

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

In the Matter of)	
)	
Inquiry Concerning the Deployment of)	GN Docket No. 09-137
Advanced Telecommunications Capability)	
to All Americans in a Reasonable and Timely)	
Fashion, and Possible Steps to Accelerate)	
Such Deployment Pursuant to Section 706)	
of the Telecommunications Act of 1996,)	
as Amended by the Broadband Data)	
Improvement Act)	
)	
A National Broadband Plan)	GN Docket No. 09-51
For Our Future)	

PETITION FOR RECONSIDERATION

The National Cable & Telecommunications Association (NCTA), pursuant to sections 1.429 and 1.430 of the Commission’s rules, hereby requests that the Commission reconsider its *Sixth 706 Report* issued in the above-captioned proceeding on July 20, 2010.¹ NCTA requests that the Commission reconsider both the appropriateness of the dataset relied on in the *Sixth 706 Report* and its conclusion that deployment of broadband networks is not proceeding in a “reasonable and timely” manner.² As demonstrated below, the Commission erred in failing to consider current information and reasonably anticipated developments in reaching its conclusion that the “reasonable and timely” standard was not being met.

¹ 47 C.F.R. §§ 1.429, 1.430; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket Nos. 09-137, 09-51, Sixth Broadband Deployment Report, FCC 10-129 (rel. July 20, 2010) (*Sixth 706 Report*).

² *Sixth 706 Report*, FCC 10-129 at ¶ 2.

INTRODUCTION

Section 706(b) of the Telecommunications Act of 1996, as amended by the Broadband Data Improvement Act, requires the Commission to report annually on whether broadband “is being deployed to all Americans in a reasonable and timely fashion.”³ In its first five reports issued pursuant to section 706(b), the Commission concluded that broadband deployment was taking place in a reasonable and timely manner.⁴ In the *Sixth 706 Report*, however, the Commission for the first time concluded that the “reasonable and timely” standard is not being met.⁵

NCTA disagrees with both the Commission’s analysis and its conclusion that broadband deployment is not reasonable and timely. The analysis was fundamentally flawed because it was the result of applying a new, forward-looking definition of broadband to out-of-date Form 477 data. The Commission essentially disregarded all of the broadband deployment that has occurred since the end of 2008, as well as projects that are anticipated to be completed in the near future.

³ 47 U.S.C. § 1302(b). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996 Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (BDIA), is now codified in title 47, chapter 12 of the United States Code. 47 U.S.C. § 1301 *et seq.* Prior to enactment of the BDIA, the Commission was required to perform inquiries into the state of broadband deployment “regularly.” 47 U.S.C. § 157 note (2007). The BDIA amended this section to require the Commission to perform the inquiries “annually.” 47 U.S.C. § 1302(b).

⁴ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2402, ¶ 6 (1999) (*First 706 Report*); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, 15 FCC Rcd 20913, 20914, ¶ 1 (2000) (*Second 706 Report*); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report, 17 FCC Rcd 2844, 2845, ¶ 1 (2002) (*Third 706 Report*); *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, 19 FCC Rcd 20540 (2004) (*Fourth 706 Report*); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Fifth Report, 23 FCC Rcd 9615, 9616, ¶ 1 (2008) (*Fifth 706 Report*).

⁵ *Sixth 706 Report*, FCC 10-129 at ¶ 2.

Had the Commission used more current data (or had it compared 2008 deployment data to its 2008 definition of broadband), it would have concluded, as it did in its prior five reports, that deployment is taking place in a reasonable and timely manner.

