

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Inquiry Concerning Deployment of Advanced) GN Docket No. 17-199
Telecommunications Capability to All Americans)
in a Reasonable and Timely Fashion)

COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association (NCTA) supports the Commission’s proposals to revise the annual Section 706 Report to better reflect the vitality of the marketplace for broadband services in the United States.¹ The Commission should adopt the changes recommended below and conclude that advanced telecommunications capability is being deployed in a reasonable and timely fashion.

INTRODUCTION

The *Notice* presents an opportunity for the Commission to once again make the annual Section 706 Report into a useful tool for monitoring the progress of broadband deployment in the United States. As NCTA has demonstrated on numerous occasions, recent Commissions have turned the assessment required under Section 706 into a results-driven exercise designed to achieve a pre-ordained finding that advanced telecommunications capability was not being deployed in a reasonable and timely manner.²

¹ *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 17-199, Thirteenth Section 706 Report Notice of Inquiry, FCC 17-109 (rel. Aug. 8, 2017) (*Notice*).

² *See, e.g.*, Comments of the National Cable & Telecommunications Association, GN Docket No. 16-245 at 1-2 (filed Sept. 6, 2016) (NCTA 2016 Comments) (“The Commission’s focus on the minutia of broadband performance characteristics detracts from a meaningful assessment of the state of broadband in America; it serves only to augment the complexity of the analysis with little resulting benefit.”); Comments of the National Cable & Telecommunications Association, GN Docket No. 15-191 at 1 (filed Sept. 15, 2015) (NCTA 2015 Comments) (“While the annual report required under Section 706 has the potential to provide a useful analysis of the state of broadband in America, in recent years it has become a results-oriented exercise in which the

As described below, NCTA supports proposals that would increase the reliability and meaningfulness of this annual inquiry. In particular, the Commission should return the focus of the report to deployment of advanced telecommunications capability, rather than analyzing a host of other issues not identified in the statute. To obtain a fuller picture of today's marketplace, the Commission should broaden its analysis to cover multiple speed thresholds. For similar reasons, the Commission's analysis should include all broadband services regardless of technology, as required by the statute. With these sensible changes in its analysis, the Commission should conclude that advanced telecommunications capability is being deployed in a reasonable and timely fashion.

I. THE FUNDAMENTAL PURPOSE OF THE SECTION 706 REPORT IS TO ASSESS THE PROGRESS OF ADVANCED TELECOMMUNICATIONS CAPABILITY DEPLOYMENT

The annual Section 706 report should be a relatively straightforward project of compiling the relevant data and assessing whether it satisfies the statutory test of reasonable and timely deployment. Had the Commission performed this inquiry every year as it was contemplated by the statute – namely, using consistent metrics from year to year and applying a valid and consistent legal standard – the public would have a sound basis on which to understand the state of broadband deployment in the United States.

Unfortunately, in recent years the Section 706 report (1) has not been issued every year, (2) has not applied consistent metrics, and (3) has applied a legal standard that is not grounded in the statute. As a result of those failures, the report has become a meaningless exercise in which the Commission invariably reaches a negative conclusion without any regard to the level of

Commission frequently moves the goal posts to ensure a negative finding on the reasonableness and timeliness of deployment.”).

deployment that actually has taken place.³ In light of these concerns, NCTA welcomes the Commission’s recognition that “our annual inquiry would be aided by establishing a consistent, objective framework using predictable, reliable, and regularly-released public data from sources on which we can rely to evaluate our benchmarks.”⁴

An important step in turning this process into a meaningful assessment would be to focus on advanced telecommunications capability deployment, as required by the statute. Section 706 requires the Commission to “initiate a notice of inquiry concerning 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.”⁵ Moreover, Congress specifically defined “advanced telecommunications capability” in terms of technical network characteristics (“high-speed, switched, broadband”) and the services they enable (“high-quality voice, data, graphics, and video telecommunications”).⁶ Given this statutory directive, the Section 706 inquiry is not the appropriate context for the Commission to examine factors that go beyond deployment into other areas, such as broadband

³ See, e.g., *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 16-245, Twelfth Broadband Progress Notice of Inquiry, 31 FCC Rcd 9140, 9176 (2016), Statement of Commissioner Ajit Pai Approving in Part and Concurring in Part (“[A]s in previous years, this proceeding promises to play out like a 1970s television show: a predictable script that meets a preordained goal. There will, of course, be some drama But everyone knows the denouement: Early next year, the FCC will find that broadband is not being deployed ‘in a reasonable and timely fashion.’”).

