

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)

REPLY COMMENTS OF
THE FREE STATE FOUNDATION¹

I. Introduction and Summary

These reply 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." The Free State Foundation's initial comments focused on facts and data points requiring an affirmative answer to that question in the agency's upcoming *Eighteenth Section 706 Report*.

These reply comments emphasize that Section 706 dictates a determination based on the progress in deployment of broadband – not adoption, affordability, equity, or other concepts not included in the statute. Additionally, these reply comments recommend retaining the 100/20 Mbps speed benchmark and rejecting a symmetrical benchmark as well as any 1

¹ These reply comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. 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. While the Introduction and Summary does not contain citations to authorities, the body of the comments contains complete citations to all cases, agency decisions, and other authorities.

Gbps long-term aspirational goal. Considering factors other than deployment would be at odds with Section 706.

The FCC’s National Broadband Map strongly supports an affirmative Section 706 finding. The Map shows that, at the end of 2023, over 92% of U.S. residential units had access to a wired or licensed fixed wireless service offering 100/20 Mbps, and over 94% had access to 25/3 Mbps service. Those figures climb to 99% when satellite service is included. The number of units that lacked access to 100/20 Mbps service via wired or licensed fixed wireless went down by 6.5 million last year. Market data regarding ongoing deployments of fiber, cable, fixed wireless access (FWA), and satellite networks, backed by strong private investment, further support an affirmative finding under Section 706. We agree with the recent statement of Senators Ted Cruz, Marsha Blackburn, and Cynthia Lummis that disregarding or downgrading the role of satellite and wireless broadband services is “divorced from reality” and “perpetuates misinformation about broadband in America.”

The Free State Foundation agrees with commenters who hold that the best reading of Section 706’s directive – to assess annually “the availability” of broadband capability and determine whether it “is being deployed to all Americans in a reasonable and timely fashion” – is that it requires a determination based solely on the progress of broadband deployment. The Commission should not base its determination on adoption, affordability, equity, universal availability, or other concerns that are distinct from deployment and not contained in the statute.

Indeed, we agree with certain commenters that the Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo* (2024) requires a “progress-based” determination of deployment because that is the best interpretation of the statute. Under *Loper Bright*, if a

statutory reading “is not the best, it is not permissible.” Whether broadband is affordable, being adopted, equitable, or universally available are different questions, not presented by a plain reading of Section 706.

Moreover, the overruling of the “Chevron Doctrine” in *Loper Bright* means that the agency can no longer rely on Section 706 as an independent grant of regulatory power. The Commission should return to its previous and correct interpretation of Section 706 as hortatory.

The Free State Foundation also agrees with commenters who support retention of the Commission’s 100/20 Mbps speed benchmark for defining broadband because 100/20 Mbps service enables the use of broadband for widely popular functions used by consumers, including streaming HD video, web surfing, social media, and more. The Commission should not impose a symmetrical speed requirement. Consumers appear to use broadband far more for downloads than for uploads, and a sharp, sudden increase in download benchmark speeds likely would disrupt investment-backed network deployments and operations of many provider participants in subsidy programs. Furthermore, a symmetrical requirement appears at odds with Section 706’s requirement of technological neutrality regarding broadband “without regard to any transmission or media technology” and “using any technology.”

Also, we agree with commenters who have recommended the Commission not readopt its long-term 1 Gbps speed goal. Section 706 does not direct the Commission to make aspirational determinations or use futuristic standards for making determinations about deployment progress. Aspirational or futuristic standards untethered to present-day common consumer use conflict with Section 706’s focus on the immediate and present concern about whether broadband “is being” reasonably and timely deployed to all Americans.

