

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Inquiry Concerning Deployment of Advanced	)	GN Docket No. 22-270
Telecommunications Capability to All Americans	)	
in a Reasonable and Timely Fashion	)	

**Comments of TechFreedom**

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## Summary

Section 706 is a reporting statute; it grants the FCC no substantive regulatory authority. Clear statutory language bounds what Congress asked for in the report, both in time and scope. The current FCC has disregarded those bounds and is instead using this proceeding as an opportunity to provide regulatory ammunition for its heavy-handed agenda. The Commission seeks data it isn't authorized to seek, to use toward ends that it isn't authorized to pursue.

Moving the goalposts for what constitutes "broadband" means that the digital divide may never appear to close at all—even as broadband availability has grown to include nearly everyone. The FCC knows this. The present proceeding aims at one real objective: rate regulation for broadband. It does so with doubtful data, a questionable understanding of consumer needs, and an insufficient legislative mandate.

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Pursuant to sections 1.415 and 1.419 of the Commission’s rules,<sup>1</sup> TechFreedom hereby files these comments in response to the Notice of Inquiry (“Notice” or “NOI”) released by the Commission on November 1, 2023.<sup>2</sup> Rather than treating this proceeding as the reporting exercise Congress intended in enacting Section 706, the Commission uses this docket to elicit public support for its continued attempts to rewrite the Telecommunications Act in what is arguably the largest regulatory power grab in American history.

**I. Introduction**

Section 706 of the Telecommunications Act requires the FCC to report annually<sup>3</sup> to Congress “whether advanced telecommunications capability is being deployed to all

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<sup>1</sup> 47 C.F.R. §§ 1.415 & 1.419.

<sup>2</sup> Fed. Commc’ns Comm’n, In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 22-270 (Nov. 1, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-89A1.pdf> (hereinafter Notice). The Notice established December 1, 2023, as the comment date. These Comments are timely filed.

<sup>3</sup> The last report actually submitted to Congress was the Fourteenth Broadband Progress Report, *see infra* note 38, released in January 2021, in the waning days of the Trump administration. The current FCC has not seen fit to even begin this statutorily required process until 33 months into the current administration. The fact that the Commission has been unable to move forward with a

Americans in a reasonable and timely fashion.”<sup>4</sup> Further, the Commission’s action in response to the results of its findings under Section 706 must be “consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”<sup>5</sup> Section 706 thus has both a temporal component (whether broadband is being deployed in a “reasonable and timely basis”), and a self-limiting component (the Commission may use only those “measures that promote competition” and those “methods that remove barriers to infrastructure investment”).

The current proceeding is essentially the antithesis of this statutory mandate. The NOI asks: “Can anything less than universal access in these areas be sufficient to reach a positive finding under section 706?”<sup>6</sup> The NOI does not ask whether we are on the right path toward narrowing or eliminating the digital divide.<sup>7</sup> Instead, anything short of perfect access, *right now*, means a failing grade for industry. This at the same time that we have been

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Notice of Inquiry since the beginning of this administration because of a lack of a third commissioner is strong evidence that this proceeding is not about reporting to Congress, but an attempt to use the Section 706 process to move forward with a substantive regulatory agenda.

<sup>4</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 1302(b)).

<sup>5</sup> 47 U.S.C. § 1302(a).

<sup>6</sup> Notice ¶ 65.

<sup>7</sup> *See, e.g.*, Dissenting Statement of Chairman Brendan Carr, 1 (Nov. 1, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-89A3.pdf> (“Reading Section 706 as directing the Commission to determine whether advanced telecommunications capability has already been deployed to 100% of Americans reads the ‘reasonable and timely’ language out of the statute and is inconsistent with Congress’s use of the present progressive tense ‘is being deployed.’”).

assured repeatedly by both the NTIA and the FCC that the \$45.2 billion in BEAD funding would achieve universal access to broadband.<sup>8</sup>