⁴ Notice, FCC 17-109 at ¶ 23.

⁵ 47 U.S.C. § 1302(b) (emphasis added).

⁶ *Id.* § 1302(d)(1) (“The term ‘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.”)

subscription levels, performance consistency, and usage allowances, which have occupied an increasingly large portion of recent reports.⁷

In addition to limiting its focus to deployment, the Commission also should apply a legal standard that comports with the statutory language. As NCTA has explained previously, prior reports have set the bar for reasonable and timely deployment so high – 100 percent deployment and adoption of advanced telecommunications capability – that it would be impossible for the Commission to reach a positive finding.⁸ Chairman Pai has aptly referred to this as the “are we there yet” test and explained why it is an improper interpretation of the statute.⁹ The better approach, as suggested in the *Notice*, is to “evaluat[e] progress – specifically, comparing deployment to census blocks in the present year to deployment to census blocks in previous years.”¹⁰

⁷ As NCTA has explained, the Commission can and does examine these issues outside of the Section 706 context. See NCTA 2016 Comments at 6-7.

⁸ NCTA 2015 Comments at 11 n.24 (“Given that the electric grid itself did not even reach all Americans after more than a century, the better interpretation is that ‘reasonable and timely’ refers to progress in deployment over the prior year and not whether the goal of 100 percent coverage has been achieved.”); see also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd 1375, 1489 (2015) (*2015 Report*), Dissenting Statement of Commissioner Michael O’Rielly (“[T]he Report narrowly holds that if some Americans do not have access to 25/3, then the standard isn’t met. This inflexible test constructed by the majority, which ignores the significant time and costs required to expand and upgrade networks, simply does not comport with the statute or with reality. It also ensures that any standard the Commission sets will never be met, which seems to be the purpose.”).

⁹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 11-121, Eighth Broadband Progress Report, 27 FCC Rcd 10342, 10519 (2012), Dissenting Statement of Commissioner Ajit Pai (Pai 2012 Statement) (“Aside from being inconsistent with the statute’s use of the progressive present tense, the Commission’s ‘are-we-there-yet’ test has the added defect of reading the phrase ‘in a reasonable and timely fashion’ out of the statute. We should not treat statutory terms as mere surplusage, especially when there is a way to read the statute that respects every word Congress chose to legislate.”).

¹⁰ *Notice*, FCC 17-109 at ¶ 30; see also Pai 2012 Statement (Section 706 “most naturally requires a comparison of broadband deployment within the country at one point in time with broadband deployment at a later point in time, after which an assessment can be made as to whether ‘reasonable and timely’ advancements have been made.”).

In assessing whether the level of progress is reasonable and timely, the Commission necessarily should consider the challenging business case for deployment in rural areas and the effect of its own subsidy programs in overcoming those challenges. In particular, the Commission's analysis should reflect the significant financial commitments that it already has made pursuant to the Connect America Fund (CAF). While NCTA was highly critical of past decisions to award billions of dollars in subsidies solely to incumbent local exchange carriers for the purpose of delivering services that do not meet the threshold past Commissions set as the definition for "advanced telecommunications capability,"¹¹ any assessment of current gaps in broadband coverage should account for the intended results of that funding and not continue to treat the areas receiving CAF support as if they were truly unserved.