II. Broadband Is Being Deployed to All Americans in a Reasonable and Timely Fashion

The Free State Foundation’s initial comments in this proceeding cited data from the the FCC’s National Broadband Map that support an affirmative finding that broadband is being deployed to all Americans in a reasonable and timely fashion.² For example, the Map indicates that, as of year-end 2023, over 92% of residential units in the U.S. had access to a wired or licensed fixed wireless service offering 100/20 Mbps.³ Also, over 94% had access to a wired or licensed fixed wireless service offering 25/3 Mbps or better service.⁴ And the number of units that lacked access to 100/20 Mbps service via wired or licensed fixed wireless was reduced by 6.5 million compared to a year earlier.⁵ Notably, approximately 99% of households had access to broadband at the end of 2023 when satellite services are included. Furthermore, analysts and market reports for 2023 and early 2024 – regarding the growth of broadband access via fiber, cable, 5G fixed wireless access (FWA), and satellite services – reinforce an affirmative finding under Section 706.⁶

We agree with the recent statement of Senators Ted Cruz, Marsha Blackburn, and Cynthia Lummis that disregarding or downgrading the role of satellite and wireless broadband services is “divorced from reality” and “perpetuates misinformation about broadband in America.” As they pointed out in an October 31, 2024, letter to the heads of the National Telecommunications and Information Administration and the U.S. Census Bureau, “not only does an overemphasis of one technology diminish competition and innovation, but it can

² See FCC National Broadband Map, at: <https://broadbandmap.fcc.gov/home>; Comments of the Free State Foundation (FSF), Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 24-214 (October 7, 2024), at: <https://freestatefoundation.org/wp-content/uploads/2024/10/FSF-Comments-Section-706-Inquiry-100724.pdf>.

³ FCC National Broadband Map, at: <https://broadbandmap.fcc.gov/home>.

⁴ FCC National Broadband Map, at: <https://broadbandmap.fcc.gov/home>.

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

⁶ Comments of FSF, at 7-10.

result in billions in over-spending—such as cases reported by the Wall Street Journal where the cost of an internet connection can exceed the value of the house.” While those comments were directed to the Biden-Harris Administration’s implementation of the \$42 billion BEAD program, they are pertinent to the FCC’s preparation of its Section 706 report as well.⁷

The Free State Foundation agrees with commenters who similarly conclude that broadband is being reasonably and timely deployed to all Americans.⁸ These deployments have been backed by strong private investment. USTelecom reports capital expenditures by U.S. broadband providers totaled \$94.7 billion in 2023.⁹ Additionally, NCTA reports annual cable broadband investment totaled \$23.6 billion in 2023, and CTIA reported annual wireless industry investment of \$30 billion last year.

III. Section 706 Requires a Determination Based Solely on Progress of Deployment

The text of Section 706 requires the Commission to 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.”¹⁰ The Commission’s *2024 Section 706 Report* misconstrued the statute by basing its determination upon a multiplicity of factors, including whether the goal of universal

⁷ See Letter dated October 31, 2024, from Senators Cruz, Blackburn, and Lummis to NTIA and the U.S. Census Bureau at https://www.commerce.senate.gov/services/files/8D084967-54FE-48DC-9839-987FDA079C58?ref=broadbandbreakfast.com&utm_source=substack&utm_medium=email.

⁸ See e.g., Comments of ACA Connects, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 24-214 (October 7, 2024), at 3-5; Comments of CTIA, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 24-214 (October 7, 2024), at 8, 12 (wireless broadband); Comments of NCTA, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 24-214 (October 7, 2024), at 1-2; Comments of WISPA, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 24-214 (October 7, 2024), at 1-4.

⁹ USTelecom, “2023 Broadband CapEx Report” (October 18), at: <https://ustelecom.org/research/2023-ustelecom-broadband-capex-report/>; Comments of NCTA, at 7 (internal cite omitted); CTIA, “2024 Annual Survey Highlights” (September 10, 2024), at: <https://www.ctia.org/news/2024-annual-survey-highlights>.

