

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

In the Matter of)
)
Inquiry Concerning the Deployment of Advanced) GN Docket No. 24-214
Telecommunications Capability to All Americans)
in a Reasonable and Timely Fashion)

**COMMENTS OF
THE FREE STATE FOUNDATION**

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I. Introduction and Summary

These comments are submitted in response to the Commission's Notice of Inquiry regarding Section 706 of the Telecommunications Act of 1996's requirement that the agency assess annually "the availability of advanced telecommunications capability to all Americans" and determine "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." Data regarding broadband availability and deployment for 2023, as well as market reports for early 2024, dictate an affirmative answer to that question. To determine otherwise, the Commission would need to turn upside down and inside out the familiar epigrams: "Statistics don't lie!" and "Facts Matter!"

According to the FCC's National Broadband Map, as of year-end 2023, over 92% of residential units in the U.S. – or 150.3 million units – had access to a wired or licensed fixed wireless service offering 100/20 Mbps or better service. Also, more than 94% – or 154.3 million units – had access to a wired or licensed fixed wireless service offering 25/3 Mbps or better

¹ These comments express the views of Randolph May, President of the Free State Foundation, and Seth Cooper, Senior Fellow and Director of Policy Studies. 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.

service. Between the end of 2022 and the end of 2023, the number of units that did not have access to 100/20 Mbps service via wired or licensed fixed wireless was reduced by 6.5 million. For fiber, at the end of 2022, 38% of units – or nearly 61 million units – had access to 100/20 Mbps or better service offerings, and 43% of units – or 70.2 million units – had access by the end of 2023.

Importantly, publicly available deployment data and analyst reports for 2023 and early 2024 provide irrefutable indicators that the availability of services meeting the Commission’s benchmark continues to increase, reinforcing the conclusion that broadband is being reasonably and timely deployed to all Americans. For example, RVA, LLC, has reported that fiber deployment to U.S. homes grew 12% or by 9 million in 2023. Last year, cable broadband providers Charter Communications and Comcast Xfinity added 300,000 new rural and 1.1 million new total passings, respectively.

As of late 2023, T-Mobile’s Ultra Capacity 5G service covered 300 million people, and its overall 5G footprint covered more than 330 million people or 98% of the population. AT&T touted that its low-band 5G network covered more than 295 million people and that its mid-band 5G+ network covered more than 210 million people. In December 2023, Verizon announced that its 5G network was available to more than 230 million people. These 5G networks are expanding residential broadband access via fixed wireless access (FWA) services. As CTIA has reported, “Over the past two years, 95% of net new broadband subscribers chose 5G home service,” and “1 out of 5 net 5G home adds were entirely new home broadband subscribers.”

The Commission should include satellite broadband as part of its Section 706 analysis and determination in its upcoming report. The extent of broadband availability and timely deployment to all Americans improves significantly when satellite broadband is considered.

Indeed, the FCC’s National Broadband Map reveals that broadband access is now almost ubiquitous when satellite broadband is considered. As of year-end 2023, about 99% of the U.S. population had access to broadband service with advertised speeds of 100/20 Mbps. The service made available by satellite providers Starlink, HughesNet, and ViaSat plays an important role in increasing ubiquity.

The Free State Foundation's comments in the Commission’s *2024 Section 706 Report* proceeding recommended that the Commission undertake a “fact-intensive analysis of actual consumer needs.”² Under this approach, the Commission would examine particular consumer use cases in selecting a speed benchmark.³ Such use cases must be based upon reasonable assumptions as to representative household size, number of simultaneous users, level of video quality consumed, and more.⁴ That recommendation still deserves consideration. Even if the Commission retains its existing 100/25 Mbps benchmark, the agency should undertake such an assessment grounded in marketplace realities to establish a more objective – and more accurate – baseline for ascertaining when any future increase in broadband speed thresholds would be warranted.

A surface-level assessment indicates that speed benchmarks of 100/20 Mbps likely overstate significantly current use cases for most households. Given that Netflix recommends minimum speed capabilities of 15 Mbps or higher for 4K ultra-high-definition (HD) streaming video and 5 Mbps or higher for 1080p HD streaming video, and that web surfing, social media apps, and streaming music typically require less than 15 Mbps, broadband service with 100/20

² 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, at 17.

³ Comments of the Free State Foundation, GN Docket No. 22-270, at 18.

⁴ Comments of the Free State Foundation, GN Docket No. 22-270, at 18.

Mbps capabilities support common household uses even in homes with multiple simultaneous users and an increase is decidedly unwarranted.

The Commission should not increase its 100/20 Mbps benchmark for defining broadband Internet services. Taken in isolation, the existing benchmark fosters a mistaken impression that anything less than 100/25 Mbps is not “broadband” at all. Increasing the benchmark at this point would create an even more misleading picture of the state of broadband availability and progress in timely deployments. Any subsidy efforts should be directed, first and foremost, to unserved areas. But deeming areas with over 100/20 Mbps capabilities as effectively unserved or underserved risks diverting subsidies to areas that are easier to build out infrastructure instead of the shrinking number of areas where residents have access to services speeds between 25/3 Mbps and 0/0 Mbps.

