the ungrounded interpretation of Section 706 that the *Notice of Inquiry* adopts. But it does not stop there. Instead, through what Free State Foundation scholars characterized in their [comments](#) as "a substantial amount of interpretative sleight of hand," it bootstraps to the precarious position that, because nothing short of immediate and universal access can justify an affirmative Section 706 finding, its goals must be nothing less than "universal deployment, affordability, adoption, availability, and equitable access to broadband throughout the United States."

Meanwhile, NTIA's efforts to bolster the Commission's assertion that its Section 706 inquiry should look beyond availability and the pace of deployment utterly fail to persuade. First, and as noted above, the *ex parte* letter cites two different NTIA-prepared analyses revealing that a significant portion of those households offline by choice – 75 percent – would remain so even if the price of broadband were \$0. Thus, by NTIA's own admission, consumer preferences render wholly unattainable the goal of universal access embraced by the *Notice of Inquiry*.

Second, NTIA's *ex parte* letter relies vaguely on "the guidance offered by Congress in the Infrastructure Investment and Jobs Act (IIJA)" in its endorsement of the FCC's approach. (The FCC's *Notice of Inquiry* fails to do much better, leaning exclusively on a specific sentence buried deep within the 1,000+ page IIJA – a sentence that, as Free State Foundation scholars

[highlighted](#), "incorporates Section 706 by reference solely for definitional purposes, no less" – in a vain attempt to rationalize its regulatory overreach.)

Third, the *ex parte* letter points to an NTIA publication prepared in 1998 in response to a Clinton Administration "goal to connect all Americans to the information infrastructure" – but that publication makes no reference to Section 706, which was passed just two years prior.

Fourth, it quotes the definition of "digital equity" set forth in the Digital Equity Act of 2021, a term not found in Section 706. From there, it engages in some bootstrapping of its own, arguing that "[t]he Section 706 inquiry has the potential to serve as an important indicator of our nation's progress toward achieving digital equity."

No matter what broader policy objectives may be found in the Biden Broadband Plan, however, the congressional direction articulated in Section 706 remains the same: the FCC must conduct an annual, focused inquiry into the "the *availability* of [broadband] to all Americans" and determine whether it "*is being deployed* to all Americans in a reasonable and timely fashion" (emphasis added). Specious arguments to the contrary that invoke policy predilections nowhere found in the text of the statute, whether from one administrative agency (the FCC) or two (the FCC *and* NTIA), cannot change that fact.

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### **Further Readings**

[Comments of the Free State Foundation](#), *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 22-270, Seventeenth Section 706 Report Notice of Inquiry (December 1, 2023).

Seth L. Cooper, "[Pitfalls of FCC's Proposal to Sharply Raise Broadband Benchmark Speed](#)," *FSF Blog* (November 8, 2023).

Randolph J. May and Andrew Long, "[The FCC Should Define 'Broadband' Based on Actual Consumer Usage](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 34 (August 24, 2023).

Seth L. Cooper, "[Congress Should Restore Focus on Bringing Broadband to Unserved Rural Americans](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 30 (July 18, 2023).

Michelle P. Connolly, "[Mindfully Wasteful Spending: The Definition of Broadband](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 20 (May 18, 2023).

Michelle P. Connolly, "[NTIA's BEAD Program Needs Revisions to Succeed](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 50 (October 3, 2022).

Seth L. Cooper, "[A Case for Modest Speed Benchmarks in the FCC's Next Broadband Report](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 44 (September 7, 2022).

Andrew Long, "[The Department of Agriculture \(Obviously\) Is Not the FCC: Why, Then, Is It Dictating Communications Policy?](#)" *Perspectives from FSF Scholars*, Vol. 16, No. 62 (November 29, 2021).

Andrew Long, "[Treasury Department Resurrects the Scary Biden Broadband Plan](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 56 (October 20, 2021).

Seth L. Cooper, "[Say No to the Biden Broadband Plan for Government Subsidies and Price Controls](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 38 (July 27, 2021).

Randolph J. May and Andrew Long, "[Biden Broadband Plan: 'Future Proofing' Is Likely Fool's Proofing](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 32 (June 24, 2021).

Randolph J. May and Andrew Long, "[Biden Broadband Plan – Transparency and Accuracy Required for Sound Policy](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 27 (June 2, 2021).

Randolph J. May and Seth L. Cooper, "[Biden Broadband Plan Favoring Government-Owned Networks Lacks a Constitutional Foundation](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 24 (May 11, 2021).

Randolph J. May and Andrew Long, "[Biden Broadband Plan: Claims That Broadband Is Too Expensive' Are Unfounded](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 23 (May 7, 2021).

Randolph J. May and Andrew Long, "[Biden Broadband Plan: Misdirected Broadband Subsidies Hurt Competition and Consumers](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 21 (April 28, 2021).