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**Section 706's Deregulatory Directive:
Accelerate Broadband by Removing Regulatory Barriers**

by

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The FCC will soon be releasing its *Ninth Broadband Progress Report* – or "706 Report." Data published since the last *706 Report* suggests further strides have been made in broadband deployment. As of June 2012, some 95% of Americans had access to broadband. Closer to 98% had access if you include 3G wireless. And since June 2012, according to the data, 4G LTE network coverage has expanded even more.

But if the next *706 Report* follows its predecessors, the FCC might declare yet again that, in spite of such widely-acknowledged progress, broadband is still not being timely deployed. And, if it follows prior reports, the FCC might emphasize again its ongoing regulatory initiatives or call for new regulatory intervention in the broadband market.

One can bemoan the FCC's unduly negative gloss on the state of broadband deployment. But one shouldn't belabor it. More important than any positive or negative conclusions by the FCC are the agency's policy prescriptions. Unfortunately, the FCC has preferred a pro-regulatory approach that leaves existing regulatory barriers to broadband deployment in place and risks creating new barriers.

It's time to counter that pro-regulatory approach on its own terms. Even accepting another FCC negative finding about broadband deployment, however wrong such finding might be, we need an alternative policy approach to accelerate broadband deployment by removing barriers to infrastructure investment. We need a broadband policy for promoting broadband deployment that is deregulatory and market-driven, consistent with the deregulatory terms of Section 706.

There are a number of things that the FCC can do to remove regulatory barriers to broadband infrastructure investment.

First, the FCC can forbear from enforcing analog-era, legacy telephone regulations.

Those regulations were premised on monopolistic conditions and impose a financial drag that diverts resources from broadband services. An FCC process of elimination can start with removing the remaining *Computer Inquiry III* rules regarding narrowbanding enhanced services.

Second, the FCC can promptly approve trials to facilitate the ongoing IP transition.

Relieving broadband providers from costly requirements to maintain old copper-based networks will free up resources for next-generation Internet Protocol-based technologies. The FCC should green-light geographically-targeted trials to assess the efficiency and effectiveness of deregulatory reforms as networks transition to all-IP.

Third, the FCC can set a sunset date for the public switched telephone network

(PSTN). A deadline would focus the efforts of the FCC and providers to better ensure that the IP-transition and PSTN retirement process is prompt. A PSTN sunset date should coincide with a deregulatory, market-driven framework for voice services in an all-IP world.

Fourth, the FCC can take targeted steps to remove regulatory barriers to cell site

construction. The FCC should look for ways to expand on its *Declaratory Ruling* establishing a shot-clock for state and local government action on cell tower siting applications. It could, for instance, offer binding interpretations for certain statutory terms concerning what kinds of state and local regulations impermissibly "prohibit or have the effect of prohibiting" wireless services by creating "significant gaps in coverage." The FCC should also consider defining and adding categories of cell site infrastructure to the list of facilities categorically excluded from environmental processing because of their minimal impact on surrounding visual environments.

Fifth, the FCC can conduct the incentive spectrum auction in a simple and timely

manner. The lack of available spectrum for commercial use can be attributed, in large part, to regulatory barriers to efficient reallocation of spectrum licenses. A successful two-sided incentive auction can help address those barriers. Allowing all wireless providers to participate is critical to ensuring not only that the auction meets bid revenue requirements set by Congress but that it raises the maximum revenue possible under the circumstances for taxpayers. Open eligibility is also essential to ensuring the most efficient approach whereby those carriers that will pay the most for spectrum licenses can put those resources to their highest use.

Sixth, the FCC can conduct prompt and principled reviews of mergers and secondary market transactions involving transfers of spectrum licenses. Mergers or secondary market transactions involving spectrum licenses can allow providers to more efficiently use such resources and accelerate deployment of next-generation services. FCC reviews should be consistently prompt, with any conditions imposed being related to the proposed transaction and consistent with consumer welfare. A proper analysis of today's wireless market should focus on prospects for continued heavy investment in infrastructure for next-generation wireless broadband networks.

If the FCC continues to suggest – wrongly, in my view – that progress in broadband deployment is a problem, a deregulatory and market-driven approach offers an answer. And it's sound policy, regardless of FCC deployment findings. Should the FCC continue to allow regulatory barriers to stand in the way of infrastructure investment, the agency will have itself to blame for any lack of timely and reasonable deployment of broadband services to all Americans.

Published Data Points to Continued Progress in Broadband Deployment

While we await the FCC's release of the *Ninth Broadband Progress Report* – or "706 Report" – a few things can be said about what we can expect to find in it. First and foremost, the actual facts about broadband deployment are encouraging, especially when separated from the FCC's opinions about them.

A [May 2013 Report by NTIA](#) contains an updated broadband deployment data set from the State Broadband Initiative (SBI). Prior FCC *706 Reports* have relied on SBI data. So the latest SBI numbers provide a baseline for measuring progress. According to SBI data reported by NTIA, as of June 30, 2012, the nation's broadband deployment picture includes the following:

Basic Availability: Ninety-eight percent of Americans have access to wired or wireless broadband at combined advertised download speeds of 3 Mbps or greater and upload speeds of 768 kbps or greater (referred to as 3/768 here).

Wireline: Just over 93% of Americans have access to advertised wireline broadband at speeds of at least 3/768, and almost 93% of Americans have access to at least 6 Mbps. Ninety-one percent of Americans have access at 10 Mbps, but access drops to 78% at 25 Mbps.

Wireless: Approximately 81% of Americans can access mobile wireless download speeds of 6 Mbps or greater. Nearly 26% of the population can access fixed wireless download speeds at 6 Mbps.

