

**STATEMENT OF
COMMISSIONER AJIT PAI
APPROVING IN PART AND DISSENTING IN PART**

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. 15-191.

Congress has asked us to “annually initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans.”¹ I approve this *Notice* to the extent it meets that statutory requirement.

But I cannot support the kabuki theater that recent section 706 proceedings have been and that this one is sure to be. Here is the sad reality: It doesn’t matter what the public says or what the data show. When this proceeding ends, the FCC will issue a negative finding about the state of broadband deployment. And that’s because such a finding is necessary to maintain the limitless regulatory authority over Internet service providers, and perhaps other online entities, that the Commission thinks it has under the Telecommunications Act of 1996.

To its “credit,” the Commission makes abundantly clear how it will reach this preordained result. The *Notice* is filled with page after page of new conditions, novel tests, and nebulous qualifiers designed to give the agency plenty of ways to ensure a negative finding when the pen hits the paper.²

The *Notice*’s headline-inspired 25 Mbps benchmark for fixed broadband is a prime example of the arbitrariness of this proceeding.³ The FCC uses that benchmark only when convenient—namely, to claim that broadband deployment is insufficient. But then, why did it decide that 10 Mbps was good enough for rural Americans when it poured \$10.8 billion into the Connect America Fund last year?⁴ And why did it pat itself on the back for giving low-income Americans a 10 Mbps option when it approved the AT&T/DirecTV transaction just last week?⁵ If the FCC truly believes a 25 Mbps connection “has become ‘table stakes’ in 21st century communications,”⁶ it shouldn’t relegate certain Americans to a slow lane for broadband. It shouldn’t tolerate, much less deepen, the divide between the digital haves and the rural and low-income have-nots.

¹ Telecommunications Act § 706(b).

² See, e.g., *Notice* at para. 8 (new condition that an area is unserved unless it has “both fixed and mobile broadband”); *Notice* at paras. 41–46 (new test for broadband “consistency”); *Notice* at paras. 50–52 (qualifying objective test by listing “additional factors” the FCC will consider such as “access to multiple service providers”).

³ *Notice* at para. 24.

⁴ *Connect America Fund et al.*, WC Docket Nos. 10-90, 14-58, 14-192, Report and Order, 29 FCC Rcd 15644, 15649, para. 15 (2014).

⁵ *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Memorandum Opinion and Order, FCC 15-94, Appendix B at Condition VI.2.a–b (July 28, 2015).

⁶ *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. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd 1375, 1480 (2015) (Statement of Chairman Tom Wheeler), available at <http://go.usa.gov/3scbB>.

Similarly, the FCC has found the benchmark a useful crutch when claiming that the broadband market is not competitive. Artificially ratchet up the standard, and voila! Fewer competitors will be found. But the FCC didn't limit its net neutrality rules to 25 Mbps service—it applied them to everything faster than dial-up.⁷ And in another vote today, the FCC is bending over backwards to manipulate the market for special access services with speeds of 1.5 Mbps.⁸

In sum: A serious agency would evaluate the market using consistent, objective criteria. But the FCC simply chooses the preferred policy outcome of the moment and works its way backward. For these reasons, I dissent in part.

⁷ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5682, para. 187 (2015).

⁸ *Technology Transitions et al.*, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 15-97 (Aug. 6, 2015).