



Reply Comments of

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In the Matter of

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

April 6th, 2015

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I. Introduction & Summary

Promoting broadband deployment should be the overarching goal of everything the FCC does. To that extent, we applaud the Commission for finding time to include an eleven (11) - paragraph Notice of Inquiry about how promote broadband deployment in its new Broadband Progress Report.³ Yet this seems to be, quite literally, an afterthought — a small gesture towards removing actual barriers to broadband deployment after a significant expenditure of staff resources on crafting new regulations that either have nothing to do with broadband deployment or would probably discourage broadband deployment.

A rough comparison illustrates the Commission’s misallocation of resources: Just this year, the Commission spent 43 paragraphs redefining broadband in the 706(b) Report issued alongside the instant Notice of Inquiry (in order to justify new regulations based on Section 706),⁴ 245 paragraphs in its Open Internet Order justifying sweeping new regulations imposed upon broadband that go well beyond traditional “net neutrality” concerns,⁵ 127 paragraphs reclassifying broadband under regulations designed for the monopoly telephone network of 1934,⁶ and 108 paragraphs attempting to undo most of that reclassification through a legally dubious re-interpretation of the Commission’s forbearance powers that would, apparently, allow it complete free rein to forbear *sua sponte*.⁷ That makes a total of 523 paragraphs spent just on the Commission’s most recent assertions of regulatory authority (and, within that authority, discretion). The ratio between the two, 48 to 1 (523/11) provides a rough proxy for the relative priority the Commission has placed on actually promoting broadband deployment — but, of course, says nothing of the ways the Commission has actually obstructed broadband deployment, most notably by:

- Reclassifying broadband under Title II, which could mean an immediate increase in pole attachment rates paid by cable providers, and, in the longer term, years of uncertainty about the regulatory status of broadband services, both in terms of
 - whether the FCC will prevail in court in its reclassification, forbearance therefrom and the underlying regulations, and
 - what the FCC will actually do with its authority under Title II and its regulations;

³ 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, *2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, GN Docket No. 14-126, ¶¶ 153–63 (rel. Feb. 4, 2015) [hereinafter “2015 Broadband Progress Report”], available at <http://apps.fcc.gov/ecfs/document/view?id=60001039416>.

⁴ *Id.*, ¶¶ 19–62.

⁵ See Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28, ¶¶ 60–305 (rel. Mar. 12, 2015) [hereinafter “2015 Order”], available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf.

⁶ See *id.*, ¶¶ 306–433.

⁷ See *id.*, ¶¶ 434–542.

- Delaying the transition of traditional telephone networks to IP services,⁸ which means that billions are spent each year on maintaining antiquated circuit-switched networks rather than on new broadband networks; and
- Dawdling on making more spectrum available for wireless broadband services, while also trying to use spectrum auctions to reengineer wireless markets.⁹

We object to the Commission’s various regulatory forays – Title II reclassification, issuance of expanded net neutrality rules, attempted preemption of state laws based on Section 706 – not merely because we believe they are both illegal (as discussed below) and unsound, but also because we believe they are distractions from focusing on promoting broadband deployment. If only because the Commission faces a host of difficult legal questions about its authority – including its 2010 re-interpretation of Section 706 as an independent grant of authority, despite two appellate decisions upholding that re-interpretation but with scant *Chevron* analysis as to why – we urge the Commission to “put its own house in order” by carefully reassessing how everything it currently does, or is about to do through a never-before-seen “modern” re-interpretation of Title II, affects broadband deployment. This includes, principally:

- Considering how Title II will affect broadband deployment, particularly by small providers and new market entrants, and whether the Commission needs to grant additional forbearance for such operators, ideally through competitively and technologically neutral approaches that, for example, create safe harbors from regulatory burdens for markets with robust competition between multiple providers;
- Re-assessing the pole attachment rates charged to broadband providers as telecommunications services, as the Commission appears to have the authority to do under *FCC v. Florida Power Corp*¹⁰;
- Facilitating the IP Transition without further delay; and
- Maximizing the availability of spectrum for broadband services.

But no less important is that the Commission refocus at least part of its efforts away from regulation and towards research and recommendations. The Federal Trade Commission has long understood that its

⁸ See, e.g., 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, *Comments of the United States Telecom Association*, GN Docket No. 14-126, at 2 (Mar. 6, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001039420> (pleading with the Commission to remove outdated legacy regulations that apply only to a subset of telecommunications providers and divert substantial resources away from next generation networks).

⁹ See Policies Regarding Mobile Spectrum Holdings, *Report and Order*, WT Docket No. 12-269 (rel. June 2, 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-63A1.pdf (establishing a new spectrum screen that will apply to both licensing through competitive bidding and through secondary market transactions).

¹⁰ See *FCC v. Florida Power Corp.*, 480 U.S. 245, 253–54 (1987) (analyzing, in a 5th Amendment takings inquiry, the FCC’s ratemaking authority for pole attachments and finding that the rate set was not confiscatory and thus did not effect a taking); but see *id.* at 255 (Powell, J. & O’Connor, J. concurring) (“The one sentence included in today’s opinion in no way accurately portrays the full rationale of judicial review of ratemaking by administrative tribunals. Other portions of the *Permian* opinion could be quoted to indicate that the standard gives governments far less leeway.”).

purpose is not merely to regulate competition and provide consumer protection, but to advocate policies that promote competition and consumer welfare at all levels of government. Thus, the FTC has long had a robust advocacy program, which involves both suing state actors when they cross the line into becoming market participants,¹¹ as well as issuing reports and making advocacy filings with other regulatory agencies, such as defending Uber and other ride-sharing services before the D.C. Taxicab Commission.¹²

Much as we object to the regulatory spree undertaken by current and recent FCC leadership, we recognize and greatly respect the vast accumulated experience of FCC staff in telecommunications markets. We urge the FCC not merely to channel this unique resource towards broadband deployment, but to combine its own collective expertise with that outside the Commission, and to ensure that this work remains a priority for the FCC and that the agency does everything it can to promote broadband deployment going forward. If the FCC should lose in court on its re-interpretation of Section 706, preemption of state laws under Section 706, Title II reclassification, etc., this diversification will ensure that the FCC does not wind up empty-handed. Simply put, it is the only way for the FCC to avoid putting all its eggs in one basket.