The Notice proposes to analyze adoption, affordability, and equitable access in its inquiry and upcoming report. Those concerns may be worth studying independent of this proceeding, but the text of Section 706 focuses on availability and timely deployment. It would be contrary to the statute for the Commission to make adoption, pricing, and equity concerns the basis for the agency’s Section 706 determination.

Due to the Supreme Court’s June 2024 decision in *Loper Bright Enterprises v. Raimondo* overruling the Chevron Doctrine, Section 706 can no longer be relied upon by the Commission as an affirmative grant of agency regulatory power. The Commission’s reinterpretation of Section 706 as a grant of authority, as set forth in its April 2024 *Safeguarding and Securing the Open Internet Order*, cited the D.C. Circuit’s decisions in *Verizon v. FCC* (2014) and *US Telecom v. FCC* (2016) that applied *Chevron* deference and upheld as reasonable the agency’s interpretations of Section 706(a) and -(b) as grants of power. Those lower court precedents are

no longer controlling. Although the Commission’s 706 inquiry may include “technical” matters within the agency’s expertise, the question of whether the statute’s best reading is that it constitutes a grant of regulatory power or, instead, is intended as a guide for the exercise of other statutory powers is not a question within the agency’s expertise. Section 706’s lack of any terms clearly granting the Commission rulemaking power, combined with Section 706’s explicit direction regarding removing regulatory barriers to infrastructure investment through forbearance, price caps, and the like, indicate that Section 706 is best read as hortatory, not as an independent grant of regulatory authority. The Commission should return to that view and recognize that expanding the scope of its Section 706 analysis beyond consideration of availability and deployment will not gain the agency any new powers.

Regardless of whether the Commission determines under Section 706 – as it should in this proceeding – that broadband is being reasonably and timely deployed to all Americans, the Commission should exercise its other powers to identify and remove regulatory barriers to broadband infrastructure investment.

To further promote investment in the broadband network infrastructure, particularly for mobile and 5G FWA services, the Commission should work proactively to make more spectrum available for commercial use, particularly mid-band spectrum. It should advance every proposal for spectrum that may realistically be suitable for commercial uses – whether on a licensed or unlicensed basis. A larger spectrum supply will improve broadband availability and speed up deployment.

Also, to avert the threat of rate regulation to future investment in broadband infrastructure under Title II of the Communications Act, the Commission should reverse the *Safeguarding and Securing the Open Internet Order* and reclassify broadband as a lightly-regulated “information

service” under Title I. Although the order currently is stayed by the Sixth Circuit because it likely violates the Major Questions Doctrine, the looming threat of rate regulation remains while the litigation is pending. The Commission should provide regulatory certainty to the private market and promote network infrastructure investment by reversing that order.

II. The Commission Should Find That Broadband Is Being Deployed to All Americans in a Reasonable and Timely Fashion

A. The FCC’s National Broadband Map Supports an Affirmative Finding

The upcoming *Eighteenth Section 706 Report* presumably will focus on progress made in deploying fixed and mobile broadband Internet access services in 2023. In sum, the fourth iteration of the FCC’s National Broadband Map provides a strong basis for the Commission to conclude that broadband Internet access service is being deployed to all Americans in a reasonable and timely fashion under Section 706.

According to the latest version of the FCC’s National Broadband Map, as of year-end 2023, over 92% of residential units in the U.S. – or 150.3 million units – had access to a wired or licensed fixed wireless service offering 100/20 Mbps or better service.⁵ Also, more than 94% – or 154.3 million units – had access to a wired or licensed fixed wireless service offering 25/3 Mbps or better service.⁶

Notably, the FCC’s National Broadband Map reveals significant improvements in broadband availability over a short period. Between the end of 2022 and the end of 2023, the number of units that did not have access to 100/20 Mbps or better service via wired or licensed fixed wireless was reduced by 6.5 million.⁷ At the end of 2022, only 26.19% of units – or 41.9 million units – had access to FWA services offering 100/20 Mbps or better, and by the end of

⁵ FCC National Broadband Map, at: <https://broadbandmap.fcc.gov/home>.

⁶ FCC National Broadband Map, at: <https://broadbandmap.fcc.gov/home>.

⁷ FCC National Broadband Map, at: <https://broadbandmap.fcc.gov/home>.

2023, nearly 42% – or 68.6 million units – had access.⁸ For fiber, at the end of 2022, 38% of units – or nearly 61 million units – had access to 100/20 Mbps or better service offerings, and 43% of units – or 70.2 million units – had access by the end of 2023.⁹ These figures – which exclude satellite broadband service offerings – show the number of unserved locations is not only modest but shrinking. The number of unserved locations undoubtedly has decreased in 2024.

