

**DISSENTING STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

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. 10-159; Seventh Broadband Progress Report and Order on Reconsideration

I am both optimistic and pragmatic about the state of broadband deployment. We continue to take great strides to provide faster and better broadband to more Americans every year. Capital investment in fixed and mobile broadband deployment continues to be a tremendous success story. The report's only metric that permits year-to-year comparison finds that the percentage of U.S. households served by terrestrial broadband grew from 92 percent in December 2008 to 96 percent in June 2010. In the same period, the number of unserved households dropped almost in half from 8.8 million to 4.6 million.¹

Section 706 of the Telecommunications Act of 1996 requires the Commission to determine whether "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion."² In all of the reports starting with the first in 1999, the FCC has answered "yes" to that question. Last year, however, the Commission dramatically reversed course.³

Last year's negative conclusion was unsettling considering that America had made impressive improvements in developing and deploying broadband infrastructure and services. In just six years, broadband deployment skyrocketed from reaching only 15 percent of Americans in 2003, to 95 percent by the end of 2009. I cast a dissenting vote. This year's report continues with the same flawed analyses and conclusions, albeit with a novel rationale, which is discussed below. As a result, I respectfully dissent again.

¹ I share the Commission's watchfulness with respect to Form 477 subscribership data and county-level measurements, but do not believe we can simply explain away the import of the significant year-over-year improvement. Subscribership data is an imperfect proxy for deployment, but it is the best comparison tool we have today. By one metric, broadband download speed increased 34 percent last year as providers continue to roll-out higher speed offerings to meet consumer demand. Press Release, *Downstream Bandwidth for US Broadband Subs Increase by 34% in 2010*, In-Stat (Feb. 16, 2011). This substantial increase would lend some credence to the Form 477 findings of a significant growth in the number of connections that meet the Commission's speed requirements. Overall, I support the report's inclusion of the State Broadband Data and Development (SBDD) data as well as the Technical Appendix's forthright discussion about the limitations of both data sets. That said, incorporating yet another new data source complicates the Commission's ability to assess any trends over time regarding timely and reasonable deployment. I am hopeful that we can make more apples-to-apples comparisons in future reports, and look forward to a more complete data set in future SBDD releases. See Technical Appendix, ¶ 10 (detailing that over a quarter of broadband providers elected not to participate in the NTIA process); see also George S. Ford, *Challenges in Using the National Broadband Map's Data*, Phoenix Center Policy Bulletin (Mar. 2011).

² 47 U.S.C. § 1302(b) (Section 706 of the Telecommunications Act of 1996 has since been codified in Title 47, Chapter 12 of the United States Code but is commonly referred to as "Section 706").

³ 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. 09-137, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Sixth Broadband Deployment Report, 25 FCC Rcd 9556 (2010) ("*Sixth Report*"). In fact, the *Sixth Report* explicitly included in its caption and referenced findings from the National Broadband Plan that "95% of the U.S. population lives in housing units with access to terrestrial, fixed broadband infrastructure capable of supporting actual download speeds of at least 4 Mbps."

This year's report makes a surprising leap by arguing that Congress did not mean "physical" deployment when referring to "deployment" and "availability." It concedes that the Act does not define the terms "deployment" and "availability." Instead of looking to the plain statutory language to determine Congress' intent, however, the Commission relies on legislative report language to argue that even if broadband is physically deployed to a particular area but is not affordable, it is *not* considered available under Section 706. But, the actual statutory language says otherwise, stating that as part of the inquiry, the Commission should look at demographic information for "geographical areas that are *not served* by any provider of advanced telecommunications capability."⁴

Regrettably, through this attempted re-interpretation of Section 706(b), the Commission appears to continue a trend towards more regulation and ever increasing authority over broadband and the Internet. The report references barriers to infrastructure investment that include "poor digital literacy," "low broadband service quality," "affordability," and "lack of access to computers." It is unclear from this report if this Commission now contends it has authority under Section 706(b) to establish regulation to address each of these "barriers," many of which bear little nexus to infrastructure deployment.

With respect to the analysis itself, the exclusion of mobile broadband is particularly disappointing. It is hard to believe that a May 2011 broadband deployment report downplays the rapid rise of 3G service, as well as the historic levels of investment in our nation's 4G infrastructure. The Chairman has correctly noted that "3G wireless services can deliver speeds capable of handling a dramatically wide array of consumer applications."⁵

The Chairman has also observed that "mobile broadband is being adopted faster than any computing platform in history," highlighting that the United States "had 141 million 3G subscribers – one-fifth of the worldwide total and more than three times as many as any other nation, except Japan, making us the world's largest 3G market and a major reason why the U.S. has been the undisputed leader in mobile innovation."⁶

The data strongly support the Commission's focus on mobile broadband: The most recent Form 477 filings show that the number of mobile broadband connections at downstream speeds above 3 Mbps jumped from 133,000 in December 2008 to 5.3 million in June 2010.⁷ This is incredible growth. Yet, even this statistic fails to capture the subsequent significant increase in 3G and 4G penetration since June 2010. Cisco's recent analysis suggests that there are already 2.6 million mobile-only Internet consumers in North America, and that number is estimated to be 55 million by 2015.⁸ Many underserved communities have expressed a clear preference for mobile broadband options.⁹ In addition, the Commission's most recent *14th Annual Wireless Competition Report* found that over three quarters of the American population has access to at least three mobile broadband providers, up from 51 percent in just

⁴ 47 U.S.C. 1302(c) (emphasis added).