Fortunately, to explore this area the FCC need not create a new institutional structure from whole cloth. In 1999, the Commission convened the Federal-State Joint Conference on Advanced Services

... as part of the Commission's ongoing efforts to ensure that advanced services are deployed as rapidly as possible to all Americans. It serves as a forum for an ongoing dialogue among the Commission, state regulators, and local and regional entities regarding the deployment of advanced telecommunications capabilities. It is comprised of commissioners from state public utilities commissions and from the FCC.¹³

Unfortunately, the Commission has made scant use of this Joint Conference. Since 2009, the Conference has convened only a single Summit, in early 2013 when it, along with NTIA, held a daylong event on broadband adoption and usage.¹⁴ Not since 2008 has the Joint Conference actually done anything related to broadband deployment, aside from establishing a web portal that was used by representatives from state broadband projects for a couple years, but not at all since 2011.¹⁵

¹¹ *North Carolina Board of Dental Examiners v. FTC*, 574 U.S. ____ (2015), available at http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf.

¹² See *FTC, Letter to the DC Taxicab Commission Re: Second Proposed Rulemakings Regarding Chapters 12, 14, and 16 of Title 31* (June 7, 2013), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf.

¹³ FCC, *Federal-State Joint Conference on Advanced Telecommunications Services* (last visited Apr. 6, 2015), <http://www.fcc.gov/encyclopedia/federal-state-joint-conference-advanced-telecommunications-services>.

¹⁴ FCC, *Broadband Summit 2013* (Feb 7, 2013), available at <http://www.fcc.gov/events/broadband-summit>.

¹⁵ *BroadbandBestPractices.org, Conceptualized and Developed by the State members of the Federal-State Joint Conference on Advanced Services (706 Joint Conference)* (last visited Apr. 6, 2015), <http://communities.nrri.org/web/telecom-broadband-adoption/706-project-home> (showing a project summary list with 21 results in total).

Even this portal appears to focus mostly on the expenditure of taxpayer dollars on government-owned broadband networks rather than on what we believe should be the key work of the Joint Conference: to maximize deployment and competition, by minimizing barriers to entry, while also minimizing both the expenditure of taxpayer dollars and the problems attendant with any government operation of broadband networks. This approach would be deregulatory insofar as government regulation and simple bureaucracy have proven to be an obstacle to broadband deployment, but it also envisions a positive, quite literally *constructive* role for government to play. There are a wide range of options available at all levels of government short of simply socializing broadband networks, as identified in the report *Gigabit Communities: Technical Strategies for Facilitating Public or Private Broadband Construction in Your Community* (attached hereto as **Appendix A**),¹⁶ such as by facilitating access to rights-of-way (the only true “natural monopoly” in the broadband ecosystem), deploying Dig Once conduits,¹⁷ building or helping to build fiber-ready utility poles, operating middle-mile fiber backhaul networks,¹⁸ or (which we would prefer to be a last-resort only if private providers do not take advantage of smart infrastructure to deploy new networks and/or upgrade existing ones) even providing service directly to end-users over publicly-owned wireless¹⁹ or wireline networks.²⁰

II. A Pro-Deployment Agenda for the Commission

Apart from the previous steps taken by the FCC in the name of broadband deployment, which may or may not (and likely will not, in our view) promote broadband deployment, there are several positive steps the Commission can take in order to promote deployment regardless of the outcome of the legal challenges to the Commission’s prior actions in this area. In general, the FCC should dust off its 2010 National Broadband Plan. The FCC should also revitalize the Federal-State Joint Conference on Advanced Services, create a new Broadband Deployment Advisory Committee, consider converting the Advanced Services

¹⁶ See generally CTC Tech. & Energy *Gigabit Communities: Technical Strategies for Facilitating Public or Private Broadband Construction in Your Community* (2013), available at <http://www.ctcnet.us/wp-content/uploads/2014/01/GigabitCommunities.pdf> (presenting strategies for cities to pursue in regard to process efficiency, information access, and access to key assets).

¹⁷ See Broadband Deployment on Federal Property Working Group, *Implementing Executive Order 13616: Progress on Accelerating Broadband Infrastructure Deployment — A Progress Report to the Steering Committee on Federal Infrastructure Permitting and Review Process Improvement*, 8–10 (Aug. 2013), available at https://www.whitehouse.gov/sites/default/files/microsites/ostp/broadband_eo_implementation.pdf (establishing Dig Once best practices for the Federal level, and promising to work with the DOT going forward to facilitate deployment and minimize excavation at the state and local level).

¹⁸ See, e.g., KentuckyWired, *Kentucky Information Highway/iWAY Middle Mile Architectural Plan* (last visited Apr. 6, 2015), <http://finance.ky.gov/initiatives/nextgenkih/Pages/default.aspx> (describing KentuckyWired, a state-sponsored program leveraging private capital to deploy high-capacity fiber optic middle-mile infrastructure in public-private partnerships with ISPs to deliver last-mile service to end-users).

¹⁹ See, e.g., Kevin Rector, *Baltimore Launches Free Wi-Fi in Inner Harbor*, THE BALTIMORE SUN (Sept. 8, 2014), available at <http://www.baltimoresun.com/business/bs-bz-inner-harbor-wifi-20140908-story.html>.

²⁰ See, e.g., Sean Buckley, *Municipal Providers Protest FCC’s Title II Net Neutrality Proposal*, FIERCETELECOM (Feb. 13, 2015), available at <http://www.fiercetelecom.com/story/municipal-providers-protest-fccs-title-ii-net-neutrality-proposal/2015-02-13>.

Joint Conference into a Joint-Board with additional responsibilities, improve the Universal Service program, and expeditiously act to free up more spectrum for commercial broadband.

A. Updating the National Broadband Plan

At the direction of Congress,²¹ the FCC developed and then promulgated a National Broadband Plan back in 2010,²² and although the Commission has implemented some of the recommendations contained therein, such as those related to public safety, it has largely neglected others²³ – especially those having to do with smart infrastructure and micro-level barriers to deployment. The Plan itself recognizes that it “is both a ‘noun’ and a ‘verb.’”²⁴ And, that “[l]ike the Internet itself, [it] will always be changing—adjusting to new developments in technologies and markets, reflecting new realities and evolving to realize previously unforeseen opportunities.”²⁵

At a minimum, the FCC should conduct a thorough assessment of what progress has been made at all levels of government towards the implementing the Plan’s “Broadband Action Agenda” and produce an updated version of that agenda to produce a clear list of steps the FCC and other government actors can take to promote broadband deployment.

Ideally, the Commission should produce a Version 2.0 of the Plan, but perhaps a Version 1.1 or 1.2 will suffice — at least through the Plan’s 2020 goals for broadband deployment and performance.²⁶ In either

²¹ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 515, § 6001(k) (2009) (published but not codified in 47 U.S.C. § 1305(k)), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr1enr/pdf/BILLS-111hr1enr.pdf>.

