

**CONCURRING 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. 15-191.

Congress created the FCC “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.”¹ In the Telecommunications Act of 1996, Congress reiterated that charge, requiring the FCC to “encourage” the deployment of advanced telecommunications capability—broadband—to all Americans and to “take immediate action to accelerate deployment” if the country falls behind.² In other words, section 706 is focused on bringing high-speed Internet access to places where a business case for deployment doesn’t already exist. It’s all about rural America.

In the first broadband deployment report of the Obama Administration, the FCC declared that broadband was not being deployed to all Americans in a reasonable and timely fashion, finding that 14–24 million Americans could not access it.³ As required by federal law, the Commission vowed “immediate action to accelerate deployment.”⁴ The Commission has since repeated that vow again⁵ and again⁶ and again.⁷

Today, the agency declares once more that broadband is still not being deployed to all Americans in a reasonable and timely fashion.⁸ It finds that “approximately 34 million Americans lack service, nearly the population of Canada.”⁹ That’s at least 10 million more Americans than were being left behind at the beginning of this Administration.

¹ Communications Act § 1.

² Telecommunications Act § 706(a)–(b).

³ *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; A National Broadband Plan for Our Future*, GN Docket Nos. 09-137, 09-51, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9574, para. 28 (2010).

⁴ *Id.* at 9575, para. 29; Telecommunications Act § 706(b).

⁵ *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, 26 FCC Rcd 8008, 8040, para. 64 (2011).

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. 11-121, Eighth Broadband Progress Report, 27 FCC Rcd 10342, 10403, para. 139 (2012).

⁷ *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, 1455, para. 141 (2015).

⁸ *Order* at para. 1.

⁹ *Order* at para. 120.

These figures confirm that this Administration's policies to encourage and accelerate broadband deployment over the last seven years just haven't worked. The digital divide between rural and urban America hasn't been closed. And so the FCC today gives this Administration a failing grade.

You might think that for all the money the Administration has spent, there would be real progress. But the FCC doesn't think so. And in many ways, I agree.

I agree that it's a failure to spend \$28.1 billion on the FCC's high-cost program since 2009 and yet still find a "stark contrast in service between urban and rural America."¹⁰

I agree that it's a failure to spend \$8.2 billion on so-called "stimulus" spending that favors overbuilding (and, all too often, politically connected cronyism) and consequently leaves "Americans who live in rural areas [] ten times more likely to be unserved than their urban counterparts."¹¹

I agree that it's a failure to agree to commit \$9.4 billion through the Connect America Fund and \$350 million through the Mobility Fund to deploy services that don't meet the FCC's 25 Mbps standard for broadband.¹² After these funds go out the door, we will still have to say then what we say today: "Americans living in rural areas and Tribal lands disproportionately lack access."¹³

I agree that it's a failure that the FCC has spent \$10.9 billion on the Lifeline program and doubled the size of the program, yet it hasn't made a dent in telephone adoption, the supposed purpose of all those subsidies.

I agree that it's a failure that the FCC has spent \$14.6 billion on the E-Rate program, yet it still finds that 91% of schools don't meet our own long-run connectivity target and 41% of schools don't even meet the short-term goal.¹⁴

And I agree that it's a failure that the FCC has spent a record \$838 million just administering the Universal Service Fund, yet it still can't say that the Fund is administered without substantial waste, fraud, and abuse.¹⁵

In short, American taxpayers aren't getting the bang they deserve for their hard-earned bucks. And the FCC is living up to Ralph Waldo Emerson's dictum that "Money often costs too much."

One problem has been the Commission's inconsistent approach to supporting broadband deployment in rural America. What does it say when the FCC reconsiders its historic *Universal Service*

¹⁰ *Order* at para. 121.

¹¹ *Order* at para. 121; *see also* Tony Romm, *Wired to Fail*, Politico, <http://politi.co/1VupCji> (July 28, 2015). The Administration received \$4.7 billion for the National Telecommunications and Information Administration's Broadband Technology Opportunities Program and \$3.5 billion for the Rural Utility Service's Broadband Initiatives Program.

¹² Specifically, \$114 million in Connect America Fund Phase I Round 1, \$324 million in Connect America Fund Phase I Round 2, and \$9.005 billion in Connect America Fund Phase II Offers of Model-Based Support as well as \$300 million in Mobility Fund Phase I and \$50 million in Tribal Mobility Fund Phase I.

¹³ *Order* at para. 121.

¹⁴ *Order* at para. 123.

