

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Inquiry Concerning the Development 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.

Today's Report, which is the one thing that section 706 actually does authorize, relies on intentionally flawed analyses to find that broadband is not being deployed to all Americans in a reasonable and timely fashion. Equally problematic, it is accompanied by an embarrassingly weak NOI that confirms the Commission has no concrete plans to promote broadband deployment, particularly in rural and unserved areas. Accordingly, I must dissent from the item.

The Report sets a new broadband benchmark of 25/3 Mbps for purposes of section 706, which I suspect will be applauded by some as a sign that the Commission supports ever higher speeds. And, to be clear, I too support higher speeds for all Americans. But selecting an artificially high standard and applying it in a way that is impossible to achieve in order to reach all Americans, certainly in the near term, makes a mockery of a process that was supposed to provide an honest assessment of broadband deployment in the United States. Some have suggested that it is designed to preserve the ability to regulate broadband under section 706 even as the Commission seems poised to reclassify broadband as a Title II service. Regardless of the reason, I cannot support this charade.

To justify setting the new benchmark at 25/3, as opposed to the current 4/1 or even 10/1 as several commenters suggested,¹ the Report notes that 4K TV requires 25 Mbps. But 4K TV is still relatively new and is not expected to be widely adopted for years to come.² While the statute directs us to look at "advanced" telecommunications capability, this stretches the concept to an untenable extreme. Some people, for example, believe, probably incorrectly, that we are on the path to interplanetary teleportation.³ Should we include the estimated bandwidth for that as well?

Perhaps recognizing the weakness of that line of argument, the Report quickly shifts from analyzing individual usage to household usage in order to multiply the speed requirements. It assumes that several users and/or devices in a household are simultaneously engaged in very high-bandwidth activities. But while the Report cites evidence that households have many devices, and that some devices are used for high-bandwidth activities, there's no actual data in the Report linking the two. Unless four or more people are each streaming HD videos at the same time, which is neither the norm nor the analysis required by the statute, it's hard to come up with a use case that warrants the 25/3 standard. Other activities, such as email, VoIP calls, and web browsing are simply not data intensive enough to approach this benchmark.

¹ See, e.g., NATOA Reply Comments at 3 (supporting 10 Mbps down for residential); CWA Comments at 1 (supporting 10 Mbps/1.5 Mbps); SIA Comments at 2; Hughes Comments at 2.

² See, e.g., Business Insider, *Our 4K Future — The New TV Standard Is Here And It Will Roll Out Much Faster Than HD* (Mar. 12, 2014), <http://www.businessinsider.com/the-rise-of-4k-tv-2014-3#ixzz3OFobgNAX> ("4K-capable TVs will be in 10% of all North American households by year-end 2018. We forecast that this number will reach 50% by the end of 2024, just 10 years from now.").

³ See Pew Research Center, *Reality check: How close are we to teleportation and Mars colonies?* (Apr. 17, 2014), <http://www.pewresearch.org/fact-tank/2014/04/17/reality-check-how-close-are-we-to-teleportation-and-mars-colonies/>.

Having settled on this new standard, it comes as no surprise that the Report finds that 25/3 service is not being deployed to all Americans. By setting the benchmark at this level, the Report is able to exclude both mobile and satellite broadband service from its analysis, despite the ever expanding capabilities and popularity of both services.

Even worse, it makes the finding by misreading the phrase “is being deployed”, and by giving essentially no weight to the statutory language “in a reasonable and timely fashion”. The former suggests that the Commission should look at “progress—not total achievement” as my colleague Commissioner Pai has said before.⁴ The latter implies that the Commission should take into account factors such as network engineering and the economics of serving rural and other high-cost areas. Read together, these provisions appropriately recognize that deployment to all Americans isn’t going to be uniform and certainly can’t happen overnight. Following that reasoning, the Commission would still be able to evolve the standard (at a realistic pace) while reaching a positive finding as long as there has been reasonable and timely progress towards it.

In fact, the data in the report suggest that there could be a positive finding even at the higher standard using the more realistic analysis required by the statute. Between 2011 and 2013, the percentage of Americans lacking access to 25/3 dropped from 28 percent to 17 percent. That’s remarkable given that the high benchmark limits the number of technologies, and therefore providers, that are currently able to offer such service. The Report takes issue with the fact that the gap narrowed by just three percentage points between 2012 and 2013. But that’s not at all surprising given that providers quickly confront a significant cost curve as they edge out into more rural areas. Indeed, that is why the Commission created a Remote Areas Fund to help bring alternative technologies such as fixed wireless and satellite broadband to areas that it knew could not be cost-effectively served by “wireline or cellular terrestrial broadband technologies” (much less fiber).⁵

Nonetheless, the Report narrowly holds that if some Americans do not have access to 25/3, then the standard isn’t met. This inflexible test constructed by the majority, which ignores the significant time and costs required to expand and upgrade networks, simply does not comport with the statute or with reality. It also ensures that any standard the Commission sets will never be met, which seems to be the purpose.