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<sup>8</sup> See, e.g., *Oversight and Reauthorization of the National Telecommunications and Information Administration, Before the Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Commerce, 118th Cong. (2023)* (statement of Alan Davidson, Assistant Sec'y of Commerce for Commc'ns and Info., Nat'l Telecomm. & Info. Admin.), <https://www.ntia.gov/speechtestimony/2023/written-statement-assistant-secretary-alan-davidson-house-committee-energy> (discussing BEAD under the subsection entitled "Internet for All"); Nat'l Telecomm. & Info. Admin, *How the FCC National Broadband Map Impacts the BEAD Program, Part 3 of 3: Meeting the Urgent Need*, INTERNET FOR ALL (May 10, 2023), <https://www.internet4all.gov/blog/how-fcc-national-broadband-map-impacts-bead-program-part-3-3-meeting-urgent-need> (stating "NTIA is preparing to enter a crucial phase for the Internet for All initiative. Soon, we will notify states and territories of their BEAD program allocation amounts."); *Advancing Internet For All*, Nat'l Telecomm. & Info. Admin, <https://www.ntia.gov/blog/2023/advancing-internet-all> (last visited Nov. 30, 2023) (stating "In order to meet the urgency of this moment to connect the unconnected, we continue to target June 30 as the date by which we will allocate each state and territory's BEAD Program funding for high-speed Internet service."); Press Release, Dep't of Commerce, Biden-Harris Administration's "Internet for All" Initiative: Bringing Affordable, Reliable High-Speed Internet to Everyone in America, (May 13, 2022), <https://www.commerce.gov/news/fact-sheets/2022/05/fact-sheet-biden-harris-administrations-internet-all-initiative-bringing> (stating "Today, NTIA is launching three Internet for All funding opportunities: Broadband Equity, Access, and Deployment (BEAD) Program Enabling Middle Mile Broadband Infrastructure Program (\$1 billion) State Digital Equity Act programs (\$1.5 billion) ... Along with other federal investments, these programs will: Connect All Americans to High-Speed Internet."); Press Release, The White House, Biden-Harris Administration Announces Over \$40 Billion to Connect Everyone in America to Affordable, Reliable, High-Speed Internet (June 26, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/26/fact-sheet-biden-harris-administration-announces-over-40-billion-to-connect-everyone-in-america-to-affordable-reliable-high-speed-internet/> (President Biden and Vice President Harris are delivering on their historic commitment to connect everyone in America to reliable, affordable high-speed internet by the end of the decade...through the Broadband Equity Access and Deployment (BEAD)); Press Release, Sen. Michael Bennett, Bennet, Hickenlooper, Polis Welcome Over \$826 Million in Broadband Equity, Access, and Deployment (BEAD) Funding for Colorado from Bipartisan Infrastructure Law (June 26, 2023), <https://www.bennet.senate.gov/public/index.cfm/2023/6/bennet-hickenlooper-polis-welcome-over-826-million-in-broadband-equity-access-and-deployment-bead-funding-for-colorado-from-bipartisan-infrastructure-law>; Letter from Sen. Mark Warner to Chairwoman Jessica Rosenworcel, Fed. Commc'ns Comm'n (Jan. 13, 2023), [https://www.warner.senate.gov/public/\\_cache/files/9/2/920c002f-7abb-401b-85d6-763cd076768c/2DEF7121073F95624B556529A1984A7C.1.13.23-letter-to-fcc-on-broadband-map.pdf](https://www.warner.senate.gov/public/_cache/files/9/2/920c002f-7abb-401b-85d6-763cd076768c/2DEF7121073F95624B556529A1984A7C.1.13.23-letter-to-fcc-on-broadband-map.pdf) (stating "Ensuring that the new map is as accurate as possible is critically important to closing the digital divide and providing access to affordable, reliable broadband to every single American" in reference to BEAD funding deployment.).

Why does the NOI frame the inquiry in this way? The answer is obvious: if the Commission can give a failing grade to the broadband industry, it can institute sweeping new regulations to control every aspect of the Internet, this time under the guise of imaginary substantive requirements in Section 706.<sup>9</sup> But if the Commission concludes that broadband is not being deployed in a “reasonably and timely fashion,” it is the federal government that should receive the “F.”

## **II. Section 706 Is a Reporting Statute, Not an Independent Authority to Regulate Broadband**

A plain reading of Section 706 makes clear that it is a reporting statute only: Congress tasked the FCC in the Telecommunications Act with annually providing an update on the progress of broadband deployment.<sup>10</sup> Section 706 contains no additional grant of regulatory powers to the FCC. Indeed, current FCC precedent, upheld by the D.C. Circuit Court of Appeals,<sup>11</sup> concludes that Section 706 is hortatory in nature.<sup>12</sup> Moreover, as the *Mozilla* court

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<sup>9</sup> See Notice ¶ 67 (“Section 706 states that if we make a negative finding as to the availability of advanced telecommunications capability, we are required to ‘take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.’ If we do, in fact, make a negative finding, what actions should the Commission take to further our universal service goals for broadband, both in the immediate future and over the long-term?” (footnote omitted)).

<sup>10</sup> 47 U.S.C. § 1302(b).