²² FCC, *Connecting America: The National Broadband Plan* (rel. Mar. 17, 2010) [hereinafter “National Broadband Plan” or “the Plan”], available at <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

²³ See, e.g., 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, *Comments of NCTA*, GN Docket No. 14-126, at 3 (Mar. 6, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001039416> (“[T]he gaps in broadband deployment identified in the 2015 *Broadband Progress Report* are largely attributable to the Commission’s failure to effectively implement many of its own prior recommendations. In particular, the Commission has not implemented the National Broadband Plan’s recommendation to expand the universal service lifeline program to support broadband, and it has not implemented the Remote Areas Fund that it established to deploy broadband to unserved areas.”).

²⁴ National Broadband Plan, at 333.

²⁵ *Id.*

²⁶ *Id.* at 336 (listing the goals for 2020: (1) At least 100 million U.S. homes should have affordable access to world-class actual download speeds of at least 100 Mbps and actual upload speeds of at least 50 Mbps; (2) The U.S. should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation; (3) Every American should have affordable access to robust broadband service and the means and skills to subscribe if they so choose; (4) To ensure the safety of the American people, every first responder should have access to a nationwide, wireless, interoperable broadband public safety network; and (5) To ensure that America leads in the clean energy economy, every American should be able to use broadband to track and manage their real-time energy consumption).

case, the FCC will need to draw upon greater expertise from outside the agency. This calls for a new model of facilitating such sharing of expertise and collaboration.

B. Revitalizing the Federal-State Advanced Services Joint Conference

The FCC convened the Federal-State Joint Conference on Advanced Services (“the Conference”) back in 1999 to examine the very issue considered in Section 706(b): stimulating broadband deployment.²⁷ By the FCC’s own description, the Conference is intended to “serve[] as a forum for an ongoing dialogue among the Commission, state regulators, and local and regional entities regarding the deployment of advanced telecommunications capabilities.”²⁸ Yet membership on the Conference is currently limited to only the five FCC Commissioners and four PUC representatives (from DC, California, Iowa, and New York).²⁹

The Commission’s description of the Conference clearly suggests that input from local and regional entities, as well as state regulators from bodies other than PUCs (e.g., transportation committees), should be considered, but, since the Conference was established under Section 410(b) of the Communications Act,³⁰ its membership is limited to FCC personnel and state PUC representatives.³¹

C. The FCC Should Create a Broadband Deployment Advisory Committee

Thus, we encourage the FCC to create an advisory committee similar to that which the FCC formed to consider issues related to the Open Internet proceeding,³² specifically tasked with considering unresolved issues related to broadband deployment and making recommendations and policy proposals either to the existing Conference or directly to the Commission. The Commission has standing authority to create such

²⁷ See FCC, FCC Encyclopedia, *Federal-State Joint Conference on Advanced Telecommunications Services* (last visited Apr. 6, 2015), <http://www.fcc.gov/encyclopedia/federal-state-joint-conference-advanced-telecommunications-services>.

²⁸ *Id.*

²⁹ See FCC, *Members of the Federal-State Joint Conference on Advanced Telecommunications Services* (last visited Apr. 6, 2015), <http://www.fcc.gov/encyclopedia/members-federal-state-joint-conference-advanced-telecommunications-services>.

³⁰ See *Federal-State Joint Conference On Advanced Telecommunications Services*, *Order*, CC Docket No. 99-294, ¶ 3 (rel. Oct. 8, 1999), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-99-293A1.pdf (“Through this Order, we convene a Federal-State Joint Conference pursuant to section 410(b) of the Communications Act to provide a forum for an ongoing dialogue between this Commission, the states, and local and regional entities regarding the deployment of advanced telecommunications capabilities.”).

³¹ See 47 U.S.C. § 410(b) (“The Commission may confer with any State commission having regulatory jurisdiction with respect to carriers, regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized under such rules and regulations as it shall prescribe to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act.”).

³² See FCC, *Open Internet Advisory Committee* (last visited Apr. 6, 2015), <http://www.fcc.gov/encyclopedia/open-internet-advisory-committee>.

bodies pursuant to the Federal Advisory Committee Act,³³ and may direct them to operate according to a Charter as it sees fit.³⁴

Since the term “Advanced Services” has no recognition outside the world of telecom law, we encourage the Commission to name this committee the Advisory Committee on Broadband Deployment. Absent a compelling distinction between “advanced services” and “broadband,” the Commission should also consider renaming the Joint Conference on Advanced Services as the Joint Conference on Broadband Deployment.

Ideally, such an advisory committee would have a broader and more diverse membership than the existing Conference. In addition to FCC personnel and a rotating selection of state PUC representatives, this Advisory Committee should have representatives from:

- **Federal:** other key Federal agencies, like the Department of Transportation and Environmental Protection Agency;
- **State:** state transportation departments, state legislators on committees with oversight of transportation and other infrastructure projects as well as any state-level rules affecting construction of both residential and commercial buildings;
- **Local:** members of local boards with responsibility for the same;
- **Private:** a broad range of broadband providers, including both large and small cable and telco operators, fixed and mobile wireless operators, satellite operators, and new entrants both large and small;
- **Academics:** scholars who study legal, economic, and regulatory barriers to broadband deployment as well as public-private partnerships designed to facilitate deployment; and
- **Civil Society:** Organizations dedicated to advancing broadband deployment and competition.

The Commission should err on the side of including a larger number of members and grouping them into working groups.

Through regular meetings (initially, probably quarterly), the Advisory Committee could revitalize the moribund Conference by collecting the best available ideas on overcoming barriers to broadband deployment and referring them to the Conference for further consideration — essentially functioning as a drafting committee for the Joint Conference, which would select the most promising of the Committee’s ideas, refine them further and add its stature to them in the recommendations it makes to the FCC and to state PUCs, as well as to Congress, state legislators and municipalities on potential changes they might consider making to statutes.

³³ See Federal Advisory Committee Act, 5 U.S.C. App. 2 (1988) (setting forth rules and regulations to govern Federal advisory committees).

³⁴ See, e.g., FCC, *Charter: Consumer/Disability Advisory Committee* (Nov. 20, 2000), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-289405A1.pdf (setting forth rules for the consumer protection advisory committee in regard to objective, scope, membership, meetings, etc.).

