

**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. 14-126.

Before Humpty Dumpty had a great fall in *Through the Looking-Glass*, he told Alice, “When I use a word, . . . it means just what I choose it to mean—neither more nor less.”¹ So too, apparently, at the FCC. For today’s report declares that 10 Mbps Internet access service is no longer broadband. Only 25 Mbps or more counts.

This decision should surprise American consumers. 71% of consumers who can purchase fixed 25 Mbps service—over 70 million households—choose not to.² And before today, 58 million Americans thought they had subscribed to mobile broadband.³ But now the FCC says they’re getting something else.

This decision should also surprise the FCC itself. Just last month, the agency voted to spend \$10.8 billion over the next six years to deploy what it called 10 Mbps “broadband” so that millions of rural Americans could enjoy “access to *advanced* telecommunications and information services.”⁴ That’s billions of dollars that may help Americans get the Internet access services they actually want. But apparently that funding won’t be supporting broadband, even though last month’s item, in fact, used that term no fewer than 320 times.

Indeed, today’s report raises the question: Why are we spending over \$10 billion to deploy something that isn’t broadband? Don’t those in rural America deserve broadband access? Taken together, our decision last month and our decision today are incoherent.

Unfortunately, rather than “assessing common household broadband uses or relying on broadband adoption rates as bases for establishing a speed benchmark,” as we proposed to do last summer,⁵ the Commission picks an arbitrary 25 Mbps threshold. It does this by looking at ISPs’ marketing materials,⁶ asking what speed is needed to stream 4K video that few actually watch,⁷ and italicizing the word *advanced* nine separate times.⁸ Random factors like these are hardly a compelling basis for policymaking.

Instead, the driving factor in defining broadband should be consumer preference. And only this year has the majority of consumers with access actually adopted speeds of 10 Mbps or higher.⁹ That’s

¹ Lewis Carroll, *Through the Looking-Glass* 94 (Random House ed., 1946).

² See *Report* at Table 3 & Chart 1.

³ FCC, *Internet Access Services: Status as of December 31, 2013* at 4 (Oct. 2014) (reporting the number of 10 Mbps mobile connections), available at <http://go.usa.gov/SwPd>.

⁴ *Connect America Fund; ETC Annual Reports and Certifications; Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, WC Docket Nos. 10-90, 14-58, 14-192, Report and Order, FCC 14-190, paras. 15–16 (rel. Dec. 18, 2014) (*CAF Phase II Order*) (emphasis added); 47 U.S.C. § 254(b)(2).

⁵ *Tenth Broadband Deployment NOI*, 29 FCC Rcd at 9751, para. 7.

⁶ *Report* at paras. 28, 53.

⁷ *Report* at Table 1 & paras. 46, 47.

⁸ *Report* at paras. 3, 23, 47, 48, 49, 53, 53, 54, 140.

⁹ *CAF Phase II Order*, FCC 14-190, at para. 17.

why the FCC acknowledged when we commenced this inquiry that 10 Mbps accommodates the needs of consumers whose intensity of Internet use spans a broad range. At 10 Mbps, one family member could stream a super HD movie, another could make an HD video call, and yet another could deliver files to and retrieve them from the cloud, all while everyone in the house sends emails, gets alerts, and checks the weather.¹⁰ Similarly, consider that the median American Internet service provider streamed Netflix at a rate of 3.14 Mbps in December.¹¹ This means that members of a household could stream an episode of *House of Cards*, Aziz Ansari’s latest standup routine, and *Sesame Street* all at the same time with a 10 Mbps connection.¹²

But for some time now under this Administration, grounding the new benchmark for broadband in reality hasn’t been the point. No, the ultimate goal is to seize new, virtually limitless authority to regulate the broadband marketplace. Under its interpretation of section 706 of the Telecommunications Act, the FCC can do that only by determining that broadband is not “being deployed to all Americans in a reasonable and timely fashion”—or, more colloquially, by ignoring the consistent progress in Internet connectivity that’s obvious to anyone with a digital connection and an analog pulse.¹³ That explains why the FCC rewrote the statutory test the last time it was considering net neutrality rules.¹⁴ That explains why this Administration has studiously excluded satellite and mobile broadband services from its evaluation.¹⁵ And that explains why the FCC is suddenly upping the benchmark by a factor of six.¹⁶ A thriving marketplace must be found to have failed so that the agency can regulate it back to health. We’ll see if the agency sticks with this benchmark when it really matters—in rulemakings and adjudications to come.

Instead of reciting a slew of facts to demonstrate why broadband clearly is being deployed to all Americans in a reasonable and timely fashion, I’ll stick with just two: 98.5% of Americans now live in areas covered by 4G LTE networks (*i.e.*, networks capable of delivering 12 Mbps mobile Internet access).¹⁷ That’s 97.99 million more Americans than just two years ago.¹⁸ And that’s real, concrete

¹⁰ *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, Tenth Broadband Progress Notice of Inquiry, 29 FCC Rcd 9747, 9754, Table 2 (2014) (*Tenth Broadband Deployment NOI*).

¹¹ Netflix, USA ISP Speed Index Dec. 2014, <http://ispspeedindex.netflix.com/usa> (last visited Jan. 28, 2015) (reporting speed for Charter). The fastest reported speed was only 3.36 Mbps. *Id.* (reporting speed for Verizon FiOS).

¹² Given these facts and our prior findings, I find it puzzling that the report blithely asserts that a 10 Mbps connection is insufficient for members of a household to simultaneously “[p]articipate in an online class, download files, and stream a movie” or “[v]iew 2 HD videos.” *Report* at Table 1.

¹³ 47 U.S.C. § 1302 (codifying the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153 (as amended)).

¹⁴ *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, 27 FCC Rcd 10342, 10518–21 (2012) (Dissenting Statement of Commissioner Ajit Pai) (explaining the switch in 2010 and why the new test cannot be reconciled with the statutory language), available at <http://go.usa.gov/Sm6A>.

¹⁵ *Report* at paras. 74–76 (repeating the refrain that mobile and satellite data will be excluded because they “may overstate actual deployment”).

¹⁶ The benchmark before today was 4 Mbps. *See Report* at para. 3.

¹⁷ *Report* at para. 109.

¹⁸ *Cf. Report* at para. 109.

progress towards universal—dare I say it—broadband service. Further, one can only smile at the irony of the Commission’s insistence in finding failure the *very same month* that Google announces expansion of the Google Fiber project to 18 new cities, companies like Dish introduce over-the-top video options that rely on broadband, and bids for AWS-3 mobile broadband spectrum approach \$45 billion. At some point, the agency has to take “yes” for an answer when it comes to broadband deployment.

All of this ends with a Kafkaesque twist. The statute that inspires this exercise in broadband reporting tells us to accelerate broadband deployment “by removing barriers to infrastructure investment.”¹⁹ Yet the FCC appears dead set on doing precisely the opposite. The report itself offers no plan of action. And when you survey the Commission’s future agenda, barriers dot the horizon, from regulating the Internet like a public utility next month to slowing down the IP transition to micromanaging spectrum policy. Each of these policies, and others, will reduce broadband investment, raise the cost of deployment, and deter competitive entry into the broadband market. That’s not what the American consumer wants or deserves.

For all of these reasons, I dissent.

¹⁹ See 47 U.S.C. § 1302 (“If 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.”).