Furthermore, the FCC’s National Broadband Map shows that, at the end of 2023, 4G LTE mobile service offering speeds of at least 5/1 Mbps covered 67.98% of the geographic area of the U.S., up from 66.22% at the end of 2022. At the end of 2023, 5G mobile service offering 35/3 Mbps covered 30.99%, up from 24.51% at the end of 2022.

B. Market Data and Reports Support an Affirmative Finding

Importantly, publicly available deployment data and analyst reports for 2023 and early 2024 provide strong indicators that the availability of services meeting the Commission’s benchmark continues to increase, reinforcing the conclusion that broadband is being reasonably and timely deployed to all Americans:

- **Fiber Broadband Access.** According to RVA, LLC, fiber deployment to U.S. homes grew 12% or 9 million in 2023.¹⁰ RVA, LLC, also found that 51.5% of primary homes in the U.S. now have access to fiber.¹¹ BroadbandNow found that the average fiber access rate was 55.6% of U.S. households in June 2023, up from 45.9% of households in December 2021.¹²

⁸ FCC National Broadband Map, at: <https://broadbandmap.fcc.gov/home>.

⁹ FCC National Broadband Map, at: <https://broadbandmap.fcc.gov/home>.

¹⁰ See Fiber Broadband Association, “Fiber Broadband Association Reports North America Hit Highest Annual FTTH Growth Record” (December 11, 2023), (citing research by RVA, LLC), at: <https://fiberbroadband.org/2023/12/11/fiber-broadband-association-reports-north-america-hit-highest-annual-ftth-growth-record/>.

¹¹ See Fiber Broadband Association, “Fiber Broadband Association Reports North America Hit Highest Annual FTTH Growth Record.”

¹² Tyler Cooper, “Over Half of America Now Has Access to Fiber,” BroadbandNow (November 14, 2023), at: <https://broadbandnow.com/research/fiber-penetration-trends>.

- Cable Broadband Access. During 2023, Charter Communications expanded its gigabit cable footprint by adding 300,000 new rural passings in 2023.¹³ In the first half of April 2024, Charter added about 162,000 rural passings.¹⁴ Also, Comcast Xfinity reportedly added 1.1 million residential and business passings in 2023,¹⁵ with additional buildout ongoing in 2024.
- 5G Fixed Wireless Access (FWA). In 2023, T-Mobile added 2.1 million subscribers to its 5G Home Broadband FWA service, and Verizon gained about 1.7 million subscribers to its FWA service.¹⁶ Also, AT&T launched its AT&T Internet Air service in 2023, gaining about 93,000 subscribers that year. During the second quarter of this year, T-Mobile added 406,000 FWA subscribers,¹⁷ for 5.6 million total, Verizon added 378,000 FWA subscribers, for a total of 3.8 million,¹⁸ and AT&T launched its AT&T Internet Air service and signed up over 139,00 subscribers for a total of 350,000.¹⁹ According to CTIA: “Over the past two years, 95% of net new broadband subscribers chose 5G home service—and importantly, 1 out of 5 net 5G home adds were entirely new home broadband subscribers.”²⁰
- Mobile Broadband Access. In October 2023, T-Mobile announced that its Ultra Capacity 5G service covered 300 million people and that its overall 5G footprint covered more than 330 million people, or 98% of the population.²¹ AT&T touts that its low-band 5G network covers more than 295 million people and that its mid-band 5G+ network covers

¹³ Charter Communications, “Fourth Quarter and Full Year 2023 Results” (February 2, 2024), at: <https://ir.charter.com/static-files/ba52d4ff-3a83-415b-8c1a-1f0a9a12df8b>.

¹⁴ Charter Communications, Earnings Release: “Charter Announces First Quarter 2024 Results” (April 26, 2024) (reporting an additional 73,000 rural passings), at 1, at: <https://ir.charter.com/static-files/82ac17e1-3415-407a-a861-15a6e9207cdc>; Charter Communications, Earnings Release: “Charter Announces Second Quarter 2024 Results” (July 26, 2024) (reporting an additional 89,000 rural passings), at:

¹⁵ Comcast, Press Release: “Comcast Reports 4th Quarter 2023 Results” (January 25, 2024), at: <https://www.cmcsa.com/news-releases/news-release-details/comcast-reports-4th-quarter-2023-results>.

¹⁶ T-Mobile, Earnings Release: “T-Mobile Delivers Industry-Leading Growth in Customers, Service Revenues and Profitability in Q2, Raises 2024 Customer and Cash Flow Guidance,” (June 30, 2024), at:

https://s29.q4cdn.com/310188824/files/doc_financials/2024/q2/Q2-2024-Earnings-Release-vFinal.pdf; Verizon, News Release: “Verizon finishes 2023 with strong cash flow and wireless customer growth” (January 23, 2024), at <https://www.verizon.com/about/sites/default/files/4Q23-Earnings-Release-Final.pdf>. (Verizon figures cited above are based on a composite of all four quarterly earnings reports for 2023.)

¹⁷ T-Mobile, Earnings Release: “T-Mobile Delivers Industry-Leading Growth in Customers, Service Revenues and Profitability in Q2, Raises 2024 Customer and Cash Flow Guidance.”