There are multiple issues that the committee should consider, including the following clusters of issues, which might make appropriate areas of focus for working groups within the Committee (which could draw on the expertise of non-members of the Committee):

- From our perspective, the most important work of the Working Group would be to explore how to stimulate broadband deployment and competition without crowding out private investment through the removal of regulatory barriers, the construction of smart infrastructure, and the creation of public-private partnerships. We believe it would make most sense to address the full range of models, from public ownership and operation to our preferred model of public subsidy for truly “dumb” infrastructure used by provide providers in the same working group, lest these models be conceived as fundamentally different, rather than existing across a spectrum of government intervention. We suspect that the most natural breakdown of the Working Group’s affairs would be according to infrastructure segment:
 - **Last 300 feet:** Wiring of multi-dwelling units, conduits and trenches from the home to the curb, etc.
 - **Last mile:** Dig Once under city streets and sidewalks, muni dark fiber, municipal hosting of network equipment, aerial wiring over streets, etc.
 - **Wireless infrastructure:** Tower siting, collocations, small cells, backhaul, etc.
 - **Spectrum:** Licensing of spectrum bands for different uses; exploring different licensing paradigms, etc.
 - **Middle mile:** Backhaul for both wireless and wireline networks, pole and tower attachments, Dig Once along highways, etc.
 - **Satellite services:** spectrum, space policy, launch policy, etc.
- **Universal Service & Adoption:** If the legs of the infrastructure are addressed in this fashion, this will more effectively address the diverse needs of certain unserved and underserved populations than would creating separate groups to explore their needs directly. The point would be to address broadband Universal Service through each of the component parts of the supply chain. Indeed, the language of Section 706 concerns on broadband “deployment” and “availability,” not “adoption,” as is consistent with Congress’s focus on “infrastructure investment” and “competition.” In other words, whether Congress intended Section 706 to be a grant of authority or merely a command to use other sources of authority to serve these ends, it was clearly focused on the *supply* side of the market. That said, the statute does command the FCC to assess the reasonableness of deployment, which could arguably include price, which, in turn, necessarily implicates the demand side of the market. Moreover, basic economics would suggest that the *supply* of broadband will respond to the *demand* for broadband. As Alfred Marshall, one of the founders of microeconomics, famously quipped “As both blades if a scissor is important to cut a piece of cloth, so is demand and supply essential for the determination of price.” We would support the creation of an Adoption working group as part of the Advisory Committee’s larger ambit of promoting investment and competition, which would have responsibility for studying factors affecting adoption, subsidies, cross-subsidies, redlining concerns, etc. This working group could break down its work into studying adoption among the underserved in
 - Urban areas, potentially distinguishing between large and small cities;

- Rural areas and tribal areas, which will largely overlap but raise different issues
- Schools and libraries, the one subgroup specifically mentioned by the statute.
- **Competition:** New entrants into the market will face unique issues, which probably merits maintaining a separate working group, given the statute’s focus on competition alongside infrastructure investment.
- **IP Transition:** At least in the short-term, this topic is sufficiently important to merit its own working group.

By providing a feedback mechanism that allows all interested stakeholders to have more direct input, the Commission will be able to obtain more and better data to use in its analyses, and thus make better-informed recommendations that will already have buy-in from those who will be asked to implement them: other federal agencies, state agencies and local authorities. This buy-in will be even more important to the extent that the Advisory Commission recommends that the FCC take specific regulatory actions — especially if those involve preemption of state laws, as discussed below.

In essence, a well-functioning Advisory Committee would be a kind of multi-stakeholder body, which would be vastly superior in many ways to the FCC’s typical notice-and-comment informal rulemaking process — but it need not be used as a replacement, whether the rulemaking function at issue is one based on Section 706 or on some other provision of the Act that affects broadband deployment. Rather, the FCC could direct the Committee to gather data and develop proposals, which could then be reported to the Conference for it to consider and vote upon, and its recommendations could then *supplement* the FCC’s existing rulemaking processes by allowing interested parties to file comments in response to the specific proposals put forward by the Conference. This would help to remedy the Commission’s habit of crafting very broad NPRMs, then jumping to specific outcomes that are not necessarily foreseeable from the NPRM, even if they can be characterized as “logical outgrowths”; merely satisfying the relatively low bar of administrative law should not be considered adequate for sound, evidence-driven policymaking.

Adding this additional layer of input into the FCC’s processes for making new policies and rules may delay the speed at which any one proceeding may be completed, but if the resultant policies and rules are superior and embody greater consensus, they may be less likely to be challenged (and perhaps overturned) in court, and they may do a significantly better job of promoting both broadband deployment and the larger public interest in the long run. After all, notwithstanding several of the Commission’s recent negative 706(b) findings, the true goal of Section 706 is to promote widespread and sustainable growth in broadband for Americans over the long-haul, so using it to make broad policy decisions based only on a snapshot of the current market is truly unwise. Utilizing the existing 706(b) Conference and a new broadband deployment Advisory Committee to better inform the Commission on these issues and to develop multi-stakeholder-backed codes of conduct and policy frameworks would greatly enhance the quality of the FCC’s actions.

D. The FCC Should Consider Converting the Joint Conference Into a Joint Board to Administer Sections 224 and 706

Section 410 distinguishes between a Joint Conference (Section 410(b)) and a Joint Board (Section 410(a)).³⁵ The key difference is that a Joint Board may function essentially like an Administrative Law Judge — and “The action of a joint board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe.”³⁶ Since the Commission, in 1999, had decided that Section 706 was not an independent grant of authority, it is hardly surprising that it chose to create a Joint Conference rather than a Joint Board. A Joint Board may be advisable for two reasons — yet also carries with it real risks.

First, rate-setting is the classic province of administrative law judges and, at a minimum, Title II reclassification raises ongoing questions about the rates the Commission will have to set for pole attachments, particularly because cable providers previously subject to the lower rates set under Section 224(d) will now have to pay the higher rates set under Section 224(e) — unless of course the Commission revises the latter rates. Giving state PUCs a say in such rates may make institutional sense. It may also create greater buy-in at the state level for whatever rates are ultimately set. Unfortunately, as a matter of realpolitik, it is also possible that the rates recommended by a Joint Board for final approval by the full Commission may be higher than those that might be recommended by FCC bureau staff simply because incumbent utilities (especially electricity providers) have more sway at state PUCs. It is possible that this could actually make broadband deployment *more* difficult.