<sup>11</sup> *Mozilla Corp. v. Fed. Commc’ns Comm’n*, 940 F.3d 1, 46 (D.C. Cir. 2019) (“The Commission interpreted these provisions as ‘exhorting the Commission to exercise market-based or deregulatory authority granted under other statutory provisions, particularly the Communications Act’ not as ‘an independent grant of regulatory authority to give those provisions meaning.’ Despite Petitioners’ contentions, we find that this interpretation of Sections 706(a) and (b) is lawful.” (citing RIFO ¶ 270)). The court continued: “Thus, we proceed to Step Two of the analysis and ask whether the Commission’s understanding of Section 706 as hortatory represents a reasonable interpretation of the statute. We find that it does.” *Id.*

<sup>12</sup> Fed. Commc’ns Comm’n, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, ¶ 270 (Jan. 4, 2018), <https://docs.fcc.gov/public/attachments/FCC-17-166A1.pdf> (“RIFO”).

affirmed, Section 706 lacks any specificity as to who, or even what, Congress intended the FCC to regulate under that section.<sup>13</sup> The FCC cannot, in a Notice of Inquiry, reverse established Commission precedent.<sup>14</sup>

Even worse, the NOI ascribes to Section 706 language that simply doesn't exist in the statute. The NOI's second paragraph declares, in setting up the entire premise of this proceeding: "we propose to focus our inquiry on the universal service goals of section 706—universal deployment, affordability, adoption, availability, and equitable access to broadband throughout the United States."<sup>15</sup> Section 706 contains only 319 words. *Not* included in those words are "universal," "affordability," "adoption," or "equitable access." Section 706 refers only to "the availability of advanced telecommunications capability to all Americans." The NOI goes on to claim that the Infrastructure Investment and Jobs Act<sup>16</sup> somehow modified Section 706 to include these new terms: "Notably, for the first time since enacting section 706, Congress, in the Infrastructure Act, provided additional statutory text regarding the meaning of the provision. Specifically, Congress describes section 706 as setting out 'the statutorily mandated goals of universal service for advanced

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<sup>13</sup> *Id.* ("Furthermore, in support of its interpretation, the Commission notes that Section 706 lacks details 'identify[ing] the providers or entities whose conduct could be regulated,' whereas other provisions of the Act that unambiguously grant regulatory authority do specify such details. We find the Commission's rationales in favor of its reading of Section 706 to be reasonable." (citations omitted)).

<sup>14</sup> *Fed. Commc'ns Comm. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").

<sup>15</sup> Notice ¶ 2.

<sup>16</sup> Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (Infrastructure Act).



telecommunications capability.”<sup>17</sup> Yet the citation for this claim, footnote nine, merely refers to Section 60104 of the Infrastructure Act, which says only that “the term ‘universal service goals for broadband’ means the statutorily mandated goals of universal service for advanced telecommunications capability under section 706 of the Telecommunications Act of 1996 (47 U.S.C. 1302).”<sup>18</sup> Specifically, Section 60104(c) required the Commission to “report on the future of the Universal Service Fund” and to “provide recommendations for Congress to expand the universal service goals for broadband, if the Commission believes such an expansion is in the public interest.”<sup>19</sup> Section 60104 is yet another reporting statute, much like Section 706; it recognizes that it is the role of Congress, not the FCC, to determine whether the “universal service goals for broadband” are in need of “expansion.”

Thus, the Infrastructure Act did nothing to amend Section 706; it did not add the new goals asserted in the NOI. Yet the Commission now concludes that its “inquiry must include an examination of multiple universal service goals and should not be limited to the narrow question of physical deployment of service.”<sup>20</sup> With that, the Commission has rewritten the Telecommunications Act to fit its current heavy-handed regulatory agenda. The NOI then embarks on a voyage of discovery of regulatory powers completely untethered from the actual statute.<sup>21</sup>

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<sup>17</sup> Notice ¶ 6 (footnote omitted).

<sup>18</sup> Infrastructure Act § 60104.

<sup>19</sup> *Id.*

<sup>20</sup> Notice ¶ 7.

<sup>21</sup> *See West Virginia v. Env'tl. Prot. Agency*, No. 20-1530, at \*24-25 (U.S. June 30, 2022) (“All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, ‘common sense as to the manner in which Congress [would have been] likely to delegate’

### III. The FCC Seeks Data and Policy Support That Far Exceed the Statutory Mandate of Section 706

Section 706(c) clearly states what data the FCC should use in completing its inquiry and report:

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) and to the extent that data from the Census Bureau is available, determine, for each such unserved area—

- (1) the population;
- (2) the population density; and
- (3) the average per capita income.<sup>22</sup>

That's it. The statute does ask the FCC to report on any other deployment metric. Yet the Commission attempts to rewrite Section 706 by asking “are geographically disaggregated data sources available that would enable the Commission also to provide additional demographic information regarding both deployment and adoption of advanced telecommunications capability, for example, considering the unserved population by race, ethnicity, age, or disability status?”<sup>23</sup>

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such power to the agency at issue made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through ‘modest words,’ ‘vague terms,’ or ‘subtle device[s].’ Nor does Congress typically use oblique or elliptical language to empower an agency to make a ‘radical or fundamental change’ to a statutory scheme. Agencies have only those powers given to them by Congress, and ‘enabling legislation’ is generally not an ‘open book to which the agency [may] add pages and change the plot line.’ We presume that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’” (citations omitted)).