I. THE COMMISSION RELIED ON OUT-OF-DATE FORM 477 DATA

In concluding that broadband deployment in the United States is not reasonable and timely, the Commission relied primarily on Form 477 data reflecting deployment at the end of 2008.⁶ Given that the Commission had more recent Form 477 data available – reflecting deployment as of June 2009 and December 2009 – its analysis was at best incomplete.⁷

Had the Commission considered the more recent data in its possession, some of the largest counties identified as unserved would not have been on the list. Mecklenburg County, North Carolina (population 890,000), Wake County, North Carolina (population 866,000), Richland County, South Carolina (population 364,000), and Lexington County, South Carolina (population 249,000), all currently have access to robust broadband at speeds that meet or exceed the 4 Mbps download and 1 Mbps upload standard cited by the Commission in the *Sixth 706 Report*, but all are identified as unserved areas.⁸ With deployments of next-generation

⁶ *Id.* at ¶ 19 and Appendix D.

⁷ The Commission also identified the cost model prepared in conjunction with the National Broadband Plan as another source of data that supported its conclusion that deployment was not taking place in a reasonable and timely fashion. *Sixth 706 Report*, FCC 10-129 at ¶ 13 (citing *Connecting America: The National Broadband Plan*, GN Docket No. 09-51, at 20, 129, 136, 157 n.6, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf (Omnibus Broadband Initiative, Mar. 16, 2010) (National Broadband Plan) and *The Broadband Availability Gap*, OBI Technical Paper No. 1, Omnibus Broadband Initiative, at 17, <http://download.broadband.gov/plan/the-broadband-availability-gap-obi-technical-paper-no-1.pdf> (Apr. 2010) (OBI Broadband Availability Gap Paper)). But the problems with relying on Form 477 data from 2008 cannot be cured by supplementing them with results from a cost model that has not been publicly disclosed and that estimates deployment based on data from a handful of states and predictions about where broadband might have been deployed. *See* OBI Broadband Availability Gap Paper at 22-23, 24-25. As the staff paper describing the model explains, the limited hard data on which the model is based creates a risk that the results may not be accurate. OBI Broadband Availability Gap Paper at 24-25 (“Since the statistical regression relies on a small number of states, to the extent that the tie between demographics and network availability in the rest of the country is not the same as these states, the regression will not be accurate.”).

⁸ *Sixth 706 Report* at ¶ 11 and Appendix C; *see also AT&T Biennial Report on Video Competition in North Carolina to the Revenue Laws Study Committee*, April 2010,

broadband facilities by cable and telephone companies continuing, as documented in the National Broadband Plan,⁹ it is likely that other counties that have been identified as unserved in the *Sixth 706 Report* now also have broadband service that meets the Commission's specified speed criteria.¹⁰

The Commission also appears not to have considered other ongoing efforts to bring broadband to unserved areas. Two in particular are worth mentioning. First, the Commission apparently gave no consideration to the numerous broadband funding mechanisms that have been created by other federal and state agencies. For example, RUS and NTIA have almost completed the process of distributing \$7 billion in funding from the American Recovery and Reinvestment Act of 2009 (ARRA).¹¹ Unless those agencies have failed in their mission, at least some of that

<http://www.ncleg.net/DocumentSites/committees/revenuelaws/2009-2010/Reports%20to%20Revenue%20Laws/Video%20Programming%20Act%20report/ATT%20ppt.pdf> (stating that U-verse service was deployed in November and December of 2008 in several of the aforementioned "unserved" counties delivering speeds at or above the 4 Mbps downstream and 1 Mbps upstream thresholds); Mike Robuck, *TWC launches D3 in Charlotte*, CED Magazine, July 16, 2010, <http://www.cedmagazine.com/article.aspx?id=170921> (stating that Time Warner Cable launched next generation DOCSIS 3.0 service with 50 Mbps download speed and 5 Mbps upload speed in Charlotte, which is located in Mecklenburg County, North Carolina); *AT&T U-verse Service Arrives in Columbia*, AT&T Press Release, Dec. 22, 2008, <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26421> (announcing the availability of U-verse service with speeds at or above the speed thresholds in Columbia, South Carolina, located in Richland County, in December 2008).

⁹ National Broadband Plan at 20-21.

