

**DISSENTING STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 22-270, 2024 Section 706 Report (March 14, 2024)

Today’s Section 706 Report is the FCC’s first in three years. Thanks to the passage of time, we came to this proceeding with a fresh opportunity to grade the pace of progress that broadband providers have made over the past few years to bring Americans across the digital divide.

We’ve made impressive strides. Definitely so. Wireline providers are aggressively rolling out fiber optic networks with gigabit speeds. 5G networks now stretch from coast to coast. Fixed wireless has become a competitive mainstay with millions of new subscribers in the residential broadband market. Thousands of satellites launched into low-earth orbit offer speeds comparable to terrestrial broadband, particularly in rural and remote areas that were traditionally left behind. And billions of dollars in federal support are flowing to close any remaining gaps. By any possible measure, we’re seeing real progress in the availability of high-speed broadband.

If there were ever moment—if there were ever a stretch of time—where the pace, cadence, and speed of broadband builds would result in the FCC agreeing, on a unanimous basis, that broadband is “being deployed to all Americans in a reasonable and timely fashion,”¹ as Section 706 states, today would be that day. But it isn’t. The more than \$8 billion for broadband allocated by states and localities under the American Rescue Plan does not matter. The more than \$9 billion awarded through the Treasury Department’s Capital Projects Fund does not matter. The more than \$21 billion doled out to the FCC’s low-income and school kids programs does not matter.

So what today’s decision really does is lay bare for everyone to see that the Section 706 inquiry is no longer about assessing the pace of broadband builds—it is about the next month or two. It is about Title II. The reason the FCC gives the Biden Administration’s broadband efforts a failing grade today, the first the FCC has handed out since 2016,² is because the FCC believes that a negative finding will empower it soon enough to impose new controls on the Internet.

None of this is really all that surprising. But what’s surprising, or at least interesting to me, is how the FCC arrived at this conclusion.

This 706 Report makes three basic errors that work to obscure the state of progress. *First*, the report relies on bad data. It uses broadband deployment statistics that are 15 months old when newer information is available at our fingertips. And the numbers used in this report have inaccuracies that were since corrected. *Second*, the FCC reads a new standard into the law that Congress never enacted. Rather than measure the incremental progress of broadband availability as Section 706 requires, the FCC moves the goalposts and undertakes an all-or-nothing inquiry using factors that appear nowhere in the statute. In

¹ 47 U.S.C. § 1302(b).

² Compare *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Fourteenth Broadband Deployment Report, 36 FCC Rcd 836 (2021); *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2020 Broadband Deployment Report, 35 FCC Rcd 8986 (2020); *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Broadband Deployment Report, 34 FCC Rcd 3857 (2019); *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2018 Broadband Deployment Report, 33 FCC Rcd 1660 (2018). The FCC did not release a 706 Report in 2017, 2022, or 2023.

other words, the agency uses criteria that could never be satisfied. *And third*, while we all agree that the FCC should be aiming for 100/20 Mbps in our programs (which we've been doing since at least 2016), the 706 Report uses that benchmark to disregard technological neutrality and consumer expectations.

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Start with the data. In 2020, Congress enacted the Broadband DATA Act, which directed the FCC to undertake a biannual Broadband Data Collection (BDC) “relating to the availability and quality of service of fixed and mobile broadband Internet access service for the Commission to create broadband coverage maps.”³ Congress recognized that these information collections would be imperfect. After all, they largely rely on self-reported data from providers. So Congress required the FCC to iterate continuously by undertaking a fresh BDC every six months and subjecting that data collection to a public challenge process. Each iteration would be more accurate than the last. To date, the Commission has released three versions of the map. In this 706 Report, the Commission relies on the BDC for the first time. The maps represent a monumental achievement thanks to the tireless work of Commission staff.

