

**DISSENTING STATEMENT OF  
COMMISSIONER AJIT PAI**

Re: *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 No. 11-121

From 1999 to 2008, the Commission found that broadband was being deployed to all Americans in a reasonable and timely fashion. In 2010, however, this suddenly changed. Today, the Commission determines for the third straight year that the objective set forth in section 706(b) of the Telecommunications Act of 1996 is no longer being met. Because the Commission's conclusion rests on a flawed interpretation of the statute, and because I see the elimination of regulatory uncertainty—not the public fisc or new regulation—as the key to accelerating broadband deployment, I respectfully dissent from today's report.

Official statistics tell us that the recession technically ended three years ago. Yet for many Americans, the recovery still has not come. The Federal Reserve estimates that the economy's output is still \$800 billion smaller than it could be.<sup>1</sup> The unemployment rate has risen to 8.3 percent,<sup>2</sup> which understates our economy's woes given that more than five million people have given up searching for employment since the recession began.<sup>3</sup> Even the communications sector is not immune; telecommunications companies employ 160,000 fewer workers than they did three-and-a-half years ago, meaning that the sector's workforce has shrunk by over fifteen percent.<sup>4</sup>

Despite our general economic problems and the current regulatory environment, the private sector deserves credit for what it has been able to accomplish recently when it comes to infrastructure investment. Communications network operators invested \$66 billion in 2011.<sup>5</sup> According to State Broadband Initiative data, private sector investment brought fixed terrestrial broadband service meeting the Commission's speed benchmark to 7.4 million Americans<sup>6</sup> and mobile broadband service to 46.7 million Americans<sup>7</sup> from June 2010 to June 2011.

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<sup>1</sup> See Federal Reserve Bank of St. Louis, FRED Economic Data, <http://research.stlouisfed.org/fred2/graph/> (compare NGDPPOT to GDP as of Aug. 15, 2012).

<sup>2</sup> See Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, (Seas) Unemployment Rate, <http://go.usa.gov/Gw9>.

<sup>3</sup> Compare Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, (Seas) Labor Force Participation Rate, <http://go.usa.gov/Gwk> (showing that the labor force participation rate has declined from 66.0% in November 2007 to 63.7% in July 2012), with Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, (Seas) Civilian Labor Force Level, <http://go.usa.gov/Gw0> (showing that 155 million Americans participated in the labor force in July 2012, and accordingly 5.6 million more Americans would have participated had the participation rate not declined from November 2007 to July 2012).

<sup>4</sup> Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, (Seas) Telecommunications Labor Force Level, <http://go.usa.gov/GwB> (showing that telecommunications employment fell from 994,700 in January 2009 to 830,100 in May 2012).

<sup>5</sup> US Telecom, Broadband Investment, <http://bit.ly/ygeVLS>.

<sup>6</sup> See *Eighth Broadband Progress Report* at tbl. 7.

<sup>7</sup> See *id.* at tbl. 14.

The report sets aside this evidence because under its reading of the statute,<sup>8</sup> progress is irrelevant. “[T]he standard against which we measure our progress is universal broadband deployment,”<sup>9</sup> it maintains, and “approximately 19 million Americans did not have access to fixed broadband [in 2011].”<sup>10</sup> In other words, because fixed broadband service meeting the Commission’s speed benchmark is not already (or very soon to be) available to all Americans, “broadband is not yet being deployed to all Americans in a reasonable and timely fashion”<sup>11</sup>

My colleague, Commissioner McDowell, and my predecessor, Commissioner Baker, previously noted problems with this interpretation of Section 706.<sup>12</sup> I hope to flesh out some aspects of the statute that further highlight the deficiencies in the Commission’s recent approach.

First, the Commission has consistently ignored in recent years the statute’s direction that “advanced telecommunications capability” may be deployed “using *any* technology.”<sup>13</sup> That instruction does not permit us to segregate fixed connections from mobile connections, focusing on the former and neglecting the latter. Instead, in making our statutory finding we should consider all broadband services meeting the statutory definition regardless of the technologies used to deploy them. If the Commission followed this statutory command and relied on the State Broadband Initiative data to look at *all* broadband services meeting the benchmark,<sup>14</sup> it would

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<sup>8</sup> See 47 U.S.C. § 1302 (codifying Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153 (as amended)) (directing Commission to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”).

<sup>9</sup> *Eighth Broadband Progress Report* at para. 138.

<sup>10</sup> *Id.* at para. 135.