¹⁸ Verizon, Press Release: “Verizon delivers strong wireless service revenue and broadband subscriber growth in Q2” (July 22, 2024), at: <https://www.verizon.com/about/news/verizon-delivers-strong-wireless-service-revenue-and-broadband-subscriber-growth-q2>.

¹⁹ AT&T, Press Release: “AT&T Second-Quarter Results Demonstrate Consistent, Strong 5G and Fiber Customer Growth,” (July 22, 2024), at: <https://about.att.com/story/2024/q2-earnings.html>; Jeff Baumgartner, “AT&T in a ‘race to convergence,’ CEO says,” *LightReading* (July 24, 2024), at: <https://www.lightreading.com/broadband/at-t-in-a-race-to-convergence-ceo-says>.

²⁰ CTIA, “2024 Annual Survey Highlights” (September 10, 2024), at: <https://www.ctia.org/news/2024-annual-survey-highlights>.

²¹ T-Mobile, Press Release: “T-Mobile’s Ultra Capacity 5G Covers 300 Million People Months Ahead of Schedule” (October 24, 2023), at <https://www.t-mobile.com/news/network/t-mobiles-ultra-capacity-5g-covers-300-million-people-months-ahead-of-schedule>.

more than 210 million people.²² Also, in December 2023, Verizon announced that its 5G network was available to more than 230 million people.²³ And in March of this year, EchoStar certified to the FCC that it has deployed a 5G network that offers download speeds of at least 35 Mbps to 70% of the population.²⁴

- **Internet Speed Increases.** Ookla, speed test results showed several states had double-digit increases in test results with speeds of 100/20 Mbps, with the highest increases taking place in New Mexico (50%), Arizona (45%), and Minnesota (38%), and Nevada (37%).²⁵ According to Ookla’s Speedtest Global Index, the median speed in the U.S. in August 2024 for fixed services was 242.27/36.19 Mbps, and for mobile services it was 103.73/8.24 Mbps.²⁶
- **Strong Private Investment in Network Infrastructure.** For fixed wireline providers, capital expenditures by U.S. broadband providers surged to \$102.4 billion in 2022, according to USTelecom’s “2022 Broadband Capex Report.”²⁷ Collectively, cable broadband providers invested \$21.7 billion in 2022 alone to build and expand their networks.²⁸ Those investment totals were likely similar in 2023. Moreover, according to one analyst, 5-year capital investment in fiber-to-the-home (FTTH) technology and services between 2022 and 2026 “will exceed all investment in FTTH to date, surpassing \$125 billion in the reporting period.”²⁹ CTIA reported that annual wireless investment totaled \$30 billion in 2023.³⁰ WIA reported that “[t]he U.S. cellular industry spent \$11.6 billion building additional capacity and coverage into the nation’s wireless networks in 2023.”³¹
- **Mobile Broadband Access.** In October 2023, T-Mobile announced that its Ultra Capacity 5G service covered 300 million people and that its overall 5G footprint covered more

²² AT&T, “5G Coverage Map,” at: <https://www.att.com/5g/coverage-map/> (last checked May 29, 2024).

²³ Verizon, Press Release: “Verizon continues gift-giving season with new 5G service in Kennesaw, GA” (December 21, 2023), at: <https://www.verizon.com/about/news/verizon-continues-gift-giving-season-new-5g-service-kennesaw-ga>.

²⁴ DISH Network, Press Release: “EchoStar Completes Nationwide Test Drive for Boost Wireless Network, Completing All 2023 FCC Commitments” (March 14, 2024), at: <https://about.dish.com/2024-03-14-EchoStar-Completes-Nationwide-Drive-Test-for-Boost-Wireless-Network,-Completing-All-2023-FCC-Commitments>.

²⁵ See Sue Marek, “How the 50 U.S. States Stack up in Broadband Speed Performance: 1H 2024 (October 1, 2024), at: <https://www.ookla.com/articles/us-broadband-speed-performance-q2-2024>.

²⁶ Ookla, “Speedtest Global Index – United States Median Country Speeds Updated August 2024,” at: <https://www.speedtest.net/global-index/united-states#fixed> (last checked October 2, 2024).

²⁷ USTelecom, “2022 Broadband Capex Report” (September 8, 2023), at: <https://www.ustelecom.org/research/2022-broadband-capex/>.

²⁸ NCTA, “Broadband Facts & Stats,” at <https://www.ncta.com/broadband-facts> (last checked May 28, 2024).

²⁹ Matt Vincent, “5-year U.S. fiber investment to surpass all previous years combined: RVA,” Lightwave (March 14, 2022), at: <https://www.lightwaveonline.com/broadband/article/55031628/5-year-us-fiber-investment-to-surpass-all-previous-years-combined-rva>.

³⁰ CTIA, “2024 Annual Survey Highlights” (September 10, 2024), at: <https://www.ctia.org/news/2024-annual-survey-highlights>.