But there is a very big problem: this 706 Report doesn't use the latest BDC datasets. The 706 Report relies on BDC Version 2, which shows broadband deployment as of December 31, 2022. The most recent dataset, BDC Version 3, was released last year in November 2023 and reflects broadband deployment as of June 30, 2023. The FCC barely mentions the existence of BDC Version 3, let alone explains why it wasn't used.⁴ The 706 Report's reliance on stale data undermines entirely the FCC's conclusions. It discredits the whole exercise and renders its ultimate conclusions untenable as to the current state of broadband availability.

The use of bad data has a compounding effect. For starters, the 706 Report glosses over all the developments that happened between the last two versions of the BDC. Six months may not sound like much, but it's a lifetime in today's climate of dynamism, investment, and intermodal competition. The rapid improvements in broadband availability and quality should be obvious to everyone. Consider the following changes over the course of six months, by no means exhaustive:

- **Total deployments:** BDC Version 3 shows 151.8 million units served by fixed terrestrial broadband at 100/20 Mbps. BDC Version 2, by contrast, had that number at 145.7 million. No surprise. Shovels are well in the ground under our FCC funding programs. After all, December 31, 2023 was the 60% service milestone under CAF Phase II. Meanwhile, the December 31, 2025 deadline for 40% service under RDOF Phase I is fast approaching.
- **Fixed wireless:** BDC Version 3 shows 66.0 million locations with fixed wireless service at 100/20 Mbps. BDC Version 2, used in the 706 Report, shows 41.9 million units with fixed wireless service at 100/20 Mbps. The growth of fixed wireless was also expected. Newly lit C-band and previously freed up 2.5 GHz spectrum have unlocked the possibilities of fixed wireless and intensified competition for the addressable in-home broadband segment. Mobile broadband

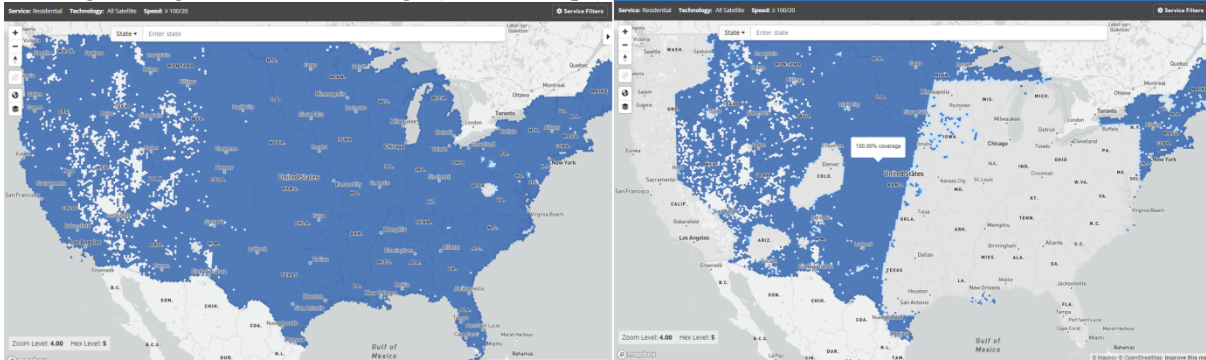
³ Broadband Deployment Accuracy and Technology Availability Act, Pub. L. No. 116-130, 134 Stat. 228 (2020) (codified at 47 U.S.C. §§ 641-646) (Broadband DATA Act).

⁴ The FCC offers two defenses for using the older BDC Version 2. First, the FCC claims to follow previous 706 reports, which used datasets from trailing years. *See* 706 Report at fn.720. That comparison is flawed. Unlike past reports, this 706 Report has access to a comprehensive data collection updated on a rolling, biannual basis. Second, the FCC states that the verification of *BDC Version 4* remains ongoing. *See id.* (“Further, we evaluate December 2022 data because, among other things, the verification process for the more recent data, from June 2023 and December 2023, has not been completed.”). But the FCC provides no basis for ignoring BDC Version 3, which is current as of June 2023 and corrects numerous deficiencies in BDC Version 2.

providers have announced new fixed wireless deployments and record-shattering net adds on a seemingly daily basis during the intervening six months between BDC Version 2 and Version 3.