¹⁵ *See* USAC, 2010 Second Quarter Filing M03 January 1, 2009 through December 31, 2009 – CASH BASIS; USAC, 2011 Second Quarter Filing M03 January 1, 2010 through December 31, 2010 – CASH BASIS; USAC, 2012 Second Quarter Filing M03 January 1, 2011 through December 31, 2011 – CASH BASIS; USAC, 2013 Second Quarter Filing M03 January 1, 2012 through December 31, 2012 – CASH BASIS USAC; 2014 Second Quarter Filing M03 January 1, 2013 through December 31, 2013 – CASH BASIS; 2015 Second Quarter Filing M03 January 1, 2014 through December 31, 2014 – CASH BASIS; 2016 First Quarter Filing M03 January 1, 2015 to September 30, 2015 – CASH BASIS.

Transformation Order seven separate times? When the agency decides first to adopt “benchmarks” for rural capital and operating expenses,¹⁶ then to rework them,¹⁷ then to eliminate them,¹⁸ and finally to resurrect them (they’re now called “specific budgets”)?¹⁹ When the U.S. Department of Agriculture feels compelled to tell the FCC that the regulatory uncertainty it’s created is devastating rural broadband deployment?²⁰

That inconsistency extends to the Commission’s inability to meet its own deadlines. The Connect America Fund’s second phase was supposed to start in 2013,²¹ not August 2015. The Commission promised to adopt a competitive bidding mechanism for that phase by December 2012,²² but we still don’t have one. The Mobility Fund’s second phase was due four years ago,²³ but it has been completely immobile. The Remote Areas Fund hasn’t commenced.²⁴ And last year, every member of this Commission promised Chairman John Thune of the Senate Committee on Commerce, Science, and Transportation that we’d adopt a stand-alone broadband mechanism before 2015 was over. (I put my plan on the table last June.) It’s now 2016, and there is no plan. There is no sign of any plan. There is no plan of any sign. But there is talk.

What is worse, the Commission has actively worked to make broadband deployment more difficult. The agency has required carriers to seek government permission before discontinuing almost every network feature no matter how little-used or old-fashioned.²⁵ It has dragged out the copper retirement process.²⁶ It has suspended the Clinton-era deregulatory framework for enterprise broadband services and appears on track for full-scale rate regulation of low-bandwidth services later this year.²⁷

¹⁶ *Connect America Fund et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 0951, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17742, para. 210 (2011) (*Universal Service Transformation Order*).

¹⁷ *Connect America Fund; High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, Sixth Order on Reconsideration and Memorandum Opinion and Order, 28 FCC Rcd 2572, 2581, para. 23 (2013).

¹⁸ *Connect America Fund et al.*, WC Docket Nos. 10-90, 14-58, 07-135, WT Docket No. 10-208, CC Docket No. 01-92, Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 7051, 7097, para. 131 (2014).

¹⁹ Remarks of FCC Chairman Tom Wheeler as Prepared for Delivery, NTCA Fall Conference, Boston, Massachusetts at 5 (Sept. 21, 2015).

²⁰ See Letter from John Charles Padalino, Acting Administrator, Rural Utility Service, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, at 2 (Feb. 15, 2013).

²¹ *Universal Service Transformation Order*, 26 FCC Rcd at 17674, para. 25.

²² *Id.*

²³ *Id.* at 17675, para. 28.

²⁴ *Id.* at 17675, para. 30.

²⁵ *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications et al.*, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 15018, para. 118 (2014).

²⁶ *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, 30 FCC Rcd 9372, 9390, 9421, paras. 29, 90 (2015).

²⁷ *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, RM-10593, Report and Order, 27 FCC Rcd 10557, 10558, para. 1 (2012).

And it has raised the cost of stringing fiber along poles (only to reverse that decision six months later).²⁸ In short, the Commission has purposely ignored the iron rule that every dollar wasted maintaining last century's fading technology is by definition a dollar that cannot go to next-generation networks. And so communities that offer the lowest profit margins—inhabited by low-income Americans, rural Americans, and others—must wait that much longer for digital opportunity.