³¹ WIA, “Wireless Infrastructure By The Numbers: 2023 Key Industry Statistics” (April 16, 2023), at: https://go.wia.org/wp_2023. See also WIA, “Connectivity Enables Innovation: Wireless Infrastructure Association Report Reveals Industry’s Critical Role in Fueling Economic Growth,” WIA Blog (April 16, 2024), at: <https://wia.org/wireless-infrastructure-association-report-reveals-industrys-critical-role-in-fueling-economic-growth/>.

than 330 million people, or 98% of the population.³² AT&T touts that its low-band 5G network covers more than 295 million people and that its mid-band 5G+ network covers more than 210 million.³³ Also, in December 2023, Verizon announced that its 5G network was available to more than 230 million people.³⁴ And in March of this year, EchoStar certified to the FCC that it has deployed a 5G network that offers download speeds of at least 35 Mbps to 70% of the population.³⁵

- Cell Site Construction. CTIA reported that the total number of cell sites in the U.S. grew in 2023 to 432,469 – up 24% from 2018.³⁶ WIA reported there were 202,100 outdoor small cells in 2023.³⁷ Additionally, WIA reported that 153,400 purpose-built cell towers were operating in 2023, up from 142,100 in 2022. WIA also reported that 244,800 macrocell sites were operating in 2023, up from 209,500 in 2022.³⁸

C. Satellite Broadband Should Be Included in the Commission’s Inquiry, and Satellite Broadband Access Supports an Affirmative Finding

The Notice asks if the Commission should treat satellite service as a part of its Section 706 inquiry.³⁹ The answer is yes. In many or most instances, the latest generation of satellite broadband services meet the Commission’s benchmarks for defining broadband, and the text of Section 706 compels a technologically neutral approach to the broadband access and deployment analysis. And there is no good reason for excluding satellite broadband.

The FCC’s National Broadband Map reveals that broadband access is now almost ubiquitous when satellite broadband is considered. As of year-end 2023, about 99% of the U.S.

³² T-Mobile, Press Release: “T-Mobile’s Ultra Capacity 5G Covers 300 Million People Months Ahead of Schedule” (October 24, 2023), at <https://www.t-mobile.com/news/network/t-mobiles-ultra-capacity-5g-covers-300-million-people-months-ahead-of-schedule>.

³³ AT&T, “5G Coverage Map,” at: <https://www.att.com/5g/coverage-map/> (last checked May 29, 2024).

³⁴ Verizon, Press Release: “Verizon continues gift-giving season with new 5G service in Kennesaw, GA” (December 21, 2023), at: <https://www.verizon.com/about/news/verizon-continues-gift-giving-season-new-5g-service-kennesaw-ga>.

³⁵ DISH Network, Press Release: “EchoStar Completes Nationwide Test Drive for Boost Wireless Network, Completing All 2023 FCC Commitments” (March 14, 2024), at: <https://about.dish.com/2024-03-14-EchoStar-Completes-Nationwide-Drive-Test-for-Boost-Wireless-Network,-Completing-All-2023-FCC-Commitments>.

³⁶ CTIA, “2024 Annual Survey Highlights” (September 10, 2024), at: <https://www.ctia.org/news/2024-annual-survey-highlights>.

³⁷ WIA, “Wireless Infrastructure By The Numbers: 2023 Key Industry Statistics.”

³⁸ WIA, “Wireless Infrastructure By The Numbers: 2023 Key Industry Statistics.”

³⁹ FCC, Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans, GN Docket No. 24-214, *Eighteenth Section 706 Report Notice of Inquiry* (released September 2024), at ¶ at 20.

population had access to broadband service with advertised speeds of 100/20 Mbps.⁴⁰

Widespread availability is due almost entirely to satellite providers Starlink, HughesNet, and ViaSat.⁴¹

Indeed, fixed satellite broadband options also improved significantly in 2023 compared to prior years. A December 2023 *PCMag* article spotlighted a filing indicating Starlink served about 1.3 million subscribers, or 59% of the total satellite broadband subscriber base, with 2.2 million subscribers globally.⁴² Its U.S. subscribership likely has increased since then, as a March 2024 study released by Starlink indicates that its global subscribership is now over 2.6 million. That is far more than Starlink's reported global subscribership of only 250,000 in March 2022.⁴³ *PCMag* also reported late last year that satellite broadband provider HughesNet began offering residential subscriber services with advertised download speeds of up to 100 Mbps.⁴⁴ That is up from HughesNet's prior offerings of up to 25 Mbps and 50 Mbps. The improved capabilities are enabled by the deployment of HughesNet's high geostationary orbit Jupiter 3 satellite.

Additionally, Amazon's Project Kuiper network, which will use 6,000 LEO satellites in combination with ground antennae and fiber connections, is expected to begin offering residential service beginning in the fourth quarter of this year.⁴⁵

⁴⁰ FCC National Broadband Map, at: <https://broadbandmap.fcc.gov/home>.

⁴¹ FCC National Broadband Map, at: <https://broadbandmap.fcc.gov/home>.