On net, then, we might recommend *against* the conversion of the Joint Conference into a Joint Board, and the assignment thereto of ratemaking under Section 224 — except that implementation of our preferred model of public-private partnership, wherein governments attempt to stimulate private deployment by building or subsidizing “smart infrastructure” will make rate-setting under Section 224 more, not less, complicated, placing increased emphasis on the other things covered by Section 224 besides poles: ducts, conduits, and rights-of-way. Of course, Section 224 specifically excludes any of those assets that are owned by government actors, even indirectly; nonetheless, much of the smart infrastructure we would like to see deployed may be owned by privately owned “public utilities” or by broadband providers. In our ideal version of “Dig Once” conduits, local governments would spend taxpayer dollars that would otherwise have been spent building government-run networks to build conduits and then would set rate rates for access to those conduits independent of the FCC (i.e., not subject to Section 224). But there are many flavors of “Dig Once” policies, and in many of these policy frameworks the conduits may be owned by one of the broadband providers, by a cooperative of broadband providers or by private utilities, in which case the FCC *would* have authority to set rates for access to the conduits — unless a state has opted out of the federal regime. These questions may quickly become complicated and would best be resolved through close coordination between the Advisory Committee and a Joint Board. In the end, of course, as with any ALJ decision, the rates set by the Joint Board would have to be approved by the full Commission

³⁵ 47 U.S.C. § 410.

³⁶ *Id.*

— and would, upon a vote by the full Commission, be fully reviewable by an Article III court. So we see little downside to making such decisions through a Joint Board.

In addition, if, as appears likely, the FCC persists in its (unconstitutional) preemption of state laws under Section 706 and proceeds on a case-by-case basis, establishing a Joint Board would be the minimum institutional step necessary to ensure that the FCC gives at least *some* respect the sovereignty of the states. The problem is simply this: If the Commission decides such questions entirely on its own, through case-by-case enforcement handled by a Bureau and then the full Commission, there will *never* be an institutional voice for states. State PUCs are, to be sure, an imperfect proxy for the real parties in interest — the state legislators and governors whose judgment the Commission presumes to set aside — but they are a better representative of the sovereign states that comprise our federation than no representative at all. The FCC would do well to heed the entablature beneath the pediment on the First Street facade of the Dirksen Senate Office Building: "the Senate is the living symbol of our union of states." A Joint Board, empowered to address such disputes, could be more than just a symbol.

More concretely, a Joint Board could allow the Commission to implement the approach laid out by President Clinton's 1999 Executive Order:

National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, **agencies shall consult with appropriate State and local officials** to determine whether Federal objectives can be attained by other means.³⁷

Of course, the President could impose it only on Executive Agencies, since "independent agencies" are not part of the Executive Branch. Nonetheless, the approach illustrates what the FCC *should* do — and addressing preemption through an Advisory Committee and then through a Joint Conference or, even more so, a Joint Board would be a better process.

To be clear, we do not believe that the FCC can cure the unconstitutionality of preemption based on Section 706 through any amount of engagement with the states, but we would prefer to see even the most unconstitutional policy implemented as well as possible. Yet we do note that danger that a Joint Board may seem, at least to some, to legitimize an illegitimate policy — and to encourage the Commission to be *more* aggressive in preempting state laws. Still, we think this problem is outweighed by the advantages of converting the Joint Conference into a Joint Board.

We recognize that this is a complicated area of administrative law and would urge the Commission to solicit further input on this question before making a decision about this question or how to address rate-making under Section 224.

³⁷ 3 Exec. Order No. 13,132, 64 Fed. Reg. 153 (Aug. 4, 1999) (emphasis added), *available at* <http://www.gpo.gov/fdsys/pkg/FR-1999-08-10/pdf/99-20729.pdf>.

E. Improving the Universal Service Program

Apart from efforts to facilitate public investment in broadband deployment, the FCC also can do much to stimulate broadband deployment by reforming its Universal Service program. The FCC has taken some notable recent steps in furtherance of Universal Service, and it may soon be poised to take many more, but, in so doing, it must be mindful of several key guiding principles. Some of these principles suggest rethinking certain prior actions and amending the current framework, while others are merely lodestars that should be considered at every step along the way.

As explained in NCTA's comments, "the gaps in broadband deployment identified in the *2015 Broadband Progress Report* are largely attributable to the Commission's failure to effectively implement many of its own prior recommendations."³⁸ In some areas, such as with the universal service Lifeline program and the Remote Areas Fund, the Commission has failed to live up to its earlier promises.³⁹ In other areas, such as with E-rate modernization and the Connect America Fund, the Commission has taken steps that are well intentioned, but there remains more work to be done on them.⁴⁰

Most troubling, though, are the recent steps the Commission has taken that unduly favor one type of technologies or one group of providers over another.⁴¹ Technology neutrality has long been one of the guiding principles of the FCC in its policymaking, and the Commission should once again make sure all of its policies abide by that principle. In particular, we urge the Commission to: (1) revoke the right-of-first-refusal for phase II of the CAF, which unduly favors DSL ILECs, and begin offering all phase II support through competitive bidding;⁴² and (2) clarify that the Schools and Libraries subsidy program will offer support to any broadband technologies capable of meeting the FCC's long-term goal of 1 Gbps per 1,000 students, and not just fiber operators, as DSL, cable, and fixed-wireless technologies are all capable of meeting those speed benchmarks.⁴³

More generally, the FCC should avoid fetishizing certain modes of broadband deployment over others. Most notably, an undue fixation on fiber service has caused the Commission to downplay (if not ignore) very real progress being made to boost broadband speeds through more iterative upgrades to traditional

³⁸ *Comments of NCTA*, *supra* note 23, at 3.

³⁹ *See id.*

⁴⁰ *See, e.g., id.* at 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, *Comments of ADTRAN*, GN Docket No. 14-126, at 2-3 (Mar. 6, 2015) available at <http://apps.fcc.gov/ecfs/document/view?id=60001039468>.

⁴¹ *Comments of ADTRAN*, at 2 ("ADTRAN believes the Commission is taking important steps to expand broadband to schools and libraries through the Universal Service Fund programs. However, ADTRAN is concerned that the Commission may not be doing so in the most efficient manner possible, to the extent that it appears it may not be acting in a technologically neutral fashion.")

⁴² *See, e.g., Comments of NCTA* at 5.

⁴³ *See Comments of ADTRAN*, at 3 (citing G.fast, DOCSIS 3.1, millimeter wave wireless backhaul, and packet microwave solutions as all being technically capable of meeting the FCC's chosen speed benchmarks).

telco infrastructure, especially the remarkable progress made just last year by AT&T in upgrading traditional DSL to VDSL2 (25+ Mbps) in 75% of its footprint, or over half the country.⁴⁴

F. Opening More Spectrum for Broadband

With the Report and Order last fall,⁴⁵ the Commission did much to promote broadband deployment by accelerating wireless facilities siting, but there is still much more that can be done in this area.⁴⁶ For one, as WISPA proposed in its comments,⁴⁷ the Commission should work expeditiously to complete its proceeding establishing rules for new commercial operations in the 3.5 GHz band.⁴⁸ To be sure, the licensing framework for the 3.5 GHz band, originally proposed in the 2012 PCAST Report,⁴⁹ is complex, and the outcome of the proceeding will be vital both for deploying new small cell and wireless backhaul technologies and for obtaining real-world feedback on the promise and potential pitfalls of dynamic spectrum sharing between different classes of users in the same band. If successful, the model used in the 3.5 GHz band could be used to efficiently open up vast swaths of new spectrum bands previously used only by Federal operators for new commercial wireless broadband solutions, without having to pay the tremendous costs of buying new equipment and relocating Federal users to other bands. Thus, in light of the complexity and potential weight of the proceeding, it is reasonable for the Commission to have carefully considered all the issues through multiple comment periods. But now, especially after NTIA recently came back to the FCC with exclusion zone maps that are updated to reflect the proposed operations,⁵⁰ there should be nothing keeping the FCC from moving forward on this issue.