- **Satellite:** BDC Version 3 shows 99.6% of locations with satellite service at 100/20 Mbps. BDC Version 2, used in the 706 Report, shows 16.09% of locations with satellite service at 100/20 Mbps. Here again, no surprise. Starlink successfully launched approximately 1,000 satellites between December 31, 2022 and June 30, 2023.⁵ You don't need to zoom into the FCC maps below to see the vivid differences in high-speed satellite coverage over the span of six months.

Left image: Satellite coverage (100/20 Mbps) for BDC Version 3 (as of June 30, 2023)
Right image: Satellite coverage (100/20 Mbps) for BDC Version 2 (as of December 31, 2022)



Worse, the dataset used in the 706 Report (BDC Version 2) has inaccuracies that overstate the number of unserved locations. When announcing BDC Version 3, the FCC rightly highlighted the improvements in accuracy—resulting in a gross addition of 3 million broadband serviceable locations and a drop in 1.1 million net unserved locations. These corrections were the result of 4.8 million challenges to broadband availability, 1.5 million accepted challenges to broadband location, mobile coverage audits, and FCC-initiated verification efforts.⁶ But the Commission disregards this newer, cleaner dataset for a 15-month-old snapshot that's demonstrably inaccurate in many ways.

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Now turn to the statute. Section 706(b) directs the FCC to study the “*availability* of advanced telecommunications capability to all Americans.”⁷ The FCC’s inquiry, in turn, must “*determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.*”⁸ The 706 Report defies this directive in several ways.

To start, the statute limits the scope of the 706 Report to the “*availability*” of broadband—that is, whether it “*is being deployed to all Americans in a reasonable and timely fashion.*” We have traditionally conducted the Section 706 exercise with a focus on availability, consistent with the law’s plain language. For the first time, however, the Commission conducts a completely new inquiry by focusing on “*universal*

⁵ See Wikipedia, *List of Starlink and Starshield launches* (last visited Mar. 8, 2023), https://en.wikipedia.org/wiki/List_of_Starlink_and_Starshield_launches.

⁶ See Chairwoman Rosenworcel Note, *National Broadband Map 3.0: Thankful for Continued Improvements* (Nov. 17, 2023), <https://www.fcc.gov/news-events/notes/2023/11/17/national-broadband-map-30-thankful-continued-improvements>.

⁷ 47 U.S.C. § 1302(b) (emphasis added).

⁸ 47 U.S.C. § 1302(b) (emphasis added).

service,” “affordability,” “adoption,” and “equitable access.”⁹

That cannot be right. *For one*, those terms appear nowhere in Section 706. Congress knows they are different from “availability,” as demonstrated elsewhere. As one example, the Communications Act has a specific section on “universal service.” And in that section, Congress uses “affordable” to modify “availability.”¹⁰ Section 706’s limited reference to “availability” is therefore no accident; it was meant to constrain the scope of our 706 Report.¹¹ *And for another*, the remedies envisioned in connection with the 706 Report—“removing barriers to infrastructure investment” and “promoting competition in the telecommunications market”—would be woefully incomplete under the Commission’s expansive reading.

Having inserted “universal service” and other terms into Section 706, the Commission then undertakes a simplistic, binary determination of whether advanced telecommunications capability *has been* deployed to all Americans. That interpretation reads the “reasonable and timely” language out of the statute and contradicts Congress’s use of the present progressive tense “is being deployed.” It also disregards language Congress used for FCC inquiries that result in a negative determination. In such cases, Congress states that the FCC “shall take immediate action to accelerate deployment,” thus confirming Congress’s focus in Section 706 on the pace of deployment and the progress that providers are making. Yet the FCC in this 706 Report makes no attempt at a progress report or a comparative finding.