<sup>11</sup> *Id.*

<sup>12</sup> See *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 No. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Rcd 8008, 8101 (2011) (*Seventh Broadband Progress Report*) (Dissenting Statement of Commissioner Robert M. McDowell) (calling the Commission’s decision to adopt a 4 Mbps/1 Mbps benchmark “arbitrary,” arguing that the Commission “should never have mandated a one-size-fits-all definition of broadband” that ignores divergent consumer preferences, and arguing against interpretations of “availability” and “deployment” that would read those statutory terms to mean something other than “availability” and “deployment”); *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; A National Broadband Plan for Our Future*, GN Docket Nos. 09-137, 09-51, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9696 (2010) (Dissenting Statement of Commissioner Meredith A. Baker) (“The goal encapsulated by section 706 is universal broadband availability. Nowhere in section 706 does it require that goal to be reached definitively in 2010. Rather, the question is whether network providers continue to make demonstrable progress towards that goal.”).

<sup>13</sup> 47 U.S.C. § 1302(d)(1) (emphasis added).

<sup>14</sup> In truth, we have never examined the availability of broadband service at our speed benchmark given that we have never collected data measuring deployment at the benchmark. Instead, we have relied on the deployment of fixed services meeting a 3 Mbps/768 kbps benchmark as the next-best thing. We should extend that same proxy to mobile services; vague concerns that providers may be over-reporting surely apply just as much to the wireline world as the wireless, see *Eighth Broadband Progress Report* at para. 37, and the widespread deployment of LTE, WiMax, and HSPA+ in the past two years demonstrates that at least some mobile offerings in otherwise unserved areas qualify as “advanced telecommunications

have concluded that 5.5 million Americans—not 19 million—lack access to advanced telecommunications capability.<sup>15</sup> Not only does this mistaken interpretation lead to a 245% overstatement of the problem, it also leads the Commission to report to Congress something it never asked for: a list of geographical areas, some of which are served by a provider of advanced telecommunications capability and some of which are not.<sup>16</sup>

Second, I do not see how the Commission’s test can be reconciled with the statutory language that instructs us to ask if broadband “is being deployed . . . in a reasonable and timely fashion.”<sup>17</sup> That language 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. Our metric, in other words, is progress—not total achievement—and Congress emphasized the point by using the progressive present tense in its command (*i.e.*, Congress used the phrase “is being deployed” in Section 706 rather than “is deployed”).<sup>18</sup>

An example illustrates the point. Suppose that you are building a house and ask the contractor to report back to you on a weekly basis whether the project “is being constructed in a reasonable and timely fashion.” Each week, the contractor submits a report responding to the question in the negative because the house has yet to be completed. Most people would consider such a response to be beside the point, but the Commission essentially uses that same reasoning today.

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,<sup>19</sup> especially when there is a way to read the statute that respects every word Congress chose to legislate.

Third, the Commission’s approach is a short-sighted one that disserves our goal of being a data-driven agency. In recent years, the Commission has relied on an expansive reading of

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capability,” *id.* at para. 6 & n.27; *see also* tbl. 15 (implying that, based on Mosaik data, 221.7 million Americans had access to LTE, WiMax, or HSPA+ as of June 2011).

<sup>15</sup> Given that the Commission, in the Notice of Inquiry released today, is seeking comment on whether to *add* latency and data capacity thresholds in the *next* report, I fail to understand how the Commission can rely on these two issues in *this* report as support for its decision to exclude consideration of mobile broadband in making its statutory finding.

<sup>16</sup> In contrast, the statute requires the Commission to “compile a list of geographical areas that are not served by *any* provider of advanced telecommunications capability.” 47 U.S.C. § 1302(c) (emphasis added).

<sup>17</sup> Because the majority adopts the construction of the statute in the *Seventh Broadband Progress Report* whole cloth, *Eighth Broadband Progress Report* at n.347, I address the arguments raised in that report.

<sup>18</sup> Verizon made this precise point about the progressive tense in comments on last year’s Notice of Inquiry. But the Commission seems to have misunderstood the argument, thinking that Verizon was making the unremarkable observation that “is being deployed” is in the present tense. *See Seventh Broadband Progress Report*, 26 FCC Rcd at 8033, para. 47 & n.163. The progressive present tense is used for actions that are occurring, without definite starting or stopping points. The simple present tense is used for actions that occur, implying a distinct start and finish.

<sup>19</sup> *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).

section 706(b) that purports to grant us heretofore unknown and unspecified authorities to carry out the public interest so long as doing so tangentially relates to broadband. But our authority under this provision only lasts so long as our section 706 determination is negative. In other words, the Commission’s authority to enforce net neutrality, subsidize broadband for low-income households, or support digital literacy programs<sup>20</sup> hangs in the balance each year, dependent on a finding that broadband is not being deployed in a reasonable and timely fashion. If we are willing to set an objective with no intent of reaching it, then I suppose that this is not a problem.<sup>21</sup> But if we believe instead that data should drive our decisions—not vice versa—then section 706(b) can never be a reliable authority for implementing good policy since we will eventually be forced to concede once again that broadband is being deployed in a timely and reasonable fashion.