⁴⁴ 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, *Ex Parte by TechFreedom*, GN Docket No. 14-126, at 9 (Jan. 22, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=60001015782>.

⁴⁵ Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Report and Order*, WT Docket No. 13-238 (rel. Oct. 21, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=60000974958>.

⁴⁶ See, e.g., 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, *Comments of WISPA*, GN Docket No. 14-126, at 3 (Mar. 6, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001039478> (“The Commission should act expeditiously to adopt rules in a number of open spectrum proceedings.”).

⁴⁷ See *id.*

⁴⁸ See Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550-3650 MHz Band, *Further Notice of Proposed Rulemaking*, GN Docket No. 12-354 (rel. Apr. 23, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521099242>.

⁴⁹ See PCAST, *Report to the President: Realizing the Full Potential of Government-Held Spectrum to Spur Economic Growth* (rel. July 20, 2012), available at http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast_spectrum_report_final_july_20_2012.pdf.

⁵⁰ See Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550-3650 MHz Band, *Letter from Paige Atkins, Associate Administrator of the NTIA Office of Spectrum Management to Julius Knapp, Chief of the FCC Office of Engineering and Technology*, GN Docket No. 12-354 (Mar. 24, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001041337> (letter),

Along with the groundbreaking experiment in the 3.5 GHz band, the FCC also should press forward on its initiative to open up more of the 5 GHz band for commercial broadband operations, which will help alleviate the crowding that currently exists among Wi-Fi users in the 2.4 GHz band.⁵¹ Furthermore, in response to the petition for rulemaking filed by Mimoso Networks, Inc.,⁵² the Commission should adopt and put forward a notice of proposed rulemaking to explore commercial uses of the 10 GHz band. Finally, with the Open Internet proceeding at least put on the back burner for the time being, the Commission should refocus the bulk of its attention towards the upcoming broadcast incentive auctions.⁵³ Timely completion of these proceedings will go a long way towards promoting broadband deployment, as both licensed and unlicensed operators make use of the newly available spectrum bands, and, critically, these proceedings can be completed at a fraction of the cost and controversy associated with some of the Commission's wireline proceedings.

III. Legal Analysis of Section 706

In 2010, the Commission made two monumental shifts in policy. First, in the Sixth Broadband Deployment Report, issued in July, the Commission decided, for the first time, that broadband was not being deployed in a reasonable and timely fashion under Section 706(b) of the 1996 Telecommunications Act.⁵⁴ Just as this reversed the finding of five previous 706(b) Reports issued since 1998,⁵⁵ in December, in its Open

<http://apps.fcc.gov/ecfs/document/view?id=60001041335> (enclosure 1),

<http://apps.fcc.gov/ecfs/document/view?id=60001041336> (enclosure 2).

⁵¹ See *Comments of WISPA*, *supra* note 45, at 4–5 (“The Commission has taken action to authorize outdoor use of the 5150-5250 MHz band, and it should move forward with proceedings in the 5350-5470 MHz band and the 5850-5925 MHz band where testing for interference is ongoing.”).

⁵² See Petition for Rulemaking of Mimoso Networks, Inc., RM-11715 (filed May 1, 2013); see also *Comments of WISPA*, at 5.

⁵³ See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, *Report and Order*, GN Docket No. 12-268 (2014).

⁵⁴ 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, *Sixth Broadband Deployment Report*, GN Docket No. 09-137 (rel. July 20, 2010), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-129A1_Rcd.pdf.

⁵⁵ 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, *Report*, CC Docket No. 98-146, at 5 (rel. Feb. 2, 1999), available at http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1999/fcc99005.wp (finding that broadband deployment was reasonable and timely); 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, *Second Report*, CC Docket No. 98-146, ¶ 1 (rel. Aug. 21, 2000), available at https://transition.fcc.gov/Bureaus/Common_Carrier/Orders/2000/fcc00290.pdf (finding that broadband deployment was reasonable and timely); 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, *Third Report*, CC Docket No. 98-146, ¶ 1 (rel. Feb. 6, 2002), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-02-33A1.pdf (finding that broadband deployment was reasonable and timely); Availability of Advanced Telecommunications Capability in the United States, *Fourth Report to Congress*, GN Docket No. 04-54, at 8 (Sept. 9,

Internet Order,⁵⁶ the FCC reversed its 1998 conclusion that Section 706 was not an independent grant of authority; the Commission discovered that Congress had, spent 47,000 words of the 1996 Act carefully modifying and/or constraining the FCC’s powers—only to throw in a postscript at the end that, *mirabile dictu!*, actually gave the FCC the power to do anything over any form of “communications” that is not specifically forbidden by the Act, based on the mere assertion that it would, somehow, promote broadband deployment.

The Commission, of course, used that supposed authority to justify its 2010 Open Internet Order based on the convoluted claim that “net neutrality” regulation of broadband providers would actually promote broadband investment.⁵⁷ Now, in its reprised Open Internet Order, the Commission uses this same theory to justify a considerably expanded conception of “net neutrality” – one that includes, for the first time interconnection and a vague, open-ended general conduct standard.⁵⁸

What began as an attempt by the FCC to justify net neutrality rules in the face of court rulings that it had no authority morphed into a basis of authority for a variety of other actions. For instance:

- In 2011, the FCC claimed that Section 706 provided it “independent authority” to use Universal Service Fund fees subsidize broadband deployment.⁵⁹
- This year, the FCC cited 706 as authority to preempt laws in Tennessee and North Carolina that imposed certain restrictions on municipal broadband networks in those states,⁶⁰ as well as for additional authority to support its adopted Open Internet rules.⁶¹
- And here, the FCC proposes to go even further, and to take actions above and beyond what it has previously done in order to promote broadband deployment.⁶²

2004), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-04-208A1.pdf (finding that broadband deployment was reasonable and timely); 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, *Fifth Report*, GN Docket No. 07-45, ¶ 1 (rel. June 12, 2008), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-88A1.pdf (finding that broadband deployment was reasonable and timely).