II. THE COMMISSION SHOULD REPORT ON DEPLOYMENT OF MULTIPLE SPEED THRESHOLDS

As NCTA previously has noted, the Commission's decision to adopt a speed benchmark of 25 Mbps downstream and 3 Mbps upstream as the definition of "advanced telecommunications capability" for fixed broadband services in the context of Section 706 is somewhat arbitrary.¹² Millions of consumers purchase services at speeds less than 25/3 Mbps and are able to obtain "high-quality voice, data, graphics, and video telecommunications," which

¹¹ See, e.g., Comments of the National Cable & Telecommunications Association, GN Docket No. 14-126, at 5-6 (filed Mar. 6, 2015) ("Unless significant changes are made, customers that are unserved today will not have access to 25/3 Mbps broadband when CAF Phase II is completed in 2021. To put it bluntly, if 25/3 Mbps is 'table stakes' in 2015, a program that spends over \$10 billion to deliver less than half that speed six years from now is a colossal waste of consumers' money."); see also *2015 Report*, 30 FCC Rcd at 1485, Dissenting Statement of Commissioner Ajit Pai ("Indeed, today's report raises the question: Why are we spending over \$10 billion to deploy something that isn't broadband? Don't those in rural America deserve broadband access? Taken together, our decision last month and our decision today are incoherent.").

¹² As NCTA has explained, in defining advanced telecommunications capability for purposes of the Section 706 report, the Commission should analyze the speeds needed to provide services that consumers regularly use currently, rather than, as in the case of the adoption of the 25/3 Mbps standard, focusing on aspirational speeds for future functionalities. NCTA 2015 Comments at 6-7; Letter from Matthew Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-126, 14-28, and 10-127 at 2-4 (Jan. 22, 2015).

Section 706 defines as the criteria for advanced telecommunications capability.¹³ Therefore, if the Commission decides to continue use of the 25/3 benchmark, its analysis should not ignore broadband offerings at other speeds as well. NCTA consistently has advocated that the Commission move away from focusing on a single speed threshold and instead track progress at multiple speed thresholds.¹⁴ As we stated in 2015, “even if the Commission adopts the proposal in the Notice of Inquiry to retain the 25/3 threshold, it still should ensure that the analysis in the Eleventh Broadband Progress Report does a thorough job of addressing the full range of broadband services available to and used by consumers, and not just the subset of services that the Commission deems to be advanced telecommunications capability.”¹⁵ For example, the Commission could examine speed tiers similar to those it adopted in the CAF Phase II auction proceeding, i.e., 10/1 Mbps, 25/3 Mbps, 100/20 Mbps, and 1 Gbps/500 Mbps.¹⁶

The Commission also should make crystal clear that its determination of whether advanced telecommunications capability is being deployed in a reasonable and timely manner is a narrow finding required for purposes of carrying out the Commission’s statutory responsibilities pursuant to Section 706 that should not be conflated with other contexts in which the Commission may be called on to assess the state of the broadband marketplace. The *Notice* includes a footnote stating that “[A]dvanced telecommunications capability’ is a statutory term with a definition that is more narrow than the term ‘broadband.’ . . . [W]hile all services

¹³ 47 U.S.C. § 1302(c)(1).

¹⁴ NCTA 2015 Comments at 7; Comments of the National Cable & Telecommunications Association, GN Docket No. 14-126, at 3-5 (filed Sept. 4, 2014) (NCTA 2014 Comments) (suggesting that the Commission measure baseline service levels and 2-3 higher speed levels, similar to the Digital Agenda Scorecard released by the European Union).

¹⁵ NCTA 2015 Comments at 7.

¹⁶ *Connect America Fund*, WC Docket Nos. 10-90, 14-58, and 14-259, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 5957-60, ¶¶15-27 (2016).

providing advanced telecommunications capability are ‘broadband,’ not all broadband services provide advanced telecommunications capability.”¹⁷ However, the Commission often does a poor job of distinguishing between the narrow term “advanced telecommunications capability” and the more general use of the term “broadband” in its pronouncements.¹⁸ This leads to confusion for the public and the media about the limited scope of the report’s findings.¹⁹

III. THE SECTION 706 REPORT SHOULD RECOGNIZE THE IMPORTANT ROLE PLAYED BY ALL BROADBAND TECHNOLOGIES

In the past, the Commission generally has not considered the presence of mobile services in making its determination regarding the reasonableness and timeliness of deployment. For a number of reasons, it is long past time for the Commission to take a more inclusive approach and consider all broadband technologies in its analysis.