¹⁰ 47 U.S.C. § 1302(b).

broadband deployment has been accomplished.¹¹ We agree with commenters USTelecom and CTIA that the Commission should not readopt that erroneous interpretation – as the agency proposes to do in the Notice.¹²

Instead, the Free State Foundation agrees with commenters USTelecom and ACA Connects that Section 706 mandates an ongoing “progress-based approach” to broadband deployment.¹³ That determination is not based on other “universal service” goals or factors not contained in the statute, such as adoption, affordability, or equity.¹⁴ Therefore, the Free State Foundation disagrees with commenters, such as Next Century Cities and Public Knowledge, that appear to presume that adoption, affordability, and other considerations beyond deployment are to be part of the Commission’s Section 706 inquiry and determination.¹⁵ We further agree with commenters that basing the Section 706 determination on whether the goal of ubiquitous broadband access has been accomplished is contrary to the statute’s “progress-based approach” that presumes the quest for universal availability is a continuing effort.¹⁶ Making that determination according to whether the goal of universal broadband has been achieved would effectively read out of the statute its progress-based

¹¹ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 22-270, *2024 Section 706 Report* (released March 18, 2024), at ¶ 2, ¶ 5.

¹² See, e.g., Comments of USTelecom, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 24-214 (October 7, 2024), at 2; Comments of CTIA, at 2. See also Notice at ¶ 54, ¶ 58, ¶ 63, ¶ 65.

¹³ See, e.g., Comments of USTelecom, at 5; Comments of ACA Connects, at 3.

¹⁴ See, e.g., Comments of NCTA, at 7 (“Section 706 does not require the Commission to consider affordability of broadband as a factor in evaluating and reporting on broadband availability”); Comments of USTelecom, at 4, 6;

¹⁵ See Comments of Next Century Cities and Public Knowledge, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 24-214 (October 7, 2024), at 1-9. See also Comments of INCOMPAS, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 24-214 (October 7, 2024), at 6-7.

¹⁶ See Comments of USTelecom, at 7; Comments of ACA Connects, at 3, note 8.

language about the reasonableness and timeliness of deployment.¹⁷ The Commission should return to the agency’s prior reading of the statute that focused its inquiry and determination on progress in broadband deployment.

Indeed, we agree with commenters USTelecom and CTIA that the Supreme Court’s June 2024 decision in *Loper Bright Enterprises v. Raimondo* compels an interpretation of Section 706 that requires a “progress-based” determination of whether broadband is being reasonably and timely deployed to all Americans because that is the best interpretation of the statute.¹⁸ As the Court stated in *Loper Bright*, a statute should be given “the reading the court would have reached if no agency were involved.”¹⁹ In other words, “[i]n the business of statutory interpretation, if a statutory reading is not the best, it is not permissible.”²⁰ We agree with commenter ACA Connects that “[w]hether broadband ‘is being deployed,’ ‘is affordable,’ or ‘is being adopted’ are three distinct questions” and that “[t]he annual inquiry called for in section 706(b) concerns only the first of these.”²¹ The question of whether the Notice’s proposed reading of Section 706 as requiring a determination based on actual considerations – such as adoption, affordability, equity, and achievement of ubiquitous access – is not the best interpretation.

Moreover, as explained in the Free State Foundation’s initial comments, the Court’s overruling of the “Chevron Doctrine” in *Loper Bright* means that the Commission can no longer rely on Section 706 as an affirmative grant of agency regulatory power.²² The

¹⁷ See, e.g., Comments of CTIA, at 7.

¹⁸ See, e.g. Comments of USTelecom, at 4; Comments of CTIA, at 2, 5.

¹⁹ *Loper Bright Enterprises v. Raimondo*, Sup. Ct. Case Nos. 22-1219, 22-451 (June 28, 2024), at 31 (cited by Comments of USTelecom, at 4).

²⁰ *Loper Bright*, Sup. Ct. Case Nos. 22-1219, 22-451, at 31 (cited in Comments of CTIA, at 5).

²¹ Comments of ACA Connects, at 3, note 8.

²² Comments of FSF, at 15-16.