⁵⁶ Preserving the Open Internet, *Report and Order*, GN Docket No. 09-191 (rel. Dec. 23, 2010), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf.

⁵⁷ *Id.*, ¶ 117.

⁵⁸ See 2015 Order, *supra* note 5.

⁵⁹ See Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, ¶ 60 (rel. Nov. 18, 2011), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-161A1.pdf.

⁶⁰ See City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 *et seq.*, The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601, *Memorandum Opinion and Order*, WC Docket Nos. 14-115 & 14-116 (rel. Mar. 12, 2015) [hereinafter “Muni Broadband Preemption Order”], available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-25A1.pdf.

⁶¹ See 2015 Order, at ¶12.

⁶² 2015 Broadband Progress Report. 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, *2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate*

A. Section 706 is Not an Independent Grant of Regulatory Authority

We oppose all these efforts for one fundamental reason: Section 706 is obviously not an independent grant of authority; it is a commandment to the Commission to use other sources of authority in the Act for the purpose of accelerating broadband deployment. As we explained our comments on the Open Internet Order (attached hereto as **Appendix B**), neither the text nor the legislative history are consistent with an interpretation of 706 as an independent grant of authority.

First, using “ordinary tools of statutory construction”,⁶³ like canons of textual interpretation, there is no ambiguity suggesting the FCC should be given deference in interpreting 706(b). Section 706 is clearly *not* an independent grant of authority. Section 706 is not part of the Communications Act. Under the Whole Act Rule, it would make little sense to think that this was meant to be a new grant of authority over communications, especially when it was included as part of the Title VII of the Telecommunications Act, titled “Miscellaneous.” The legislative history also suggests a deregulatory agenda behind the 1996 Act inconsistent with using Section 706 as a source of authority to regulate areas of the economy not reached by the rest of the Act. Finally, the canon of Constitutional avoidance suggests section 706(b) should not be interpreted in a way that could create federalism problems.

Second, an interpretation of Section 706(b) as an independent grant of authority is an unreasonable construction even if one thinks the text of Section 706 is ambiguous. Not only do the above reasons suggest that this would be an unreasonable construction, but the fact that Section 706 as an independent grant of authority would effectively allow the FCC to re-write the Communications Act suggests it would be an absurd result that is manifestly unreasonable. If Section 706 is an independent grant of authority only limited by the rest of the Act, the FCC could use a negative 706(b) finding to do nearly anything from copyright enforcement, to privacy protection, to cybersecurity.

For these reasons, as well as those additional reasons laid out in US Cellular’s petition to the Supreme Court for a writ of certiorari regarding the Tenth Circuit’s interpretation of Section 706 as an independent grant of regulatory authority (attached hereto as **Appendix B**), we believe the D.C. Circuit and Tenth Circuit erred in their *Chevron* analyses — and that the courts will eventually clarify that Section 706 is only a commandment to use other sources of authority in the Act.

Effectively, the FCC has created a new and even more sweeping form of ancillary jurisdiction, one that would (as the D.C. Circuit warned in rejecting the FCC’s broad interpretation of ancillary jurisdiction as a basis for the FCC’s 2007 enforcement action against Comcast over alleged BitTorrent blocking): “virtually free the Commission from its congressional tether.”⁶⁴

Deployment, GN Docket No. 14-126 (rel. Feb. 4, 2015) [2015 Broadband Progress Report], available at <http://apps.fcc.gov/ecfs/document/view?id=60001039416>.

⁶³ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

⁶⁴ *Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010).

To those who insist that *two* appellate courts have upheld the FCC’s interpretation of Section 706, we offer two responses.

First, the D.C. Circuit argued that both subsections of 706 were ambiguous. But the reason given was more or less that the FCC said so.⁶⁵ But just because an agency asserts ambiguity does not make it so. Normally, courts respond to such assertions with an analysis of legislative history, canons of statutory construction, etc.⁶⁶ The D.C. Circuit utterly failed in this regard.⁶⁷

Second, we note that the Tenth Circuit’s decision focused entirely on Section 706(b), because the Commission had not, in the order under review, interpreted Section 706(a) as an independent grant of authority.⁶⁸ The Commission spent less than three pages responding to arguments that Section 706(b) was not a grant of authority — without so much as mentioning *Chevron* or a single canon of statutory construction.⁶⁹ At any rate, all of this analysis is dicta and thus not binding upon any court,⁷⁰ including a future Tenth Circuit panel, because Section 706 was merely an alternative basis for the court’s decision to uphold the FCC’s expenditure of Universal Service Fund moneys on broadband, a decision that rested on primarily — and thus, in terms of precedential effect, *only* on — Section 254.

Whether the In the D.C. Circuit’s analysis Section 706 in *Verizon* is dicta or binding precedent is less clear: The Court struck down the no-blocking and transparency rules as the illegal application imposition of Title II common carrier requirements upon a Title I service. But the *Verizon* court *did* uphold the FCC’s transparency rule based on Section 706. However, as Judge Silberman noted in his dissent, the Commission could have reached this conclusion based on Section 257. As our comments (attached hereto as **Appendix B**) explain, the Commission’s failure to at least explore this alternative basis for its decision may have been reversible error, given the complicated constitutional issues of Federalism and separation of powers raised by the FCC’s re-interpretation of Section 706 as an independent grant of authority. In other words, had the case been decided on its proper grounds, under the canon of constitutional avoidance, the court would not have needed to discuss Section 706 at all and so any discussion of Section 706 would have been mere dicta.⁷¹

⁶⁵ See *Verizon v. FCC*, 740 F.3d 623, 637–40 (D.C. Cir. 2014).

⁶⁶ *Compare Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 989–98 (2005) (reviewing history of Communications Act in detail to determine whether the “offering of telecommunications” is ambiguous) *with Verizon*, 740 F.3d at 637–40.

⁶⁷ See *id.*

⁶⁸ See *In re FCC 11-161*, 753 F.3d 1015, 1049–54 (10th Cir. 2014).

⁶⁹ See *id.*, 753 F.3d at 1052–54.

⁷⁰ Cf. *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998) (“There is, of course, an important difference between the holding in a case and the reasoning that supports that holding.”).

⁷¹ See *Verizon*, 740 F.3d at 668, n. 9 (Silberman, J. concurring in part and dissenting in part).