In a startling confession of things to come, the report suggests that the “day may be fast approaching” when the consumers must have wired and wireless broadband, assumedly at 25/3 or a higher standard. In other words, it’s not one or the other but both, and it means that wireless can never be a substitute for wireline but should be viewed as “distinct product offerings”. This admission highlights that the Commission has a broadband vision completely divorced from reality. Such a precarious path of thinking should cease immediately. While consumers may use the wireless and wireline broadband

⁴ 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. 11-121, Eighth Broadband Progress Report, 27 FCC Rcd 10342 (2012) (Dissenting Statement of Commissioner Ajit Pai), https://apps.fcc.gov/edocs_public/attachmatch/FCC-12-90A1.pdf.

⁵ See *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform— Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, para. 533 (2011) (USF/ICC Transformation Order), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-161A1_Rcd.pdf.

differently today, it does not mean that they could not use one for the other if that is all that was available to them (based on many factors, including cost). Procedurally, it perpetuates the strong belief that the Commission is seeking the next justification for a negative finding for American broadband deployment.

Adding insult to injury, appended to the Report is a scant NOI on ways to accelerate broadband deployment. If the state of broadband deployment is so dire, one would think it would warrant at least an NPRM and, ideally, one with concrete proposals to remedy the alleged problems. I could have supported a true NPRM. Regardless of whether the section 706 finding is positive or negative, there is always more that the Commission can do to promote broadband deployment. Where are the proposals to remove barriers to market entry? Where are the suggestions of FCC regulations that should be repealed or waived to promote broadband deployment?

Goals without actions are meaningless – as the Report itself underscores. Several years into its universal service reforms, 20 percent of rural Americans still do not have access to even 4/1 service that was the goal at the time. Part of this is due to the slow pace of the reforms themselves. But it is also due to a failure to focus on unserved areas.

Last year, as we proposed and then adopted various Connect America Fund reforms, I was told not to worry about unserved consumers because “virtually everyone” has access to at least 4/1. Based on my experience and travels throughout rural America, I knew that wasn’t the case and today’s Report bears that out. Unfortunately, it comes a month after the Commission made certain decisions that shift some of the funding to upgrade existing service in lower cost areas rather than connecting unserved consumers in truly high-cost areas. What is more, in many parts of the country, after six or more years, those upgrades are only guaranteed to get consumers to 10/1 service – a level that, as of today, we no longer consider to be true broadband service. I look forward to the Commission defending to Congress the second class citizen status for rural Americans rendered under this conclusion.

Although some decisions have been finalized, there are other opportunities to accelerate broadband deployment in truly unserved areas if the Commission finally devotes time to them. In particular, the Commission should fully commit itself to completing a plan for the Remote Areas Fund to ensure that the hardest to reach consumers are not left behind indefinitely. The Commission also needs to adopt a Connect America Fund for rate-of-return carriers.

Another key way to accelerate broadband deployment is to remove unnecessary regulations. For example, the Commission has an open proceeding on streamlining the Part 32 accounting rules. In addition, the Separations Joint Board is currently considering comprehensive reform of the Part 36 separations requirements. I have questioned the need for both sets of rules and I hope that we will soon consider orders sunsetting both, at least on a voluntary basis.

Finally, the Commission must refrain from imposing costly new requirements that deter broadband investment and deployment. Unfortunately, the Commission has been moving in the opposite direction. For example, the Commission recently made it harder for carriers to discontinue legacy services – a decision I dissented from because it will force carriers to continue to bear the cost of maintaining legacy services and networks instead of focusing those resources on new deployments.

And, now, the Commission appears ready to reclassify broadband as a Title II service. While the Commission is expected to forbear from a number of the Title II provisions, there will undoubtedly be at least some (and I suspect many) burdensome new requirements on broadband providers, including a whole host of small businesses. In addition, there will be a protracted period of uncertainty as parties challenge various decisions at the Commission and in the courts that will also deter investment in broadband.

In sum, I am deeply disappointed in both the Report and NOI. As an expert agency for communications, we are expected to deliver high-quality reports on the state of the industry and put forth consistent and thoughtful ideas to improve access to modern communications networks. Today, we fail to do both. I dissent.