<sup>22</sup> 47 U.S.C. § 1302(c).

<sup>23</sup> Notice ¶ 44.

The FCC seems not to have learned that, when a statute specifies parameters, the Commission is not free to expand those parameters. In *NAB v. FCC*,<sup>24</sup> the FCC attempted to bootstrap off the statutory language of Section 317 regarding foreign-government sponsored programming to require broadcast stations to “independently confirm the sponsor’s status, at both the time of the lease and the time of any renewal, by checking the Department of Justice’s Foreign Agents Registration Act website and the FCC’s U.S.-based foreign media outlets reports.”<sup>25</sup> The problem, the court found, was that this latter requirement was nowhere articulated in the statute. The FCC argued that the language of Section 317 was broad enough to encompass the layering on of this additional requirement. The court disagreed:

[T]he FCC argues that even if § 317(c) does not affirmatively authorize it to require searches of the federal sources, it can require the searches as part of its general authority to “prescribe appropriate rules and regulations to carry out the provisions” of § 317. A generic grant of rulemaking authority to fill gaps, however, does not allow the FCC to alter the specific choices Congress made. Instead, the FCC must abide “not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”<sup>26</sup>

As in *NAB v. FCC*, Congress made “specific choices” as to what data it wanted the FCC to report under Section 706. If Congress had intended the FCC to change what it reported, it would have amended Section 706. The Infrastructure Act did not do so, and therefore the

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<sup>24</sup> Nat’l Ass’n of Broads. v. Fed. Commc’ns Comm’n, No. 39 F.4th 817 (D.C. Cir. 2022).

<sup>25</sup> *Id.* at 819 (citing *In the Matter of Sponsorship Identification Requirements for Foreign Government-Provided Programming*, 36 FCC Rcd. 7702, ¶ 35 (2021)).

<sup>26</sup> *Id.* at 820 (citations omitted).

FCC is limited to what Congress has mandated, not what it wants to report as a backstop for its desire to heavily regulate every aspect of broadband delivery.<sup>27</sup>

#### **IV. The FCC Lacks the Data Necessary to Evaluate Many of the Goals It Seeks to Advance in This Proceeding**

Even if Section 706 were as broad as the FCC claims, the Commission lacks data on many of its newfound definitions of what constitutes “access” to broadband. For the first time, the Commission is using the new Broadband Data Collection (BDC) data<sup>28</sup> pursuant to the Broadband DATA Act,<sup>29</sup> which “required the Commission, among other things, to collect biannual data relating to the availability and quality of service of fixed and mobile broadband Internet access service for the Commission to create broadband coverage maps.”<sup>30</sup> The collection of this data was a monumental and critical step in quantifying and pinpointing the extent of the digital divide. But the Broadband DATA Act and the subsequent three years of

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<sup>27</sup> See, e.g., Dissenting Statement of Brendan Carr Re: Implementing the Infrastructure Investment and Jobs Act, FCC 23-100, 2 (Nov. 15, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-100A3.pdf>.

The text of the order expressly provides that the FCC would be empowered, for the first time, to regulate each and every ISP’s: “network infrastructure deployment, network reliability, network upgrades, network maintenance, customer-premises equipment, and installation”; “speeds, capacities, latency, data caps, throttling, pricing, promotional rates, imposition of late fees, opportunity for equipment rental, installation time, contract renewal terms, service termination terms, and use of customer credit and account history”; “mandatory arbitration clauses, pricing, deposits, discounts, customer service, language options, credit checks, marketing or advertising, contract renewal, upgrades, account termination, transfers to another covered entity, and service suspension.” As exhausting as it is to read that list, the FCC says it is not an exhaustive list.

<sup>28</sup> Notice ¶ 3.

<sup>29</sup> Broadband Deployment Accuracy and Technology Availability Act, Pub. L. No. 116-130, 134 Stat. 228 (2020) (codified at 47 U.S.C. §§ 641-646) (Broadband DATA Act).