B. The Commission Has Not Supplied an Adequate Evidentiary Basis for Invoking Section 706

Whatever regulatory power Section 706 conferred, *arguendo*, the Commission has failed to provide an adequate evidentiary basis for using it. The Commission claims that the D.C. Circuit, in its *Verizon* decision, validated the FCC's "virtuous cycle" theory.⁷² In fact, the court said only that the FCC had met the very low bar of showing that its regulation was not "arbitrary and capricious."⁷³ This is far too low a bar to cause the elephant to spring forth from the mousehole of Section 706.⁷⁴

The Commission's recent Section 706(b) report fails to justify the invocation of Section 706 because it is "arbitrary and capricious" in the extreme. As explained in our comments in that proceeding (**Appendix C**), the FCC essentially invented the 25 Mbps threshold out of whole cloth. Previously, the benchmark was 4 Mbps down and 768 kbps up, with early proposals suggesting a change to 10 Mbps down and 1 Mbps up. Under either standard, it would be very difficult to conclude that broadband was not being deployed in a reasonable and timely manner. This is what has led many to speculate that 25 Mbps standard was intended to help the FCC justify a variety of actions, including the recent 2015 Open Internet Order and muni-broadband preemption order.

Even if the Commission were to justify invoking its 706(b) powers (or if 706(a) were a grant of authority separate from 706(b) whose use did not depend on the FCC's 706(b) finding), the FCC's arguments still fail to justify use of Section 706. The Commission has never actually conducted any economic analysis to justify its "virtuous cycle" theory.

There is little evidence to support this "virtuous cycle" theory. The various parts of the cycle are symbiotic, as the phrase implies: gains for one part benefit the other. Without more analysis, the FCC cannot say consumers will be benefitted by the choice to favor edge providers rather than ISPs. As the D.C. Circuit found, there was evidence in front the FCC that ISP investment drives edge provider investment just as much as it supports edge provider investment supports ISP investment.⁷⁵ The decision in *Verizon* rested more on the deference afforded the FCC under arbitrary and capricious review than the FCC actually making best use of the available evidence.

In fact, is notable that even without strong net neutrality rules to ensure this "virtuous cycle" and without any supposed competition, ISPs have invested heavily in building out infrastructure and increasing available speeds. According to the FCC's own data, 94% of U.S. households are in census tracts with at least two providers offering fixed broadband connections of at least 10 Mbps, and even more have access

⁷² 2015 Order at ¶¶7, 75, 137, 142, 288, 554.

⁷³ *Verizon*, 740 F.3d at 643-49.

⁷⁴ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

⁷⁵ *See Verizon*, 740 F.3d at 649.

to wireless carriers offering 3G and LTE service at comparable speeds⁷⁶—which is more than enough for most consumer uses.⁷⁷

The FCC’s decision to count only 25 Mbps speed as broadband is inconsistent with the reality of how most Internet users experience the Internet, as explained in our comments on the report (Appendix C)

As absurd as we find the idea that 706(b) is a grant of authority (or that the FCC’s broadband reports are adequate to trigger that authority), even more absurd is the idea that the Section 706(b) determination is not required at all for the Commission *and state regulators* to exercise authority to promote broadband as they see fit, willy-nilly, without any particular investigation or determination being required.

C. Section 706 Is Not an Adequate Basis for Federal Preemption of State Laws

Even assuming that Section 706 is ambiguous as to whether it is an independent grant of authority, it cannot be adequate as a basis for the FCC to preempt state laws. This would require that Section 706 be “unmistakably clear,” under *Nixon v. Missouri Municipal League*⁷⁸ and the Supreme Court’s preemption jurisprudence.⁷⁹ In *Nixon*, the Supreme Court struck down an FCC attempt to argue state ban on muni broadband was inconsistent with a FCC interpretation of an ambiguous statute, saying that

§ 253(a) is hardly forthright enough to pass *Gregory*: “ability of any entity” is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms.⁸⁰

Similarly here, the Section 706 cannot be both ambiguous and “unmistakably clear” – which is, of course, why the FCC has attempted to change the controlling legal standard. In its declaratory order preempting Tennessee and North Carolina’s laws, the FCC argues that the “unmistakably clear” standard does not apply because this is an issue of interstate commerce rather than state control over its internal subdivisions.⁸¹ To avoid the obvious application of *Nixon*, the FCC pushes the humorous distinction that while states may ban municipal broadband, they may not allow it with conditions.⁸²

⁷⁶ See FCC, Indus. Analysis & Tech. Div., WCB, *Internet Access Services: Status as of December 31, 2013*, at 9–10 (Oct. 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-329973A1.pdf.

⁷⁷ See Applications of Comcast Corp. and Time Warner Cable, Inc. For Consent to Assign or Transfer Control of Licenses and Authorizations, *Comments of TechFreedom*, MB Docket No. 14-57 (Dec. 23, 2014), available at http://docs.techfreedom.org/TF_Reply_to_ComcastTWC_Petitions.pdf.

⁷⁸ 541 U.S. 125 (2004).

⁷⁹ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (“[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”) (internal citations omitted).

⁸⁰ *Nixon*, 541 U.S. at 140-41.

⁸¹ See Muni Broadband Petition at ¶12, ¶¶154-67.

⁸² See *id.* at ¶¶ 156-57.

But, as Commissioner Pai explains,⁸³ this distinction will not likely convince a court. If anything, Section 253 from the *Nixon* decision is *more* preemptive than Section 706(b). After all, both Section 253(a) and 253(d) actually contain the words preemption! But Section 253 was still too ambiguous; it lacked a “unmistakably clear” message of preemption. It is hard to see how Section 706(b) can do better. And the idea that states can regulate muni broadband through outright prohibitions but not lesser forms of regulation will have the consequence of encouraging bans, which is unlikely to have been in accordance with Congressional intent.⁸⁴ If anything, the Act actually counsels against preemption in general, as stated by Section 601(c) of the Telecommunications Act: “NO IMPLIED EFFECT- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.”⁸⁵ Thus, even setting aside the Court’s constitutional preemption jurisprudence, the FCC seems likely to lose simply on the plain face of the 1996 Act itself.

IV. Conclusion

The Commission should have spurred the Joint Conference to a far greater activity, and created an Advisory Committee for it, years ago. But it is never too late to begin building the institutional structures that will ensure the Commission maintains a consistent focus on broadband deployment and an ability to gather and synthesize the best ideas from across affected stakeholders. As the Chinese proverb goes: “The best time to plant a tree was 20 years ago. The second best time is now.”

⁸³ See Dissenting Statement of Commissioner Ajit Pai, City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq., WC Docket No. 14-115, The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601, WC Docket No. 14-116, at 101-02, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-25A1.pdf.

⁸⁴ See *id.* at 103-06.

⁸⁵ *Id.* at 106 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c), 110 Stat. 56 (codified at 47 U.S.C. § 152)).