⁴² Michael Kan, "SpaceX: Starlink Now Has 1.3 Million Customers in the US," *PCMag* (December 13, 2023), at: <https://www.pcmag.com/news/spacex-starlink-now-has-13-million-customers-in-the-us> (citing SpaceX, "Improving Starlink's Latency," at: <https://api.starlink.com/public-files/StarlinkLatency.pdf>).

⁴³ Michael Sheetz, "SpaceX's Starlink sees the in-flight internet market as ripe for an overhaul, executive says," CNBC (March 21, 2022), at: <https://www.cnbc.com/2022/03/21/spacex-starlink-vp-aviation-internet-market-ripe-for-overhaul.html>.

⁴⁴ Michael Kan, "SpaceX: Starlink Now Has 1.3 Million Customers in the US," *PCMag* (December 13, 2023), at: <https://www.pcmag.com/news/spacex-starlink-now-has-13-million-customers-in-the-us>.

⁴⁵ David Anders, "What's the Latest on Amazon's Internet Service, Project Kuiper?" CNET (August 14, 2024), at: <https://www.cnet.com/home/internet/whats-the-latest-on-amazons-internet-service-project-kuiper/>.

Given that satellite networks are increasingly capable of meeting the Commission’s benchmarks for broadband service, no good reason in law or policy exists to exclude satellite platforms from the agency’s Section 706 inquiry. The text of Section 706, meanwhile, states that “advanced telecommunications capability is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”⁴⁶ The statute’s requirements that the Commission should act without regard to transmission technology and users of any technology requires a technologically neutral approach, and it would be contrary to the statute to preclude satellite broadband simply because it is a different platform than fiber, cable broadband, or fixed wireless.

III. The Commission Should Not Increase Its 706 Speed Benchmarks Until Actual Common Use Cases Warrant an Increase

In its *2024 Section 706 Report*, the Commission increased the benchmark definition of broadband Internet access services from 25/3 Mbps to 100/25 Mbps,⁴⁷ and in its Notice, the Commission proposes to maintain the 100/25 Mbps benchmark for the upcoming report.⁴⁸ The Commission should not increase its broadband speed definitions. Taken in isolation, the existing benchmark fosters a mistaken impression that anything less than 100/25 Mbps is not “broadband” at all. Increasing the benchmark at this point would create an even more misleading picture of the state of broadband availability and progress in timely deployments.

The Commission’s speed benchmarks for the definition of broadband service should not be based on the agency’s aspirations and should be independent of actual common uses of

⁴⁶ 47 U.S.C. § 1302(b).

⁴⁷ FCC, Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans, GN Docket No. 22-270, *2024 Section 706 Report* (released March 18, 2024), at: <https://www.fcc.gov/document/fcc-increases-broadband-speed-benchmark-0>.

⁴⁸ *Eighteenth Section 706 Report Notice of Inquiry*, at ¶ 12.

broadband by consumers. As Michelle P. Connolly, Professor of the Practice within the Economics Department at Duke University, two-time Chief Economist for the FCC, and a member of the Free State Foundation's Board of Academic Advisors, wrote in a May 2023 *Perspectives from FSF Scholars*, "Mindfully Wasteful Spending: The Definition of Broadband":

The FCC's definition is supposed to represent the minimum threshold for service to officially count as broadband service. It is not supposed to represent the minimum needed for a household with five gamers, two live streamers, and two grandparents streaming to two ultra-high-definition 4K TVs 24 hours a day. Nor should it. Extremely high speeds are not necessary for every household, and this is not how one should define a minimum threshold for a technology – especially when that minimum threshold will dictate the size and existence of presumed digital divides, how much federal money will be spent to close them, precisely where that money will go, and the extent to which it will be used to subject existing, privately financed networks to government-subsidized competition.⁴⁹

Given that subsidy efforts should be directed, first and foremost, to areas that lack broadband access, further increasing the speed benchmark for defining broadband and thereby deeming areas with over 100/20 Mbps capabilities as lacking access would make no sense for those few areas where residents have access to services speeds between 25/3 Mbps and 0/0 Mbps.

The Free State Foundation's comments in the Commission's *2024 Section 706 Report* proceeding recommended that the Commission undertake a "fact-intensive analysis of actual consumer needs."⁵⁰ Under this approach, the Commission would examine particular consumer use cases in selecting a speed benchmark.⁵¹ Such use cases must be based upon reasonable assumptions as to representative household size, number of simultaneous users, level of video quality consumed, and more.⁵² That recommendation still deserves consideration. Even if the

⁴⁹ Michelle P. Connolly, "Mindfully Wasteful Spending: The Definition of Broadband," *Perspectives from FSF Scholars*, Vol. 18, No. 20 (May 18, 2023), available at: <https://freestatefoundation.org/wp-content/uploads/2023/08/Mindfully-Wasteful-Spending-The-Definition-of-Broadband-051823.pdf>.

⁵⁰ 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, at 17.