Even assuming Section 706 means what the Commission now says, the 706 Report still flunks the statute. The 706 Report uses outdated (and demonstrably inaccurate) BDC datasets, and such data, by definition, cannot inform any inquiry Congress asked us to undertake when superior alternatives are available. The 706 Report could have measured incremental progress by putting our rich, iterative BDC datasets side by side. In particular, we could have compared BDC Version 3 to the previous two iterations and isolated changes resulting from new deployments (as opposed to errors uncovered during the challenge process). But we did not.

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The liberties the Commission takes with the data and the law necessarily color its adoption of a new 100/20 Mbps benchmark. Now, to be clear, I would have no objection to the FCC setting a goal of 100/20 Mbps for our programs. As noted earlier, we have been doing so for at least eight years now. But the item’s treatment of the new benchmark is troubling in several respects.

First, the 100/20 Mbps requirement appears to be part and parcel of the Commission’s broader attempt to circumvent the statutory requirement of technological neutrality. Section 706 defines “advanced telecommunications capability” as, “*without regard to any transmission media or technology*, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications *using any technology*.”¹² Not just once, but twice, the statute expressly requires technological neutrality.

⁹ One should not take solace in the item’s failure to make affirmative determinations about affordability, adoption, and other factors based on incomplete data, for the Commission states its intent to “revisit” these quixotic exercises in future reports. *See, e.g.*, 706 Report at paras. 104, 114, 121.

¹⁰ *See, e.g.*, 47 U.S.C. § 254(i) (“The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.”).

¹¹ According to the FCC, the Infrastructure Investment and Jobs Act (IIJA) describes Section 706 as containing “statutorily mandated goals of universal service.” 706 Report at para. 6. But as the FCC concedes, this passing characterization did not amend Section 706. *Id.* So the IIJA does not permit us to disregard Section 706’s plain language.

¹² 47 U.S.C. § 1302(d)(1) (emphases added).

Yet the 706 Report disregards Congress’s directive—most notably, by ignoring satellite deployment. According to the latest BDC, more than 99% of eligible locations have high-speed satellite service at 100/20 Mbps. In refusing to account for high-speed satellite, the item claims to follow past FCC practice. That ostrich-like assertion ignores the obvious fact that the quality and availability of high-speed, low-earth orbit satellite service has improved dramatically since our last report in 2021—so much so that satellite has become a viable source of intermodal competition. Next, the item cites to low take rates.¹³ But evidence of consumer adoption, even if it were based on the latest BDC datasets (which it isn’t), has nothing to do with the “availability” of service, which is the inquiry the statute requires. And in any case, a rationale based on take rates would prove too much. For example, it would defeat the adoption of 100/20 Mbps altogether, which also has low take rates according to the Commission’s data.¹⁴ Next, the FCC claims, without citing to any evidence, that BDC-reported satellite speeds are overstated due to the theoretical capacity constraints of satellite spectrum.¹⁵ I have already explained elsewhere why the Commission cannot use armchair speculation to pretend high-speed satellite broadband doesn’t exist.¹⁶ In any case, the FCC cannot have it both ways: either the BDC represents the best evidence of broadband deployment or it doesn’t.

Arbitrarily picking and choosing preferred technologies, unfortunately, has become all too common in this Administration.¹⁷ When I saw the original draft of the *Notice of Inquiry* in this proceeding, I was surprised to learn that it did not even propose to consider fixed wireless. And while I appreciated the ultimate decision to consider fixed wireless at my suggestion, I echo Commissioner Simington’s worry that Commission’s long-term goal of 1,000/500 Mbps lays the groundwork to step even further away from our technological neutrality mandate. I hope it is not a Trojan Horse to exclude fixed wireless in a future report because it is deemed not “capable” of supporting aspirational speeds. Because, fundamentally, the problem with counting broadband as something other than broadband is that it leads inevitably to wasteful overbuilding and upgrading communities that already have connectivity rather than remaining focused on the communities still stuck on the wrong side of the digital divide.