Indeed, the Administration has overseen the first-ever reduction in year-over-year investment by major broadband providers that happened outside a recession—and it occurred in the months following the FCC's rubber-stamp of President Obama's plan to regulate the Internet.²⁹ Countless small broadband providers have also reduced investment in the communities they serve because of the FCC's decision to treat the Internet like a 19th century railroad or 20th century water company.³⁰ As one small wireless provider testified to Congress earlier this month: "Before the [*Title II Order*] was adopted, it was our intention to triple our customer base" and "cover a three-county area. However, we have pulled back on those plans, scaling back our deployment to three, smaller communities that abut our existing network."³¹

This Administration has also overseen the first-ever decline in home broadband adoption since the advent of the commercial Internet. According to the Pew Research Center, "home broadband adoption seems to have plateaued," with an estimated 9,686,903 Americans having given up home broadband connections between 2013 and 2015.³² That means over the last six years, only 4% of Americans have decided to adopt broadband at home. Compare that with the 57% of Americans that signed up for broadband during the last Administration—a yearly average of 7%, or almost twice the adoption growth during this entire Administration.³³ Indeed, as the National Broadband Plan found at the dawn of this Administration, "[f]ueled primarily by private sector investment and innovation, the American broadband ecosystem has evolved rapidly. The number of Americans who have broadband at home has grown from eight million in 2000 to nearly 200 million last year [in 2009]."³⁴ It's unfortunate that this incredible pace of progress fizzled thereafter.

And so we come to the fundamental question: Has the section 706 test been met? Perhaps surprisingly to some, including myself, I agree with the majority's end result: After seven years, \$63.6 billion spent, and plenty of talk, this Administration's policies have failed to deliver "advanced telecommunications capability"—broadband—to the American people in a reasonable and timely fashion. The standard set forth by Congress is not being met. Rural America is being left behind.

²⁸ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order on Reconsideration, FCC 15-151 at para. 21 (Nov. 24, 2015).

²⁹ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015).

³⁰ See Statement of Commissioner Ajit Pai on New Evidence that President Obama's Plan to Regulate the Internet Harms Small Businesses and Rural Broadband Deployment (May 7, 2015), available at <http://go.usa.gov/cEbnh>.

³¹ Written Testimony of L. Elizabeth Bowles, Legislative Committee Chair, Wireless Internet Service Providers Association and President, Aristotle, Inc. before the House Energy & Commerce Committee Subcommittee on Communications and Technology at 3 (Jan. 12, 2016), available at <http://go.usa.gov/cEbP3>.

³² John B. Horrigan & Maeve Duggan, Pew Research Center, Home Broadband 2015 at 2 (Dec. 21, 2015), available at <http://pewrsr.ch/1PbbJC9>.

³³ *Id.* at 3.

³⁴ National Broadband Plan at xi.

As expected, the Commission's answer to this disappointing news is yet another vow of "immediate action to accelerate deployment."³⁵ But after far too many years and far too many broken promises, we have learned that the past is prologue.

What our country needs is a real broadband deployment agenda—a proactive, concrete, bipartisan, dedicated effort to deliver digital opportunity to every American who wants it.

Among other things, that means returning to the bipartisan consensus that the Internet should be unfettered by federal or state regulation so that entrepreneurs within the network and on the edge can innovate without permission.

That means embracing the IP Transition and letting carriers sunset the increasingly obsolete public switched telephone network in favor of next-generation technologies like fiber.

That means modernizing our rate-of-return policies so that rural residents can have the same choice for stand-alone broadband typically found in cities.

That means creating a roadmap for state and local governments so that every company that wants to deploy fiber, from Google Fiber to Kansas' RG Fiber, doesn't have to cut through regulatory thickets every single time in every single location.

That means reducing the red tape for deploying wireless infrastructure on federal lands, where approval currently takes twice as long as on private lands, disproportionately hurting rural wireless consumers.

That means reopening the spectrum pipeline to get more of the airwaves out of the federal government's hands and into the commercial marketplace.

That means rejuvenating the 5 GHz proceeding so that wireless broadband providers and consumers nationwide can put another 195 MHz spectrum to unlicensed use.

That means teeing up 12,500 MHz of spectrum in frequencies above 24 GHz to allow the United States to be a leader in developing 5G technologies.

And that means actually eliminating other regulatory barriers to infrastructure investment—such as high pole attachment rates—so that companies can deploy the small cells, the towers, the fiber, and the new services that consumers are demanding.

In short, that means promoting competition. That means getting rid of outdated rules and regulatory uncertainty. And that means giving everyone—large companies and small, entrepreneurs and consumers—the confidence that the government will no longer stand as the gatekeeper when it comes to broadband and the services and applications that depend on it.

To bring the bounty of broadband to all in our nation who want it, our country needs to choose a different path. As the National Broadband Plan put it half a decade ago, "It is time again to reduce talk to practical results."³⁶ It is time for a new beginning.

³⁵ *Order* at para. 119.

³⁶ National Broadband Plan at 338.