<sup>30</sup> Notice ¶ 3.

implementation were focused on *deployment*, not the other parameters the Commission now claims are embodied in Section 706.<sup>31</sup>

Is the FCC now admitting that its efforts and the money spent to create the new broadband maps were wasted? Is it saying that Congress was wrong in directing it to collect deployment data under the Broadband Data Act? The NOI implies as much, where the FCC admits that it lacks data on actual broadband subscriber data use, needs, and affordability, references non-governmental data sets,<sup>32</sup> and asks for additional data sets (other than the census data Congress wants used as the basis for future decision making)<sup>33</sup> to support its regulatory agenda.<sup>34</sup> In so doing, the FCC concedes that it lacks the necessary data to reach any conclusions as to the state of broadband availability in America.

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<sup>31</sup> \$98 million was appropriated for implementing the Broadband Data Act. FED. COMM'NS COMM'N, 2023 BUDGET-IN-BRIEF 55 (Mar. 2022), <https://docs.fcc.gov/public/attachments/DOC-381693A2.pdf>.

<sup>32</sup> Notice ¶ 19 (referencing *OpenVault 4Q2022 Report*; *OpenVault 4Q2020 Report*; and Consortium for School Networking, Student Home Connectivity Study (2021)).

<sup>33</sup> 47 U.S.C. § 1302(c).

<sup>34</sup> See, e.g., Notice ¶ 2 (“In light of the increasing uses and demands for high-speed broadband and the Congressional directives embodied in the Infrastructure Investment and Jobs Act (Infrastructure Act), which includes the largest ever federal investment in high-speed broadband, 2 we propose in this Notice to take a long overdue fresh look at our standards for evaluating broadband deployment and availability, the quality of our available data, and the framework that we use to make our finding under section 706”); ¶ 4 (“[W]e seek objective data and other evidence to evaluate the universal service goals for broadband. We encourage individual consumers, providers of broadband services, consumer advocates, analysts, policy institutes, governmental entities, and all other interested parties to help us determine the most effective ways to complete this statutorily mandated task”); ¶ 23 (“We invite commenters to suggest what they consider relevant combinations of benchmark download and upload speeds that we should report for both fixed and mobile broadband service. As part of their suggestions, we request that commenters consider the availability of reliable and comprehensive data and suggest available sources”); ¶ 25 (“We agree with GAO that soliciting additional stakeholder input regarding small business broadband needs, assuming adequate data are available, could assist the Commission in determining whether the current fixed speed broadband benchmark is adequate to deliver

## V. Continually Moving the Goal Posts Means Never Closing the Digital Divide

Notwithstanding the lack of data available to assess the newfound goals of “affordability, adoption, availability, and equitable access,”<sup>35</sup> the NOI reaches the preliminary conclusion that the current 25/3 Mbps standard for broadband is too low, and that broadband should be redefined to be at least 100/20 Mbps today, with the goal of reaching 1 Gbps/500 Mbps in the future.<sup>36</sup> Is 25/3 Mbps too slow for today’s broadband subscriber? Probably. But two problems exist with jumping the standard to 100/20 Mbps (or higher).

First, the Commission must realize that raising the benchmark for what constitutes broadband will instantly widen the digital divide. In 2012, when the definition of broadband was 4/1 Mbps, the Eighth Broadband Progress Report concluded that 94 percent of the population had access to those speeds, leaving 19 million on the other side of the digital divide.<sup>37</sup> In the Fourteenth Broadband Deployment Report, the last one issued by the FCC in

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“advanced telecommunications capability.”); ¶ 29 (“We also seek comment on whether the available quality of service data are sufficient to establish quantifiable benchmarks for factors such as latency and consistency. Is there sufficient information available to allow us to set benchmarks that govern service quality and to determine whether these thresholds are being met?”); ¶ 35 (“We seek comment generally regarding how to address additional potential criteria for the purposes of these reports and what data sources the Commission could rely on for analysis of additional metrics from year-to-year.”); ¶ 38 (“We also seek comment on the degree of substitutability between mobile and fixed services and how that has changed over time. What data exist concerning the cross-elasticity of demand between the services?”); ¶ 40 (“In this section we seek comment regarding each of our proposed universal service goals for broadband—deployment, affordability, adoption, availability, and equitable access. We seek comment on how to define these goals, how these goals can be evaluated, and what data is available to assess each goal.”).

<sup>35</sup> *Id.* ¶ 40.

<sup>36</sup> *Id.* ¶ 9.

<sup>37</sup> Fed. Commc’ns Comm’n, Eighth Broadband Progress Report, GN Docket No. 11-121, 33 (Aug. 21, 2012), <https://docs.fcc.gov/public/attachments/FCC-12-90A1.pdf>.