¹⁷ Notice, FCC 17-109 at ¶1 n.1.

¹⁸ See 2015 Report, 30 FCC Rcd at 1376, ¶1 n.1 (Although the Commission recognized that “‘advanced telecommunications capability’ has a unique definition in section 706 that differs from the term ‘broadband’ in other contexts,” “[f]or simplicity, in this Report we sometimes refer to ‘advanced telecommunications capability’ as ‘broadband.’”); see also NCTA 2015 Comments at 3 n.4 (citing *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, GN Docket No. 15-191, Eleventh Broadband Progress Notice of Inquiry, 30 FCC Rcd 8823, 8845, Statement of Chairman Tom Wheeler (2015) (“Earlier this year, the Commission defined broadband as connections with throughput speeds of at least 25 Mbps downstream and 3 Mbps upstream.”); *id.* at 8856, Statement of Commissioner Jessica Rosenworcel (“And while we keep in place our current 25 Megabit standard for broadband, we also ask about faster speeds in the future.”)).

¹⁹ See, e.g., *The FCC Has Changed the Definition of Broadband*, The Verge, <https://www.theverge.com/2015/1/29/7932653/fcc-changed-definition-broadband-25mbps> (Jan. 29, 2015) (“As part of its 2015 Broadband Progress Report, the Federal Communications Commission has voted to change the definition of broadband by raising the minimum download speeds needed from 4Mbps to 25Mbps, and the minimum upload speed from 1Mbps to 3Mbps, which effectively triples the number of US households without broadband access.”); *FCC Raises Speed Standard on What Qualifies as “Broadband,”* The New York Post, <http://nypost.com/2015/01/29/fcc-raises-speed-standard-on-what-qualifies-as-broadband/> (Jan. 29, 2015) (“Those losing their broadband access due to the new definition join the 6.3 percent of US households who lacked access under the old definition.”); *The FCC Has Set a New, Faster Definition for Broadband*, The Washington Post, https://www.washingtonpost.com/news/the-switch/wp/2015/01/29/the-fcc-has-set-a-new-faster-definition-for-broadband/?utm_term=.90148ad2517e (Jan. 29, 2015) (“As a result of the decision — which also sets the minimum speed for uploads at 3 Mbps — millions of people who subscribe to slower plans will effectively lose their broadband status.”).

As an initial matter, the statute itself compels the Commission to consider the availability of advanced telecommunications capability “without regard to any transmission media or technology.”²⁰ Pursuant to this language, the availability of mobile broadband that meets the definition of advanced telecommunications capability should be examined for purposes of the Commission’s analysis under Section 706.²¹ The Commission should, however, adopt its proposal to establish a benchmark of 10 Mbps downstream and 1 Mbps upstream, rather than 25/3, for mobile services. The lower 10/1 threshold for mobile services appropriately reflects the fact that most mobile connections are used by a single person and a single device, while the 25/3 threshold for fixed services was premised on the assumption that the connection would be used by multiple people and multiple devices simultaneously.²²

Moreover, even if such an approach was not compelled by the statute, any analysis that excludes broadband services used by hundreds of millions of consumers would be inherently flawed. In recent reports, the Commission has stated that mobile service is complementary to, and not a substitute for, fixed service.²³ But the Commission at a minimum should take into

²⁰ 47 U.S.C. § 1302(d)(1) (“The term ‘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.”).

²¹ As NCTA has explained, there is no basis whatsoever for the Commission’s previous decision to require an area to have access to both fixed and mobile broadband in order for advanced telecommunications capability to be deemed deployed in that area. NCTA 2016 Comments at 7 (“requiring access to both fixed and mobile broadband cannot be reconciled with the clear language used by Congress in Section 706”).

²² *2015 Report*, 30 FCC Rcd at 1400, ¶ 38 (average household has 2.58 people and seven internet-connected devices).