⁵¹ Comments of the Free State Foundation, GN Docket No. 22-270, at 18.

⁵² Comments of the Free State Foundation, GN Docket No. 22-270, at 18

Commission retains its existing 100/25 Mbps benchmark, the agency should undertake such an assessment to establish a more objective baseline for ascertaining when any future increase in broadband speed thresholds would be warranted.

A surface-level assessment indicates that speed benchmarks of 100/20 Mbps likely overstate significantly current use cases for most households. Given that Netflix recommends minimum speed capabilities of 15 Mbps or higher for 4K ultra-high-definition (HD) streaming video and 5 Mbps or higher for 1080p HD streaming video, and that web surfing, social media apps, and streaming music typically require less than 15 Mbps, broadband service with 100/20 Mbps capabilities support common household uses even in homes with multiple simultaneous users and an increase is decidedly unwarranted.

IV. The Commission’s Section 706 Inquiry and Report Should Focus on Availability and Deployment, Not Adoption or Other Concerns

Following the approach taken by the Commission’s majority in the *2024 Section 706 Report*,⁵³ the Notice proposes to include considerations about adoption, affordability, and equitable access in its inquiry and upcoming report.⁵⁴ Those concerns may be worth studying independently, but they do not directly factor into Section 706’s directive that the Commission determine “whether telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”⁵⁵ It would be contrary to the statute, and the Commission should not make those concerns the basis for its Section 706 determination.

The Free State Foundation’s comments in the Commission’s *2024 Section 706 Report* proceeding explained that the plain language of Section 706 confines the Commission’s focus to the availability and pace of deployment. Section 60401 of the 1,000+ page Infrastructure

⁵³ See *2024 Section 706 Report*, at 3, ¶ 5.

⁵⁴ *Eighteenth Section 706 Report Notice of Inquiry*, at ¶ 6.

⁵⁵ 47 U.S.C. § 1302(b).

Investment and Jobs Act (IIJA) states that “the term ‘universal service goals for broadband’ means the statutorily mandated goals of universal service for advanced telecommunications capability under section 706 of the Telecommunications Act of 1996 (47 U.S.C. 1302).”

As articulated in those FSF comments, the Commission twisted that lone single sentence in the massive IIJA that incorporates Section 706 by reference solely for definitional purposes for implementing the new Act to mean that a statutory provision more than 25 years old was effectively rewritten by Congress to broaden dramatically the scope of the Section 706 inquiry. The Commission perhaps intended that broad reinterpretation of Section 706 serve as an ostensible source of authority for furthering the Biden Administration’s policy aims regarding broadband adoption, pricing, and equity. However, reading a statutory incorporation by reference as a substantive retroactive revision to the referenced statute, here Section 706, is an improper method of statutory interpretation. The agency’s reinterpretation of the statute made in the *2024 Section 706 Report* and proposed to be repeated for the next report is likely unlawful, and the Commission should revert to its earlier, straightforward reading of Section 706 by focusing on availability and deployment.

Due to developments in Supreme Court jurisprudence that have taken place since the *2024 Section 706 Report*, Section 706 can no longer be relied upon by the Commission as an affirmative grant of agency regulatory power. Free State Foundation scholars have long expressed the view that Section 706 embodies a “deregulatory policy that guides its exercise of forbearance authority and other means for reducing or eliminating regulatory burdens.”⁵⁶

⁵⁶ Comments of the Free State Foundation, Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans, GN Docket No. 11-121 (September 6, 2011), at 2, at: <https://freestatefoundation.org/wp-content/uploads/2019/08/Section-706-Comments-090611-Final.pdf>.

Although the Commission’s April 2024 *Safeguarding and Securing the Open Internet Order*, 606-620 reinterpreted Section 706 as an affirmative grant of regulatory authority, the Commission relied on lower court decisions involving the agency’s discretionary power in interpreting ambiguous statutory terms under the Chevron Doctrine.⁵⁷ In particular, the order cited the D.C. Circuit’s 2014 decision in *Verizon v. FCC* and its 2016 decision in *US Telecom v. FCC* that applied *Chevron* deference and upheld as reasonable the agency’s interpretations of Section 706(a) and -(b) as grants of power.⁵⁸ However, the Supreme Court’s June 2024 decision in *Loper Bright Enterprises v. Raimondo* overruled the Chevron Doctrine.⁵⁹ Thus, the lower court precedents the Commission has relied upon are no longer controlling.

In *Raimondo*, the court explained that “even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions.”⁶⁰ Although the factual inquiry undertaken as part of the Commission’s 706 inquiry may implicate “technical” matters within the agency’s expertise, the question of whether Section 706 provides any affirmative grant of regulatory power to the agency is no longer a matter for the agency’s discretion, but a question of law for the courts to resolve. As the court wrote in *Raimondo*: “It therefore makes no sense to speak of a ‘permissible’ interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.”⁶¹

⁵⁷ Safeguarding and Securing the Open Internet, WC Docket No. 23-320, Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration (*Safeguarding and Securing the Open Internet Order* or “new Title II order”) (released May 7, 2024), at ¶¶ 606-620.