Second, the 706 Report justifies 100/20 Mbps by invoking the performance benchmarks in BEAD, ARPA, and our other high-cost programs.¹⁸ But the comparison is inapt. Our 706 Report should look at the current state of broadband availability. Federal funding programs are measured on a long-term horizon spanning many years. If the federal government is to spend billions of dollars on broadband deployment, that investment should endure for the long run. In other words, our funding programs establish 100/20 Mbps goals in an effort to futureproof each dollar that is spent. Section 706, on the other hand, does not direct the FCC to measure futureproofed service.

Finally, the 706 Report makes a surprisingly weak showing to justify 100/20 Mbps as the *minimum* threshold to count as official broadband service—which is, after all, the point of the 706 Report. As Section 706 indicates, the FCC should be looking first to identify the voice, video, and data

¹³ 706 Report at para. 58.

¹⁴ See 706 Report at fn. 226 & Fig. 23.

¹⁵ 706 Report at para. 58 & fn. 223.

¹⁶ See Dissenting Statement of Commissioner Brendan Carr, *Application for Review of Starlink Services, LLC, Rural Digital Opportunity Fund, Rural Digital Opportunity Fund (Auction 904), Viasat Auction 904 Application for Review*, Order on Review, WC Docket No. 19- 126, OEA Docket No. 20-34, GN Docket No. 21-231 (Dec. 12, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-105A2.pdf>.

¹⁷ See, e.g., *Redlight Report*, Ranking Member, U.S. Senate Committee on Commerce, Science, and Transportation (Sept. 2023), <https://www.commerce.senate.gov/services/files/0B6D8C56-7DFD-440F-8BCC-F448579964A3>.

¹⁸ See 706 Report at paras. 27-28.

applications that consumers are demanding and then, as a second step, adopt metrics that define “advanced telecommunications capability” based on that determination. Put differently, is it really fair to say consumers don’t have “advanced telecommunications capability” at a speed lower than 100/20 Mbps? The answer may be yes, but the item provides no compelling reason why.¹⁹ Just look at the revealed preferences. As the 706 Report acknowledges, the take rate for 100/20 Mbps was quite low as of December 2022.²⁰ Do these consumers know something we don’t? These flaws suggest the benchmark was selected, not based on hard evidence or reasonable customer expectations, but as another lever to reverse-engineer a predetermined outcome.

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I could go on, but everyone sees where the politics are headed. After putting off our Section 706 report for the past three years, the FCC now issues this 706 Report just ahead of what many expect will be a Title II vote to come.²¹

In a regulatory environment where the FCC believes that doling out a failing grade will give the agency more power, I don’t think it is too surprising, as I noted at the outset, that this Commission landed where it did. But the FCC’s basic data and legal errors will ultimately sink whatever future decisions rely on this report as a justification or basis for action. I am sure the courts will see through that gambit. I dissent.

¹⁹ As the FCC’s former Chief Economist has observed, the longstanding benchmark of 25/3 can readily support routine consumer applications—from videoconferencing to 4K streaming to real-time gaming. See Michelle P. Connolly, *Mindfully Wasteful Spending: The Definition of Broadband*, Free State Foundation Report (May 18, 2023), <https://freestatefoundation.org/wp-content/uploads/2023/08/Mindfully-Wasteful-Spending-The-Definition-of-Broadband-051823.pdf>. See also 706 Report at fn. 151 (acknowledging this point).

²⁰ See 706 Report at fn. 226 & Fig. 23 (adoption rate between 2% and 38% for 100/20 Mbps depending on technology). In supporting the 100/20 Mbps benchmark, however, the 706 Report points to the adoption rate for services with *download speeds* at 100 Mbps or higher. See 706 Report at para. 29 (adoption rate between 68% and 79% for 100 Mbps download only).

²¹ See *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, paras. 143-47 (2023) (proposing to rely on Section 706 as legal authority for Title II reclassification).