⁵ Remarks of Chairman Julius Genachowski, "The Clock is Ticking" (Mar. 16, 2011).

⁶ Remarks of Chairman Julius Genachowski, CTIA Wireless 2011 (Mar. 22, 2011).

⁷ INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, FCC, INTERNET ACCESS SERVICES: STATUS AS OF JUNE 30, 2010, Table 2 (Mar. 2011) (MAR. 2011 IAS REPORT).

⁸ *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2010–2015* (Table 6) (Feb. 1, 2011).

⁹ *Among Mobile Phone Users, Hispanics, Asians are Most-Likely Smartphone Owners in the U.S.*, NielsenWire (Feb. 1, 2011).

two years.¹⁰

This report's analysis excludes mobile broadband altogether, even while conceding that "mobile services capable of actual speeds above the 4/1 Mbps benchmark are becoming increasingly common." At a time when many operators are advancing the pace of their planned 4G network deployments, next-generation 4G is only mentioned in passing. The report does at least acknowledge that "we intend to revise our approach in future reports" to incorporate mobile broadband. That integration should have been done this year.

The exclusion of mobile broadband appears primarily to be a result of the Commission's unwillingness to revisit its arbitrary decision to define broadband as 4 Mbps downstream and 1 Mbps upstream. The Commission should never have mandated a one-size-fits-all definition of broadband. Regulators must provide a more complete picture of broadband offerings at different speed thresholds and act cautiously to avoid industry-shaping and market-distortive decisions.

If anything, the growth and popularity of mobile broadband at speeds below the Sixth Report's definition should have prompted the Commission to revisit that definition. Over half of all high-speed connections are below 3 Mbps downstream,¹¹ and the Commission's surveys find that consumers are happy with both their existing broadband service and speed.¹² Tellingly, Pew has found that only about one third of consumers pay for premium broadband services today.¹³ While it is much more likely that the Commission's broadband definition is flawed, this report seemingly concludes that there must be something significantly lacking with today's "broadband" services. I disagree.

The report is confusing and inconsistent in other ways too. For instance, it seems to take a creative and expansive approach to interpreting the phrase "all Americans" as codified by Congress in Section 706. In a breezy fashion, the report dismisses the idea that the phrase should be viewed as a "goal." Instead, it states that the phrase should have its "ordinary meaning." In the next breath, however, the report contradicts its earlier line of reasoning by leaving the door open to interpreting the meaning of "all Americans" differently at some point in the future when only a "very small number of Americans" still lack access to broadband deployment. I am concerned that such inconsistency in the Commission's interpretation amounts to arbitrary and capricious action, not to mention that this numerical moving target undercuts the effort to reach data-driven decisions.

Given that the language of Section 706 reveals a deregulatory bent,¹⁴ I expressed my concerns last year that the conclusions in the *Sixth Report* could instead be used as a pretext to impose unnecessary

¹⁰ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, 25 FCC Rcd 11407 (2010).

¹¹ Approximately 60 percent of connections (92 million out of 152 million) are below 3 Mbps downstream. MAR. 2011 IAS REPORT, Table 5. Excluding mobile offerings, approximately one-third of fixed connections are still below 3 Mbps downstream. *Id.*, Chart 2.

¹² *Broadband satisfaction: What consumers report about their broadband Internet provider*, FCC Working Paper (Dec. 2010) (finding that "51% of broadband users are very satisfied with service overall and 42% are somewhat satisfied," and that "50% of broadband users are very satisfied with the speed of their service and 41% are somewhat satisfied.").

¹³ Aaron Smith, *Home Broadband 2010*, Pew Internet and American Life Project (Aug 11, 2010).

¹⁴ Congress stated that "[i]f the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. § 1302(b).

new regulations. Unfortunately, my fears were realized only five months later. The Commission's 3-2 vote to regulate Internet network management extensively relied on the findings in the *Sixth Report* in attempting to manufacture a legal foundation for the new regulatory regime.¹⁵ Given this history, it is reasonable to be concerned that reiteration of year's conclusion in today's report may be used to bolster additional FCC regulatory efforts in other areas where Congress has not given the FCC legal authority to do so.

Institutionally, the continued unwillingness of this Commission to provide any positive statements about the state of telecommunications infrastructure and competition is troubling. We should have kept this inquiry focused on physical infrastructure as required by the statute and consistent with our past practice. Regardless of this report's conclusion, the Commission should redouble its effort to create incentives for private investment in networks and technologies that can drive broadband further and faster throughout the nation.

For these reasons, I respectfully dissent.

¹⁵ See ¶ 6 of the instant report. See also *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, *Report and Order*, 25 FCC Rcd 17905 (2010).