January 2021,<sup>38</sup> even with an increased benchmark of 25/3, by 2019 industry had deployed broadband to 95.6% percent of the country, leaving 4.4%, or 14.5 million people still unserved. According to the NOI, increasing the definition of broadband to 100/20 will instantly widen the digital divide—“approximately 91% of broadband-serviceable locations had access to a terrestrial fixed broadband service with download speeds of at least 100 Mbps in December 2022,”<sup>39</sup> thus placing 30 million people on the wrong side of the digital divide, nearly doubling the unserved from 2019.<sup>40</sup>

Even worse, notwithstanding strong progress in reaching those in rural and tribal areas,<sup>41</sup> it is in those areas where the new digital divide gap will be even wider. Providers attempting to serve rural and tribal areas often turn to technologies such as fixed wireless, or even satellite, to reach those for whom fiber or other wired technologies are impossible or prohibitively expensive. These alternative technologies, at least in the short term, will not

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<sup>38</sup> Fed. Commc’ns Comm’n, Fourteenth Broadband Deployment Report, GN Docket No. 20-269, 20 (Jan. 19, 2021), <https://docs.fcc.gov/public/attachments/FCC-21-18A1.pdf>.

<sup>39</sup> Notice ¶ 17.

<sup>40</sup> It is fascinating that the NOI nowhere provides any deployment numbers under the current 25/3 standard. According to USA Facts, 97 percent of the U.S. population has access to broadband under the current standard, leaving approximately 10 million unserved. *See How many Americans have broadband internet access?*, USAFACTS, <https://usafacts.org/articles/how-many-americans-have-broadband-internet-access/> (last visited Nov. 30, 2023).

<sup>41</sup> *See* Fourteenth Broadband Deployment Report, *supra* note 38, ¶ 33 (“The data clearly demonstrate that the gap between urban areas on the one hand and rural and Tribal areas on the other, has narrowed each year over the last five years. Indeed, while the gap between urban and rural areas was 30 percentage points as of year-end 2016, it was only 16 percentage points as of year-end 2019. As of the end of 2019, approximately 17% of Americans in rural areas and 21% of Americans in Tribal lands lack coverage from fixed terrestrial 25/3 Mbps broadband, as compared to only 1% of Americans in urban areas.” (footnote omitted.)).

be able to hit the 100/20 benchmark.<sup>42</sup> Far worse, if the FCC requires that future recipients of government funding build to this new spec, as proposed in the NOI,<sup>43</sup> progress in connecting rural America and tribal lands will slow, and money will flow to what previously were served areas, but are now being redefined to being unserved.<sup>44</sup> Looking further down the road, if the FCC announces that at some point government support will only flow to those that provide 1 gig/500 Mbps speeds, expansion of broadband into rural and tribal areas will stop completely, and providers will be forced to cease operations in areas where such speeds are too expensive to build and maintain, leaving rural and tribal residents with no connectivity at all.<sup>45</sup>

#### **A. This Need for Speed Assumes That COVID Lockdowns Are Still in Place**

The main rationale in the NOI for increasing the benchmark to 100/20 is that the COVID pandemic demonstrated the need for faster speeds because schools were shuttered, children had to learn from home, and many people had to telecommute for work. “COVID”

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<sup>42</sup> COLBY L. RACHFAL, CONG. RESEARCH SERV., IF12441, FIXED TECHNOLOGIES USED TO DELIVER BROADBAND SERVICE 2 (June 30, 2023), <https://crsreports.congress.gov/product/pdf/IF/IF12441> (“Technologies such as DSL and GEO satellites that currently meet the 25/3 Mbps benchmark may not be able to deliver the speeds required by a higher benchmark.”).

<sup>43</sup> Notice ¶ 18 (“Broadband funding programs have evolved not only to expect faster download speeds, but faster upload speeds, as well. For example, the BEAD Program requires an upload speed of 20 Mbps and winning bidders in the Bringing Puerto Rico Together and USVI Fund programs are committed to providing minimum upload speeds of 20 and 500 Mbps, respectively.”).

<sup>44</sup> RACHFAL, *supra* note 42 (“Federal funds intended to provide service to areas currently without any broadband service might be redirected to areas that already meet the existing 25/3 Mbps benchmark to upgrade those areas to meet the new benchmark.”).

<sup>45</sup> If the Commission adopts its proposal in the NOI to define “access” as having available *both* fixed and mobile broadband meeting the new 100/20 benchmark, millions more will be thrust, by administrative fiat, to the other side of the digital divide. *See* Notice ¶ 38 (“Does deployment of advanced telecommunications capability require access to both fixed and mobile broadband services?”). *See also* RACHFAL, *supra* note 42 (“Raising the minimum broadband speed benchmark would raise the number of households considered unserved with broadband.”).



and “pandemic” are used over 20 times each in the NOI as justification for the increased benchmark.<sup>46</sup> These are indeed data-driven conclusions. What is not data-driven, however, are the multiple conclusions reached in the NOI that these increased speed needs will continue, even though schools are open, and the vast majority of people have returned to in-person work, at least partially.<sup>47</sup> There is virtually no data to indicate that the speed requirements today are the same as they were during the lockdown.