¹⁰ It appears that the main reason these four areas in North Carolina and South Carolina were identified as unserved using the 2008 data is the change in the defined upstream speed from 200 kbps to 1 Mbps. As a result of that change, areas where providers offer downstream speeds well in excess of the 4 Mbps downstream standard will still be considered unserved if the upstream speed is 512 kbps. Given that neither the National Broadband Plan nor the OBI Broadband Performance Paper explained the basis for the upload speed threshold of 1 Mbps, characterizing these areas as unserved is a questionable decision. See Broadband Performance, OBI Technical Paper No. 4, Omnibus Broadband Initiative, [http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-\(obi\)-technical-paper-broadband-performance.pdf](http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-technical-paper-broadband-performance.pdf) (OBI Broadband Performance Paper); see also Rural Utilities Service, Broadband Initiatives Program, Notice of Funds Availability, RIN 0572-ZA01, 75 Fed. Reg. 3820, 3822, http://www.rurdev.usda.gov/SupportDocuments/bb_2010-1099.pdf (2010) (defining the threshold speed for rural areas that lack high speed broadband service as "5 Mbps (upstream and downstream *combined*") (emphasis added).

¹¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (ARRA); *Commerce Department's NTIA Announces Recovery Act Investment to Expand Broadband Internet Access and Economic Opportunities in Illinois*, NTIA News Release, July 30, 2010, http://www.ntia.doc.gov/press/2010/BTOP_Chicago_PCC_07302010.html (stating that NTIA will make all ARRA Broadband Technology Opportunities Program (BTOP) awards, totaling \$4.7 billion, by September 30,

funding will be directed to unserved areas of the country as Congress directed.¹² Yet it appears that there was no effort to determine whether any of the areas identified in the *Sixth 706 Report* as unserved have been selected to receive ARRA funding by either RUS or NTIA. Similarly, it appears that there was no attempt to determine whether any of the unserved areas identified in the *Sixth 706 Report* are benefiting from state universal service or broadband grants.

Second, the Commission did not consider findings made in connection with the National Broadband Plan regarding satellite broadband services.¹³ A paper on broadband availability prepared by the Omnibus Broadband Initiative acknowledges that “satellite-based broadband, which can provide service to almost any subscriber regardless of location and at roughly the same cost, could be an attractive part of the overall solution.”¹⁴ The same paper also found that “[s]atellite broadband, as provided by next generation satellites that will be launched as early as 2011, meets [the National Broadband Plan’s] Broadband Availability Target requirements by

2010, and has already announced 113 BTOP grants); *USDA Highlights Impact of Recent Recovery Act Broadband Loans and Grants; Projects Designed to Improve the Quality of Rural Life Are Underway Across the Nation*, USDA News Release, June 9, 2010, http://www.usda.gov/wps/portal/usda!/ut/p/c5/jY5LD4IwEIR_0i4U3XpEIdqABB88L6YaQjAFTCQk_HvhpgewO8eZ2fkgh1GN7KtSdIXbSAUp5OtbYI9x7F-ZwR0yUVwsz7FPW9xt2OhnXz5GroHCCy0SewfRoz_tZNpb7k8-zpyNEBzauoAMcprdlQaZKkr5GCBqlqOBqR0IQ_8rakfP-qykzxros9IP66tO8WklvFvdB6Z6v0j4-wN-1CAV/dl3/d3/L2dJQSEvUUt3QS9ZQnZ3LzZfUDhNVIZMVDmXMEJUMTBJQ01IMURERDFTODU!/?printable=true&contentidonly=true&contentid=2010%2f06%2f0313.xml (stating that RUS had awarded \$1.068 billion for 68 broadband projects in 31 states and one territory in the first round of ARRA Broadband Initiative Program (BIP) funding); *Vice President Biden Announces Recovery Act Investments in Broadband Projects to Bring Jobs, Economic Opportunity to Communities Nationwide*, White House Press Release, Aug. 18, 2010, <http://www.whitehouse.gov/the-press-office/2010/08/18/vice-president-biden-announces-recovery-act-investments-broadband-projec> (announcing an additional 94 ARRA-funded broadband projects in 37 states totaling \$1.8 billion).