Commission’s reinterpretation of Section 706 as a grant of authority, in its *Safeguarding and Securing the Open Internet Order*, was based on lower court decisions that applied “Chevron deference” to prior agency interpretations of Section 706.²³ The Commission should return to its previous reading of the statute – which is the best interpretation – that “the directives to the Commission in section 706(a) and (b) of the 1996 Act to promote deployment of advanced telecommunications capability are better interpreted as hortatory, and not as grants of regulatory authority.”²⁴

IV. The Commission Should Retain Its 100/20 Mbps Speed Benchmark, Not Impose a Symmetrical Requirement, and Discard Its 1 Gbps Long-Term Goal

Consistent with the Free State Foundation’s initial comments, we agree with commenters CTIA and WIA that the Commission should retain its 100/20 Mbps speed benchmark and not increase it or require symmetrical upload and download speeds.²⁵ Drastically and suddenly raising benchmark speeds to ultra-high levels would divert attention away from Section 706’s focus on reasonable and timely access for all Americans. Overemphasizing speeds risks diverting subsidies and pro-deployment programs away from the most important and challenging tasks of connecting unserved and underserved areas. Instead, resources may end up going toward easier objectives, such as boosting already fast networks in easy-to-reach areas.

²³ See Comments of FSF, at 16.

²⁴ Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Order, Report and Order, and Order (released January 18, 2018), at ¶ 268. See also Comments of FSF, Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans, GN Docket No. 17-199 (September 21, 2017), at 7-8, at: <https://freestatefoundation.org/wp-content/uploads/2019/08/FSF-Comments-in-Section-706-Inquiry-Final-092117.pdf>; Comments of FSF, Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans, GN Docket No. 11-121 (September 6, 2011), at 3-8, at: <https://freestatefoundation.org/wp-content/uploads/2019/08/Section-706-Comments-090611-Final.pdf>.

²⁵ See, e.g., Comments of CTIA, at 17; Comments of WIA, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 24-214 (October 7, 2024), at 4; Comments of WISPA, at 3-6.

Accordingly, we disagree with the Fiber Broadband Association, which advocates a symmetrical benchmark of 1 Gbps.²⁶ Such a definition appears to cater to one particular platform technology – fiber – to the exclusion of alternative platforms such as FWA and satellite broadband and is in disregard of the statute’s premise of technological neutrality, as reflected in the statutory definition of advanced communication capability as “without regard to any transmission or media technology” and “using any technology.”²⁷

Additionally, we agree with WIA that consumers have widely adopted services offering faster download speeds than upload speeds (or asymmetrical speeds), demonstrating that broadband access and competitiveness do not depend on the offering of symmetrical speeds.²⁸

Furthermore, the Free State Foundation agrees with commenters NCTA and USTelecom that recommend the Commission not readopt a long-term “aspirational” broadband benchmark speed goal of 1 Gbps.²⁹ Section 706 does not direct the Commission to make aspirational determinations. Nothing in the statute calls for a futuristic standard for making the Section 706 determination about deployment progress. Instead, the best reading of the statute is that the statute requires an analysis of present-day real-world common uses of broadband by consumers. We agree with commenter WISPA that “[s]peculation regarding possible future needs conflicts with the present-tense statutory language” about whether broadband “is being” reasonably and timely deployed to all Americans.³⁰ Certainly, 100/20

²⁶ Comments of the Fiber Broadband Association, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 24-214 (October 7, 2024), at 2-5.

²⁷ 47 U.S.C. § 1302(a), -(d)(1). *See also* Comments of WISPA, at 9.

²⁸ *See, e.g.*, Comments of WIA, at 4.

²⁹ *See, e.g.*, Comments of NCTA, at 12; Comments of USTelecom, at 2-3.

³⁰ Comments of WISPA, at 7.

Mbps service “enables users to originate and receive high-quality voice, data, graphics, and video telecommunications.”³¹ But 1 Gbps service capabilities far exceed the real-world broadband needs of everyday consumers, even in multi-user households.

V. Conclusion

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

Respectfully submitted,

Randolph J. May
President

Seth L. Cooper
Director of Policy Studies & Senior
Fellow

Free State Foundation
P.O. Box 60680
Potomac, MD 20854

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³¹ 47 U.S.C. § 1302(d)(1).