**B. The 100/20 Benchmark Is Based on Entertainment Uses, Not Telehealth or Homework**

It is indeed important that broadband support education and telehealth.<sup>48</sup> Yet the NOI contains no credible forward-looking predictions on those specific requirements, nor a claim that the same bandwidth is needed to “upload homework assignments,”<sup>49</sup> as was required for six or more hours each day of live video education when schools were shut down. Zoom

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<sup>46</sup> Notice ¶ 11 (“During the COVID-19 pandemic, families adapted to working, learning, receiving healthcare, and interacting with the outside world simultaneously using multiple devices on the same household connection. Higher speeds have frequently become a necessity.”); ¶ 13 (“For example, virtual school enrollment across ten states increased 176% in the 2021-22 school year, as compared to the 2019-20 school year.”)

<sup>47</sup> *See id.* ¶ 11 (“We believe many of the adaptations Americans made during the COVID-19 pandemic are here to stay—for example, more widespread teleworking and continued expansion of telehealth.”); ¶ 13 (“And even students who are attending school in person are still relying on home connectivity for schoolwork outside of school hours.”); ¶ 49 (“Even though in-person schooling has resumed, many students still lack connections at home, making it difficult to complete homework. It is imperative that schools have the speed and bandwidth required to adequately educate America’s children both in schools and at home.”).

<sup>48</sup> *See id.* ¶¶ 11, 49.

<sup>49</sup> *Id.* ¶ 49.

requires just “3.8Mbps/3.0Mbps (up/down)” for group video calling.<sup>50</sup> Instead, the NOI justifies increasing the speed benchmark based on entertainment uses of the Internet:

We seek comment on the online applications, use cases, and technologies that commenters believe a sufficient number of consumers are using today and will use in the foreseeable future. How can the Commission set relevant speed and other broadband thresholds to enable those applications, use cases, and technologies? For example, as 4K video increases in popularity, individual households may have an increasing number of 25 Mbps video streams serving applications such as video conferencing, telehealth, and remote learning, not to mention streaming of video entertainment and gaming. . . . [W]e believe it is appropriate to take into account at least occasional downloads of very large files which can be bandwidth-intensive.<sup>51</sup>

To be clear, what the NOI is saying is that it should be the goal of the U.S. government to ensure that consumers can watch Netflix and play Call of Duty, not do their homework or have a tele-visit with their doctor. Until the FCC can produce accurate data for the actual bandwidth speeds required in a post-COVID lockdown world for education and telehealth, it should not increase the benchmark speed for broadband. It is folly to demand that everyone have access to (and be able to afford) a Ferrari when a Honda Civic can get you to the same places.

### **C. Scant Data Supports the Need for a Symmetrical Speed Benchmark**

The NOI requests comment on whether the speed benchmark for broadband should be symmetrical—i.e., that the upload speed requirement should be the same as the download speed:

Given the increasing importance of upload speed, is there a continuing reason to differentiate download and upload speeds in our benchmark or should we

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<sup>50</sup> *Zoom system requirements*, ZOOM SUPPORT (Nov. 11, 2023), [https://support.zoom.com/hc/en/article?id=zm\\_kb&sysparm\\_article=KB0060748](https://support.zoom.com/hc/en/article?id=zm_kb&sysparm_article=KB0060748).

<sup>51</sup> Notice ¶ 21. Footnote 56 references two articles discussing the large file downloads required for some popular computer games.

consider setting a benchmark with symmetrical download and upload speeds? Are the demands of upload broadband uses growing at a rate at which they may soon be the same as download demands?<sup>52</sup>

Again, the NOI asks for comment on this issue, but fails to provide any data to back up the claim that Americans are uploading data as quickly as they are downloading it. Indeed, the discussion above about basing the benchmark on watching 4K video or downloading massive computer game files effectively undercuts this argument. There also is ample evidence that, even at the height of the pandemic, the vast majority of users didn't require anything close to the same upload speed as download speed.<sup>53</sup> Absent clear data to support this contention, the Commission should not abandon its prior recognition that consumers need far faster download speeds than upload speeds.

## **VI. The Notice's Approach to Affordability Is a Prelude to Rate Regulation**

Again, Section 706 makes no mention of "affordability." The Commission's argument that consumers don't have access to broadband if they can't afford it runs completely counter

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<sup>52</sup> *Id.* ¶ 22.