¹² ARRA (“Provided further, That at least 75 percent of the area to be served by a project receiving funds from [BIP] grants, loans or loan guarantees shall be in a rural area without sufficient access to high speed broadband service to facilitate rural economic development, as determined by the Secretary of Agriculture,” “The purposes of the [BTOP] program are to--(1) provide access to broadband service to consumers residing in unserved areas of the United States”).

¹³ National Broadband Plan at 87, 137.

¹⁴ OBI Broadband Availability Gap Paper at 5.

offering a minimum speed threshold of 4 Mbps downstream and 1 Mbps upstream and [Busy Hour Offer Load] BHOL per user of 160 kbps.”¹⁵

The data that were not considered by the Commission – recent deployment statistics, ARRA funding and other broadband grants, and anticipated satellite deployment – are directly relevant to the inquiry required under the statute. The lack of consideration of any of this information warrants reconsideration and revision of the *Sixth 706 Report*.¹⁶

II. **BROADBAND DEPLOYMENT IS REASONABLE AND TIMELY**

Section 706(b) is written in the progressive tense – is broadband *being deployed* in a reasonable and timely fashion; not in the past tense – has broadband *been deployed* in a reasonable and timely fashion.¹⁷ Congress thereby directed the Commission to take into account ongoing efforts by broadband service providers in making its determination, and not just to evaluate a snapshot of past or even current events. While the Commission’s “straightforward interpretation” of the “reasonable and timely” provision of the statute – “calling for broadband to be made available as soon as possible assuming all reasonable steps are taken”¹⁸ – is somewhat circular, it appropriately recognizes that the evaluation required for the report must take into account reasonably foreseeable investments and deployment as well as those already made.

¹⁵ *Id.* at 89; *see also* Susanna G. Kim, *Tapping the Web, 22,000 Miles Up*, N.Y. Times, Aug. 16, 2010, at B1 (available at http://www.nytimes.com/2010/08/16/technology/16satellite.html?_r=3&ref=technology (sign-in required) (discussing the ability of satellite providers WildBlue and HughesNet imminently to provide Internet speeds “as fast, in some cases, as fiber connections.”)

¹⁶ The Commission also relied on a staff report regarding broadband performance that was not made publicly available until after the *Sixth 706 Report* was released. *See* OBI Broadband Performance Paper; *FCC Daily Digest*, Vol. 29 No. 158, available at http://www.fcc.gov/Daily_Releases/Daily_Digest/2010/dd100816.html (rel. Aug. 16, 2010) (announcing release of OBI Broadband Performance Paper on August 13, 2010). That paper is relevant to the new broadband definition adopted in the *Sixth 706 Report*, but has no bearing on broadband availability in the United States.

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

¹⁸ *Sixth 706 Report*, FCC 10-129 at ¶ 28 n.119.

The new broadband definition adopted in this report is also forward-looking. Rather than simply using the definition adopted by the Commission in 2008,¹⁹ the Commission increased both the downstream speed (from 768 kbps to 4 Mbps) and upstream speed (from 200 kbps to 1 Mbps).²⁰ The Commission found that these new speed thresholds were based on “estimated future demand.”²¹ In particular, the Commission “[based its] predictions of future demand partially on trend data, which suggest that demand . . . [is] doubling in speed approximately every 2 to 4 years.”²² As the OBI Broadband Performance Paper found, this “represents a speed significantly higher than what the typical residential consumer consumes today (approximately 1 Mbps downstream and 250 kbps upstream).”²³

But while the Commission’s stated intent and definition of broadband properly considered future developments, it then relied on 18-month old data to determine whether those admittedly *forward-looking* objectives had *already* been achieved. Given this fundamental mismatch, it is wholly unsurprising that its answer was no. Having established an aspirational definition of broadband speeds, the task before the Commission was to determine whether all reasonable steps are being taken so that all Americans will have access to broadband services at those speeds in some reasonable timeframe. Given the nature of the inquiry, the Commission should have taken advantage of the wealth of data on current *and expected* broadband deployment that was gathered during the National Broadband Plan process, as well as consulting

¹⁹ *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, 23 FCC Rcd 9691, 9700-01, ¶ 20 n.66 (2008) (revising data speed reporting tiers on the Form 477 and characterizing services with transfer speeds between 200 kbps and 768 kbps as “first generation data” and services with transfer speeds between 768 kbps and 1.5 Mbps as “basic broadband tier 1”).