⁵⁸ *Safeguarding and Securing the Open Internet Order*, at ¶ 616 (citing *Verizon v. FCC* 740 F.3d 623, 635-642 (D.C. Cir. 2014) and *US Telecom v. FCC*, 825 F.3d 674, 733-734 (D.C. Cir. 2016)).

⁵⁹ *Loper Bright Enterprises v. Raimondo*, Supreme Court Case Nos. 22-1219, 22-451 (June 28, 2024).

⁶⁰ *Raimondo*, Case Nos. 22-1219, 22-451, at 32.

⁶¹ *Raimondo*, Case Nos. 22-1219, 22-451, at 31.

Section 706's lack of any terms clearly granting the Commission rulemaking power, combined with Section 706's concerns about removing regulatory barriers to infrastructure investment through forbearance, price caps, and the like, indicate that Section 706 is best read as hortatory, not as an independent grant of regulatory power.⁶² The Commission should return to that view, and it should recognize that expanding the scope of its Section 706 analysis beyond consideration of availability and deployment will not gain the agency any new powers.

V. The Commission Should Take Additional Actions to Remove Regulatory Barriers to Broadband Infrastructure Investment

Notwithstanding that Section 706 is not a grant of affirmative regulatory authority, and regardless of whether the Commission determines – as it should in this proceeding – that advanced telecommunications capability is being reasonably and timely deployed to all Americans, the Commission should exercise its other powers to proactively identify and remove regulatory barriers to broadband infrastructure investment.

To further promote investment in the broadband network infrastructure, particularly for mobile and 5G FWA services, the Commission should work proactively to make more spectrum available for commercial use, particularly in the mid-band spectrum. The Commission ought to prioritize the lower 3.1-3.45 GHz band for study and prompt repurposing.⁶³

Although proposals for repurposing different bands are at different stages of development, and each faces unique challenges, the Commission should advance every proposal for spectrum that may realistically be suitable for commercial uses – whether on a licensed or

⁶² See 47 U.S.C. § 1302(b). See also Comments of the Free State Foundation, Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans, GN Docket No. 11-121.

⁶³ See Seth L. Cooper, "Fast Action on the Lower 3 GHz Band Will Secure America's 5G Future," *Perspectives from FSF Scholars*, Vol. 16, No.9 (Feb. 18, 2021), at: <https://freestatefoundation.org/wp-content/uploads/2021/02/Fast-Action-on-the-Lower-3-GHz-Band-Will-Secure-Americas-5G-Future-021821.pdf>.

unlicensed basis. A larger spectrum supply will improve broadband availability and speed up deployment.

Continuation of intensive private capital market investment is critical to ensure the timely deployment of broadband Internet services to all Americans. However, private market investment is now under threat from Title II regulation of rates that will restrict broadband providers' ability to generate financial returns on their investment, thereby disincentivizing future investment that is needed to provide all Americans with timely access to next-generation broadband Internet services.

To avert the threat of rate regulation to future investment in broadband infrastructure, the Commission should reverse the *Safeguarding and Securing the Open Internet Order* that reimposed Title II classification of broadband Internet access services.

Although the order purports to forbear from Sections 201 and 202 for purposes of ex ante and ex post rate regulation,⁶⁴ the order does support rate regulation of broadband Internet access services in other ways.⁶⁵ Notably, the order declined to preempt state-level rate regulation of broadband services, specifically including those termed "broadband affordability programs." New York's Affordable Broadband Act of 2021 (ABA), for instance, requires broadband service providers operating in the state to offer Internet access plans with state-mandated price ceilings, depending on the speeds provided. By some estimates, the law's mandated price-controlled offerings to certain lower-income households apply to over one-third of New York households. The new Title II Order found that "the mere existence of a state affordability program is not rate

⁶⁴ *Safeguarding and Securing the Open Internet Order*.

⁶⁵ See Seth L. Cooper, "The FCC's New Title II Order Allows Harmful Rate Regulation," *Perspectives from FSF Scholars*, Vol. 19, No. 19 (May 21, 2024), at: <https://freestatefoundation.org/wp-content/uploads/2024/05/The-FCCs-New-Title-II-Order-Allows-Harmful-Rate-Regulation-052124-1.pdf>.

regulation” and thus not preempted.⁶⁶ It is conceivable that some affordability programs, including subsidy programs, may be able to help make broadband more affordable for low-income households without setting prices. But state laws setting maximum rate limits or mandating prices certainly constitute rate regulation.

Although the order is currently stayed by the Sixth Circuit, the looming threat of rate regulation remains while the litigation is pending. The stay panel recognized that the order likely violates the Major Questions Doctrine. The Commission could promote further private market investment by reclassifying broadband Internet access service as an “information service” and returning to a regulatory light-touch approach under Title I.

VI. Conclusion

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

Respectfully submitted,

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⁶⁶ *Safeguarding and Securing the Open Internet Order*, at ¶ 275.