Finally, I do agree with the Commission that when it comes to deploying broadband infrastructure, our country should be doing much better. But to improve our performance, the Commission needs to take Section 706’s deregulatory imperatives to heart. Today’s report, in large measure, misidentifies the primary barriers to infrastructure investment and broadband deployment. In my discussions with those in the private sector responsible for making broadband investment decisions, they do not identify the price of computers, poor digital literacy, a lack of consumer interest, or a lack of consumer trust<sup>22</sup> as the primary factors behind their decisions to keep tens of billions of dollars of capital sitting on the sidelines. Rather, they indicate that their caution stems primarily from regulatory uncertainty and in particular their concerns about whether and how Internet Protocol-based (IP) networks are going to be regulated in the future.

As it turns out, section 706 itself supplies an answer to this problem. That provision first directs the Commission to encourage deployment via “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”<sup>23</sup> And if we find that broadband is not being deployed in a reasonable and timely fashion, then we must “accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”<sup>24</sup> In my view, there is plenty to do.

Twenty years after the advent of price-cap regulation, most price-cap carriers still must

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<sup>20</sup> See *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17972, para. 123 (2010) (asserting that section 706(b) gives the Commission “additional authority to take actions such as enforcing open Internet principles”); *Lifeline and Link Up Reform and Modernization; Lifeline and Link Up; Federal-State Joint Board on Universal Service; Advancing Broadband Availability Through Digital Literacy Training*, WC Docket Nos. 11-42, 03-109, 12-23, CC Docket No. 96-45, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, 6798–99, paras. 331–32 (asserting that section 706(b) gives the Commission “authority . . . to provide USF support to ETCs through a low-income broadband Pilot Program to subsidize low-income consumers’ purchase of broadband services”) (*Lifeline Reform Order*); *Eighth Broadband Progress Report* at paras. 140, 153 (suggesting poor digital literacy is a “key barrier” to infrastructure investment and noting that Lifeline broadband pilot projects are expected to promote digital literacy, citing *Lifeline Reform Order*, 27 FCC Rcd at 6805, para. 350).

<sup>21</sup> Cf. Yoda, *STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK* (Lucasfilm 1980) (“Always with you it cannot be done.”).

<sup>22</sup> See *Eighth Broadband Progress Report* at para. 140.

<sup>23</sup> 47 U.S.C. § 1302(a).

<sup>24</sup> *Id.* § 1302(b).

file the same studies and accounting information as rate-of-return carriers. Sixteen years after the Telecommunications Act of 1996, incumbent local exchange carriers still must file tariffs as if they were local monopolists, despite competition from all corners. Thirteen years after the Commission provided a path to pricing flexibility for special access services, carriers are facing the specter of re-regulation. Eight years after the *Vonage Order*,<sup>25</sup> we still treat interconnected VoIP providers as second-class carriers rather than first-rate competitors. And two years after the Commission considered reclassifying broadband Internet access service as a telecommunications service, that docket (GN Docket No. 10-127) remains open, a sword of Damocles hanging over every broadband investor's head.

The directive from Congress may not be easy to carry out, but it is clear: Promote competition. Eliminate regulatory uncertainty. Repeal archaic twentieth-century regulations that assumed regulated monopolies running copper networks. Empower small businesses, large businesses, entrepreneurs, and others with capital to invest in broadband infrastructure, unfettered by government mandate and unshackled from outdated restraints. To be sure, all of this will not happen overnight. But we should begin immediately down this path by creating an IP Transition Task Force that would develop a holistic set of recommendations for facilitating and expediting our transition to an all-IP world. If the private sector came to the conclusion that the Commission was committed to a deregulatory approach to IP networks and was serious about eliminating the regulatory uncertainty surrounding the IP transition, I am confident that broadband infrastructure investment would increase substantially and quickly.

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Notwithstanding my bottom-line assessment of this item, the staff has made a significant number of improvements to this year's report that merit recognition. For example, the report contains a more thorough and thoughtful analysis of deployment in rural areas, U.S. territories, and Tribal lands; additional reporting on mobile data speeds; and a novel approach to calculating adoption rates (even if adoption is not strictly related to the question of deployment). For all of these accomplishments and more, I thank the analysts, the economists, the geographers, the engineers, the attorneys, and other members of our expert staff that put this report together.

In light of their efforts, I wish that I could support this item. But for the reasons outlined above, I must respectfully dissent.

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<sup>25</sup> *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004).