<sup>53</sup> See, e.g., *You've Been Served: Defining Broadband as 100/100 is not 100*, TECHNOLOGY POLICY INSTITUTE (Mar. 29, 2021), <https://techpolicyinstitute.medium.com/youve-been-served-defining-broadband-as-100-100-is-not-5eefcb50905a> ("Even multiple people in a household sharing an internet connection are unlikely to use 100/100. In principle, you could have ten kids pretending to do Zoom school but actually doing TikToks while you're in the other room pretending to work but actually watching Netflix, and still not run out of bandwidth."). See also Deborah Collier, *The Asymmetrical Consequences of Symmetrical Speeds*, CITIZENS AGAINST GOVERNMENT WASTE (Mar. 25, 2021), <https://www.cagw.org/thewastewatcher/asymmetrical-consequences-symmetrical-speeds> ("If Congress or the Federal Communications Commission (FCC) were to arbitrarily and capriciously set a standard for data download and upload speeds to a symmetrical 100/100 Mbps, it would fly in the face of the way consumers now use the internet and create an even greater divide between those who have and those who do not have internet access. For example, service providers will be required to change their service to existing customers at the expense of those who remain without available service.").

to the statute.<sup>54</sup> But reframing “availability” (the term used in Section 706) in terms of “affordability” is essential for the Commission to reach its ultimate goal: regulating broadband rates. First, the Commission asks for a methodology to determine whether broadband is affordable:

If we were to look beyond subscriber patterns in examining affordability, should we examine prices for broadband services and compare them against a selected benchmark to determine affordability? Are there other methods of measuring affordability? If we were to compare price to a benchmark, are there adequate sources to enable us to adopt a benchmark? To what would we compare the price information that we collect? Could we use as a benchmark a percentage of a certain level of income? How would we take into account the fact that a single household might have multiple mobile accounts (either individually or grouped into a family plan) while it would likely only have a single fixed broadband account? *Should a household be able to afford mobile and fixed broadband service simultaneously in order for advanced telecommunications capability to be available to them?*<sup>55</sup>

If the Commission can establish this new “affordability” benchmark, and then conclude that anyone not able to afford or willing to pay the benchmark rate for *both* fixed and wireless broadband is being denied “access” to broadband, then, according to the Notice, the agency can take action to make broadband affordable to every individual:

Section 706 states that if we make a negative finding as to the availability of advanced telecommunications capability, we are required to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” If we do, in fact, make a negative finding, what actions should the Commission take to further our universal service goals for broadband, both in the immediate future and over the long-term?<sup>56</sup>

There is only one way for the Commission to make a positive finding that *everyone* can afford their broadband connection: regulating the rates of broadband providers (and in

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<sup>54</sup> See Notice ¶ 58.

<sup>55</sup> *Id.* ¶ 55 (footnote omitted, emphasis added).

<sup>56</sup> *Id.* ¶ 67.

many cases, requiring providers to provide broadband for free to the poorest in this country). Be it through *ex ante* hard rate regulation, soft rate regulation (maximum price caps in low income areas), or *ex post* findings of digital discrimination because a protected class can't afford the available broadband in their area, the only way the FCC can meet its own definition of an affirmative finding under Section 706 will be for the FCC to regulate broadband rates. It is a foregone conclusion in the regulatory world envisioned by this NOI.

## **VII. Conclusion**

Congress has appropriated unprecedented sums of money in the last few years to properly map out the availability of broadband, and then pay for expansion of broadband to those areas. The Section 706 reporting process, completely ignored by the current Commission for 33 months, could be a critical tool in assessing whether this money is being put to its intended use. Instead, this Commission has turned this reporting exercise into an attempt to redefine terms in order to assure that it must report to Congress a negative finding, all in an effort to buttress its efforts to highly regulate broadband. The FCC should do what Congress demanded in Section 706 and accurately report “whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”<sup>57</sup> Such a report would be a welcome assessment of whether the billions being spent is actually going to close the digital divide, as this administration has promised.

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<sup>57</sup> 47 U.S.C. § 1302(b)).

What this proceeding no doubt will produce is a report that ignores the efforts of both industry and government programs to make progress in closing the digital divide, and that instead concludes that universal access to broadband can only be accomplished through massive new regulations that allows the Commission to micromanage every business decision made by broadband providers. The report will not result in policies that “remove barriers to infrastructure investment,” but rather the creation of massive new barriers that, in fact, will stifle infrastructure investment and drive up the cost to deploy broadband to those currently unserved or underserved. It does not have to be this way, if the FCC merely follows Congress’s statutory mandate in Section 706.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_

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