

**DISSENTING STATEMENT OF
COMMISSIONER MEREDITH A. BAKER**

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; A National Broadband Plan for Our Future, GN Docket Nos. 09-137, 09-51, Sixth Broadband Deployment Report

The Commission's obligation under section 706 is to evaluate broadband infrastructure deployment. By every possible metric, wired, wireless, and satellite companies continue to pour billions of dollars into our nation's broadband network. From 2003 to 2009, under a consistent minimal regulatory framework, broadband providers have invested \$27 billion annually in networks and infrastructure.¹ Each year networks go further and faster. The National Broadband Plan found that 95 percent of the U.S. population has access to a 4 Mbps/1 Mbps terrestrial broadband service, and 80 percent have choice of broadband offerings.²

In every prior Section 706 Report, the Commission concluded that broadband deployment was timely and reasonable. In a striking departure from that decade of consistent Commission findings, the Commission has changed course by concluding that broadband deployment now is not reasonable and timely. I cannot support this decision. Broadband infrastructure deployment and investment are a remarkable and continuing success story, and I am troubled by giving such significant efforts a failing grade.

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. All evidence suggests that answer be made in the affirmative. A finding of timely and reasonable need not—nor should it be—a congratulatory one. Nor is it a finding that the government has no role to promote broadband deployment in areas in which market forces will not likely result in deployment. Chairman Kennard explained that a finding of timely and reasonable does not “let[] us off the hook” from our oversight role.³ He explained, “[w]e must always be looking for ways to remove barriers to investment and promote competition.”⁴ I agree, and believe that the same rationale and approach applies equally to this Report. Broadband deployment continues to be timely and reasonable, but the job is far from complete.

Moreover, I have a number of concerns with the manner in which the Commission reached this inopportune decision. First, the Report focuses almost exclusively on terrestrial broadband options. Section 706 is not technology specific, yet this Report limits its findings to

¹ Robert W. Crandall & Hal J. Singer, *The Economic Impact of Broadband Investment*, at 2 (Feb. 23, 2010) (available at <http://www.broadbandforamerica.com/press-releases/broadband-america-study-shows-importance-investment-0>) (last visited July 20, 2010).

² FCC, Omnibus Broadband Initiative (OBI), *Connecting America: The National Broadband Plan*, GN Docket No. 09-51, at 20 (2010).

³ *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 1999*, Separate Statement of Chairman William E. Kennard, Report, 14 FCC Rcd 2398 (1999).

⁴ *Id.*

terrestrial solutions even when discussing relatively low speeds of service easily reached by today's wireless and satellite offerings.⁵ The Commission should not make consumer judgments about the viability and utility of satellite and wireless solutions that provide clear facilities-based competition opportunities. Current technologies may not allow competition at higher speeds, but satellite broadband, 3G and 4G wireless solutions do provide a level of connectivity that is "broadband" to most consumers, as well as the additional functionality of mobility.

Second, I am troubled by our decision as a regulatory agency to decide a fixed definition of broadband speed as 4 Mbps downstream, 1 Mbps upstream. It is true that prior Section 706 Reports have focused on slower "first generation" broadband services, and a fresh look at broadband speed is appropriate. I would have preferred a more fulsome evaluation of broadband deployment based on the five tiers of broadband speeds adopted by the Commission to provide fuller context as to how broadband services are deployed and used across different speed tiers.⁶ I share concerns expressed in prior Section 706 Reports that our speed measurements should be "designed for data collection and as points of reference."⁷ We should not use our broadband speed measurements as "an ultimate goal," nor should it be used "to drive the market."⁸ I also have concerns with the merits of selecting 4 Mbps/1Mbps as the broadband speed with which to evaluate deployment. The National Broadband Plan reports that more than half of consumers that could purchase 4 Mbps/1 Mbps broadband have concluded that a slower offering is more than sufficient for their broadband needs.⁹ Even if we were to adopt a new higher speed, greater context as to how 4 Mbps-capable broadband networks have been deployed over time would greatly inform this analysis. We should not select a new speed and then judge the reasonableness of deployment based upon a snapshot of current conditions.

Third, the Commission should not adopt National Broadband Plan findings and recommendations without opportunity for notice and comment as well as Commission deliberation. The Plan's findings and recommendations relied upon in this Report may or may not be the correct ones, but we should not adopt the 4Mbps/1Mbps speed threshold as the definition of "broadband" without conducting our own due diligence. Indeed, the Technical Paper describing the model relied upon by the Plan has only recently been placed out for comment in the context of universal service reform.¹⁰ Regardless of the conclusion the Commission ultimately reaches in that context, this Report prematurely accepts the Model's results today in concluding deployment is not timely and reasonable.

Lastly, the Commission's finding of nationwide untimely and unreasonable deployment is overly broad. Our analysis should be significantly more granular to identify particular geographic areas or communities for which deployment has lagged. A more granular and focused

⁵ *Sixth Broadband Deployment Report*, FCC 10-129, *supra*, at n.19 (detailing access to terrestrial 768 kbps services).

⁶ *Local Telephone Competition and Broadband Reporting*, Report and Order, 19 FCC Rcd 22340 (2004).

⁷ *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*, Third Report, 17 FCC Rcd 2844, para. 10 (2002).

⁸ *Id.*

⁹ *Sixth Broadband Deployment Report*, *supra*, at n.81.

¹⁰ *Connect America Fund; A National Broadband Plan for Our Future; High-Cost Universal Service Support*, Notice of Inquiry and Notice of Proposed Rulemaking, 25 FCC Rcd 6657, at App. C (2010).

analysis could help target commercial and community investment going forward and bring public attention to the affected communities.

The Commission should redouble its effort to promote and create incentives for private investment in networks and technologies that can drive broadband further and faster throughout the nation. I am troubled, however, by recent developments at the Commission that appear to be moving us in the opposite direction. Specifically, I have concerns that the proposals to shift broadband Internet access services to monopoly-era Title II requirements will undermine the regulatory certainty and stable foundation that has attracted capital to this sector to date, and will be necessary to fund tomorrow's broadband networks. The Commission should maintain the existing minimal regulatory approach under Title I and work proactively with carriers and investors to target actions to attract more capital and resources to support broadband networks, particularly in unserved and underserved communities.