

**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. 11-121

It is discouraging that, for the third year in a row, the majority has decided to clutch to its earlier negative findings as to whether “advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion” pursuant to Section 706 of the Telecommunications Act of 1996.¹

In reality, the growth of broadband deployment in America, especially regarding the mobile marketplace, has been swift and strong. For instance, between 2003 and 2009, broadband deployment steadily increased from reaching 15 percent of Americans to 95 percent of Americans.²

Furthermore, mobile broadband is the fastest growing segment of the broadband market. America has always led the world in wireless connectivity thanks to de-regulatory policies and our lead is growing. For instance, our country has approximately 21 percent of the globe’s 3G/4G subscribers and approximately 69 percent of the world’s LTE subscribers even though the United States is home to less than five percent of the global population.³ Furthermore, the investments made by American wireless providers have been higher than their international counterparts. For example, in 2011, over \$25 billion was invested in United States’ wireless infrastructure⁴ compared to \$18.6 billion invested in the 15 largest European economies combined.⁵

The mobile market in the United States has more competition than most international markets. Nine out of ten American consumers have a choice of at least *five* wireless service

¹ 47 U.S.C. § 1302(b) (Section 706 of the Telecommunications Act of 1996 has since been amended by the Broadband Data Improvement Act (BDIA), Pub. L. No. 110-385, 122 Stat. 4096 (2008) and is now codified in Title 47, Chapter 12 of the U.S. Code. It is commonly referred to as “Section 706”).

² See, e.g., FCC, OMNIBUS BROADBAND INITIATIVE (OBI), CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, GN Docket No. 09-51 (2010).

³ See INFORMA TELECOMS AND MEDIA (WCIS Database) (Dec. 2011).

⁴ See CTIA-THE WIRELESS ASSOC., CTIA SEMI-ANNUAL WIRELESS INDUSTRY SURVEY (2012), <http://www.ctia.org/advocacy/research/index.cfm/AID/10316>; see also CTIA-THE WIRELESS ASSOC., SEMI-ANNUAL 2011 TOP-LINE SURVEY RESULTS 10 (2012), http://files.ctia.org/pdf/CTIA_Survey_Year_End_2011_Graphics.pdf (providing cumulative capital investment numbers).

⁵ See BOA/MERRILL LYNCH EUROPEAN TELECOMS MATRIX Q112 (Mar. 30, 2012) (GLOBAL TELECOMS MATRIX Q112) (estimating €14,368 YE 2011. Conversion at \$1.2948/1€). The European countries included in the Matrix: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and UK; there are 27 members of the European Union (EU).

providers, according to the most recent FCC statistics.⁶ In Europe, however, that figure is around three.⁷ Therefore, Americans benefit from lower prices and higher mobile usage rates compared to consumers in the European Union (EU)—4 cents per minute versus 17 cents generally in the EU.⁸ Also, wireless subscriber usage on average in the United States is often three to seven times as much compared to some countries.⁹ Moreover, American consumers pay at least one-third less than consumers in many other parts of the world.¹⁰

The instant Section 706 report does discuss advances in the deployment of mobile broadband. Notwithstanding the fact that the number of Americans who gained access to mobile broadband grew significantly since last year, the report discards these important statistics, in part, for being “overstated,” and ignores them in its pre-determined 706 finding. Even if these mobile broadband statistics were incorporated, the majority indicates that it “would likely reach this same finding even if we considered the best available mobile data. Over 14 million Americans lack access, even if access to either fixed or mobile broadband is considered adequate and even when all LTE, WiMax, and HSPA+ deployments are included.”¹¹ In other words, it appears that the majority has already tipped its hand for next year’s report—reducing the number of unserved Americans to 14 million would still not be good enough for the majority’s outcome-driven Section 706 purposes.

Furthermore, even if a future Section 706 report reaches the elusive “magic number,” that still may not be adequate progress for the majority. My colleagues continue to argue that Congress did not mean “physical” deployment when it referred to “deployment” and “availability.” Rather than look to the plain statutory language to determine Congress’s intent, the majority has relied on legislative report language to argue that even if broadband is physically deployed to a particular area but is not affordable, it is not available under Section 706. That interpretation is flawed. The actual statutory language states otherwise: as part of the inquiry, the statute requires the Commission to look at demographic information for “geographical areas that are *not served* by any provider of advanced telecommunications capability.”¹² Congress was directing the Commission to study whether certain areas are actually not served by a provider, not whether consumers in certain areas choose not to adopt broadband.

This creative interpretation of Section 706 ties in nicely with the majority’s efforts to expand its jurisdictional reach. For example, the report identifies low broadband service quality, affordability of broadband, lack of access to computers, lack of relevance, and poor digital literacy as some of the barriers to infrastructure investment. These are really adoption issues, not deployment issues. And, by identifying these “barriers,” the majority has continued to use

⁶ 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, WT Docket No. 10-133, *Fifteenth Report*, 26 FCC Rcd 9664, 9669 (2011).

⁷ See GLOBAL TELECOMS MATRIX Q112.

⁸ Roger Entner, *The Wireless Industry: The Essential Engine of U.S. Economic Growth*, RECON ANALYTICS, at 1 (May 2012), <http://reconanalytics.com/wp-content/uploads/2012/04/Wireless-The-Ubiquitous-Engine-by-Recon-Analytics-1.pdf>).

⁹ See GLOBAL TELECOMS MATRIX Q112 at 71.

¹⁰ See *id.*

¹¹ Para. 138 of the instant report.

¹² 47 U.S.C. 1302(c) (emphasis added).

Section 706 as a tool for mission creep.¹³ Section 706 is narrow in scope, however, and does not provide the Commission with specific or general authority to do much of anything. Section 706 has a *de*-regulatory bent and should not be used for other purposes beyond what Congress intended, especially creating more rules, red tape and bureaucracy.¹⁴

In sum, the Section 706 process should be used to assess the progress of broadband deployment in our nation, as Congress intended. Unfortunately, that has not been the majority's practice for the past three years. Instead, the majority has used this process as an opportunity to create a pretext to justify more regulation. The fact that the report's closing paragraph heralds the use of Section 706 for the majority's adoption of unprecedented regulation of Internet network management, or "net neutrality" rules, underscores my point. Referencing the net neutrality order, the majority says "the open Internet rules were adopted to ensure the continuation of the Internet's virtuous cycle of innovation and investment, and the Commission must continue to prioritize those efforts consistent with the mandate of section 706."¹⁵ In reality, the 706 process has been co-opted by the majority, and used in the course of a "cynical cycle" of regulation.

For all of these reasons, I must respectfully dissent.

¹³ For example, in January of 2012, over my partial dissent, the Commission established a broadband pilot program as part of the Lifeline program. I had concerns with the establishment of the pilot, in part, because the Commission did not have authority to pursue it under Section 706 or any other section of the Communications Act. See *Lifeline & Link Up Reform & Modernization Lifeline & Link Up Fed.-State Joint Bd. on Universal Serv. Advancing Broadband Availability Through Digital Literacy Training*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012).

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).

¹⁵ Para. 156 of the instant report.