²⁰ *Sixth 706 Report*, FCC 10-129 at ¶ 15.

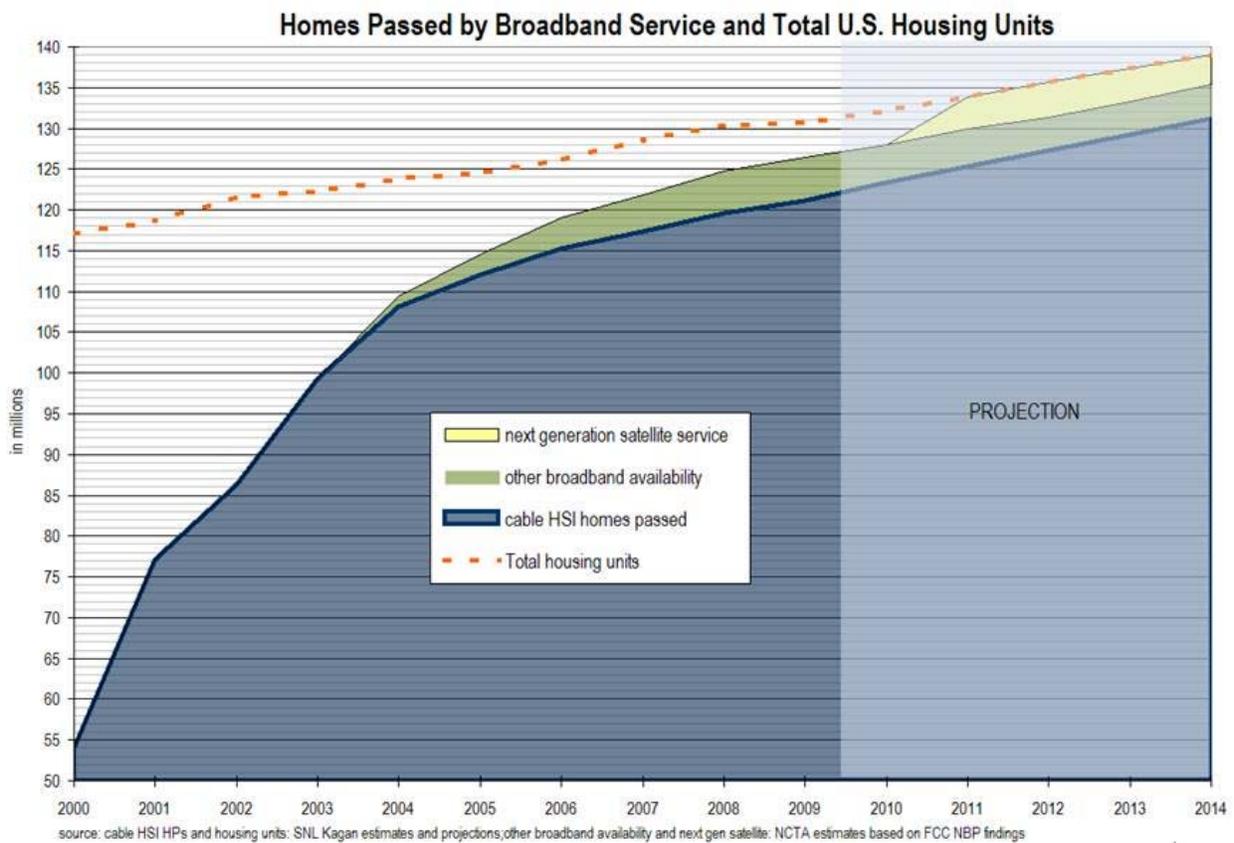
²¹ *Sixth 706 Report*, FCC 10-129 at ¶ 13.