²³ *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 16-245, 2016 Broadband Progress Report, 31 FCC Rcd 699, 710, ¶ 24 (2016) (*2016 Report*) (“We find that today fixed and mobile broadband are often used in conjunction with one another and, as such, are not functional substitutes. We base this finding on the capabilities both services offer to consumers, the manner in which these services are marketed to and used by consumers, and evidence suggesting that consumers overwhelmingly purchase both services when they have the financial means.”).

account that many customers choose to subscribe only to one type of service, not both, and that this is adequate to meet their needs.²⁴

NCTA's recommendation to count any broadband service, regardless of technology, that meets the definition of advanced telecommunications capability for purposes of Section 706 does not mean that the Commission should not monitor each type of technology separately. Indeed, given the Commission's decision to create a distinct universal service high-cost support mechanism exclusively for mobile services, monitoring fixed and mobile deployment levels separately is imperative. But for purposes of reaching a conclusion as to the reasonableness and timeliness of deployment pursuant to Section 706, the best approach is for the Commission to consider "the totality of the evidence" as proposed in the *Notice*.²⁵

IV. ADVANCED TELECOMMUNICATIONS CAPABILITY IS BEING DEPLOYED IN A REASONABLE AND TIMELY FASHION

Any rational analysis of the U.S. broadband market necessarily must conclude that advanced telecommunications capability is being deployed in a reasonable and timely fashion. According to a report by US Telecom, as of mid-2016, fixed broadband at speeds of 25/3 Mbps was available to 90 percent of the housing units in the country, while fixed broadband at 10/1 Mbps was available to 95 percent.²⁶ Wired broadband availability at 25/3 Mbps increased from

²⁴ NCTA 2015 Comments at 11; *see also 2016 Report*, 31 FCC Rcd at 783, Dissenting Statement of Commissioner Michael O'Rielly ("The report is quite certain that fixed and mobile broadband aren't substitutes, which is a completely erroneous conclusion, given that it hasn't even defined mobile broadband service yet. But it also runs completely counter to the generational preferences and views on substitutability noted in this very report."); Pew Research Center Mobile Fact Sheet, <http://www.pewinternet.org/fact-sheet/mobile/> (Jan. 12, 2017) (reporting that 12% of U.S. adults use only a smartphone for home broadband access).

²⁵ *Notice*, FCC 17-109 at ¶ 30 ("[W]e propose to analyze fixed and mobile broadband separately and then consider the totality of the evidence in our ultimate determination of whether advanced telecommunications capability is being deployed in a reasonable and timely manner.").

²⁶ US Telecom Research Brief, U.S. Broadband Availability Mid 2016, <https://www.ustelecom.org/sites/default/files/BB%20Availability%202016%201H%20RB%20Final%207.pdf>, at 6 (Aug. 25, 2017).

49 percent in 2010 to 90 percent in mid-2016, and wired broadband at 10/1 Mbps increased from 85 percent in 2010 to 93 percent in 2016.²⁷ In addition, a recent report found that gigabit services are available to 57.5 million Americans, or 18 percent of the population.²⁸ When mobile broadband availability is added to the analysis of fixed broadband, the Commission cannot plausibly conclude that advanced telecommunications capability is not being deployed in a reasonable and timely manner.²⁹

CONCLUSION

The Commission should adopt the recommendations described in these comments and conclude that advanced telecommunications capability is being deployed in a reasonable and timely fashion.

Respectfully submitted,

/s/ Steven F. Morris

Steven F. Morris
Jennifer K. McKee
NCTA – The Internet & Television Association
25 Massachusetts Avenue, NW – Suite 100
Washington, DC 20001-1431

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²⁷ *Id.* at 7.

²⁸ *Gigabit Report: 57.5 Million Americans Now in Gigabit Reach, Chicago and California Lead*, Telecompetitor, <http://www.telecompetitor.com/gigabit-report-57-5-million-americans-now-in-gigabit-reach-chicago-and-california-lead/> (Sept. 7, 2017).

²⁹ *Notice*, FCC 17-109 at ¶6 (“The *Nineteenth Mobile Competition Report* found that most of the U.S. population resides in an area with LTE coverage from at least one service provider and that median download speeds during the second half of 2015 ranged from approximately 8 megabits per second (Mbps) to 15 Mbps.”).