²² *Id.* at ¶ 13 n.57.

²³ OBI Broadband Performance Paper at 17.

with NTIA and RUS to determine whether any of the unserved areas identified in the report had been selected to receive stimulus funding. Unfortunately, as explained above, the Commission relied on stale Form 477 data from December 2008 and chose not to consider any developments after that date.

Had the Commission applied its forward-looking definition of broadband to an equally forward-looking set of deployment data, it would have found no basis for concluding that deployment is not taking place in a reasonable and timely fashion. As shown in the chart below, over the last decade the broadband availability gap has closed considerably and is projected largely to be eliminated with the introduction of new satellite broadband services in the next year.



The finding that deployment is not reasonable and timely seems to be based solely on the fact that broadband at the identified speeds is not now available to 100 percent of the housing units in the United States. But expecting 100 percent coverage today – particularly at tomorrow’s speeds – is unrealistic and unreasonable.²⁴ Given that the electric grid itself did not even reach all Americans after more than a century,²⁵ finding it unreasonable that broadband has not yet reached that goal after little more than a decade ignores history and economic reality.

Furthermore, by applying a 100 percent broadband availability standard, the Commission misread the relevant sentence in the statute. The Commission’s conclusion would address Congress’s directive in section 706(b) if that section merely said, “In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans[.]” However, that is not what Congress instructed the Commission to do. Instead, the Commission is to determine “whether advanced telecommunications capability is being deployed to all Americans *in a reasonable and timely fashion.*”²⁶ By applying a 100 percent broadband deployment standard, the Commission essentially ignored the last six words of the sentence. Although it is true that broadband has not yet been deployed to all Americans,

²⁴ This is particularly true given the National Broadband Plan’s recognition of the extremely high costs of reaching the last fewer than 6% of housing units. See National Broadband Plan at 136 (estimating a required funding amount of \$24 billion to deploy terrestrial broadband infrastructure to the 7 million unserved housing units); OBI Broadband Availability Gap Paper at 4 n.4 and 17 (out of 130 million housing units, “123 million housing units already have broadband networks available that are capable of providing service . . . of at least 4 Mbps download and 1 Mbps upload”).

²⁵ See Jeff Brady, *An Aged Electric Grid Looks to a Brighter Future*, NPR, Apr. 27, 2009, <http://www.npr.org/templates/story/story.php?storyId=103327321> (stating that the first commercial power grid started in 1882); *THE NEW ENERGY FUTURE IN INDIAN COUNTRY: Confronting Climate Change, Creating Jobs, and Conserving Nature*, National Wildlife Federation, 2010, http://www.nwf.org/News-and-Magazines/Media-Center/Reports/Archive/2010/~media/PDFs/Global%20Warming/Reports/03-23-10_NWF_TribalLands_LoRes.ashx (1.2% of U.S. households did not have access to electricity from the electric grid according to the 1990 Census).

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

this fact alone does not demonstrate that deployment is not occurring in a reasonable and timely fashion.²⁷

CONCLUSION

For all the reasons explained above, the Commission should reconsider its finding in the *Sixth 706 Report* and conclude that broadband is being deployed to all Americans in a reasonable and timely fashion.

Respectfully submitted,

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²⁷ In its very first section 706 report the Commission recognized that a finding of reasonable and timely deployment of advanced services did not depend on the availability of such services to 100 percent of Americans. *First 706 Report*, 14 FCC Rcd at 2402, ¶ 6 (“We certainly have not reached the ultimate goal that all Americans have meaningful access to advanced telecommunications services. . . . Nonetheless, we are encouraged that deployment of advanced telecommunications generally appears, at present, reasonable and timely.”).