This updated SBI data set shows continued improvements over the prior year. According to the FCC's *Eighth Report*, as of June 2011, 19 million people – or 6% of the population – lived in areas lacking broadband access. So 94% of the population had access to broadband. Had the *Eighth Report* included 3G wireless, the number of unserved would have shrunk to 5.5 million people – just 1.7% of the population. Consider also that the

Seventh Report estimated that as many as 26 million Americans lacked access to broadband.

Of course, the SBI numbers almost surely understate 4G LTE network expansion. According to the FCC's [Sixteenth Wireless Competition Report](#), as of November 2012, "[Verizon's] LTE network covered more than 250 million POPs," with "[p]lans to expand LTE nationwide in 2013." By that same date, "[AT&T's] LTE network covered 150 million POPs," with "plans to deploy LTE to...250 million POPs, by the end of 2013, and to 300 million by the end of 2014." "As of September 2012, [Sprint's] LTE service is offered in 19 cities and plans to deploy LTE to 100 additional cities within the next several months and to complete LTE build-out by the end of 2013." Also, FCC orders approving the T-Mobile/MetroPCS merger as well as the SoftBank/Sprint/Clearwire merger were premised, in significant part, on post-merger potential for furthering next-generation wireless broadband network deployment. If approved, the pending AT&T/Leap merger could similarly hasten expansion of next-generation wireless networks.

FCC's Pro-Regulatory Approach to Deployment Data and Policy Prescriptions

Even if the latest numbers about broadband deployment appear promising, absent a change in its recent disposition, don't expect the FCC to see it that way. If the FCC's next *706 Report* follows its predecessors, we can expect it to include at least three things: (1) a data summary showing broadband deployment increases, reaching now to some 95% of Americans – and closer to 98%, if you include 3G wireless; (2) a finding by the FCC that, in spite of such progress, broadband is not being deployed in a reasonably timely fashion to all Americans; and (3) an emphasis on ongoing regulatory initiatives or a call for new regulatory intervention to accelerate broadband deployment.

The FCC's rationale for its negative finding on broadband deployment in the *Eight Report* boiled down to this: (a) anything less than 100% of Americans does not, by definition, equal *all* Americans; (b) broadband deployment by providers is being reinterpreted to mean broadband adoption by consumers; and (c) convenient disregard of wireless broadband deployment data in arriving at the overall conclusion.

The FCC's finding as well as its rationale – particularly as it relates to wireless – have both been critiqued previously. Overall, the agency's approach in recent *706 Reports* embodies what FSF President Randolph May has described as "[the FCC's pro-regulatory proclivities](#)" – that is, a regulation-minded lens that it takes toward broadband deployment data and policy. By declaring the lack of timely deployment of broadband to all Americans, the FCC can more easily rationalize future regulatory interventions in the broadband market and devote plenty of space in its report to cheerleading its own preferred ongoing regulatory activities or programs.

Section 706's Deregulatory Directive

It's easy enough to focus attention on the FCC's preconceived negative findings regarding broadband deployment. But based on an accurate reading of Section 706, what should follow such a negative finding? Prompt deregulatory action.

Section 706(a) puts the FCC under an ongoing obligation to encourage the reasonable and timely deployment to all Americans of advanced telecom services like broadband, by utilizing "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." And under Section 706(b), if the FCC determines advanced telecom capabilities like broadband are not being deployed to all Americans in a reasonable and timely fashion, "it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

One may question the reasonableness of a negative finding based on the data. Even so, Section 706 directs the FCC to a series of deregulatory processes, with an immediacy imperative to remove regulatory barriers to infrastructure investment attached to any negative finding.

A Deregulatory, Market-Driven Approach to Accelerating Broadband Deployment

No doubt optimists about broadband trends want to see deployment, speeds, and investment continue strong. The deregulatory letter and spirit of Section 706 should provide the basis for the FCC to adopt a pro-market, pro-growth policy approach.

- Forbear from enforcing analog-era, legacy telephone regulations. Last-century regulations premised on telephone monopolies continue to impose a financial drag on broadband Internet service providers, diverting attention and resources from maintaining and upgrading more advanced networks and services. Such regulations have outlived their underlying assumptions and cannot be justified on a cost-benefit basis. The FCC needs to eliminate more of these rules.

A good place for the FCC to start this process of elimination is with the remaining *Computer Inquiry III* rules. *Computer III* is a complicated regulatory apparatus put in place to allow independent providers of "enhanced services" to purchase or use parts of the public switched telephone network (PSTN). As [explained](#) by FSF Visiting Fellow Greg Vogt, "[t]hese rules now apply only to three companies in a growing field of wired and wireless network providers of considerable size and strength." In particular, *Computer III* rules remain in place for "narrowbanding" enhanced services that "are being provided today over broadband and cable TV networks without reliance on *Computer III* functionality."

- Promptly approve trials to facilitate the ongoing IP transition. Many broadband Internet providers are burdened with the growing costs of maintaining outdated, copper-based networks parallel to their fiber-based broadband networks. The sooner such

providers can be relieved of costly requirements that they continue to offer service on older networks, the sooner they can devote more resources to next-generation technologies.

The FCC should green-light trials, geographically targeted and consisting of varying deregulatory and consumer choice components, to assess the efficiency and effectiveness of reforms. It should invoke its forbearance and waiver authorities as necessary to permit such trials to proceed on a timely basis. For instance, forbearance relief or waivers could be granted to clear away potential obstacles to all-IP network transitions posed by service discontinuance requirements, notice-of-network change regulations, carrier-of-last-resort obligations, or other unnecessary mandates. Trials can provide real-world data to inform PSTN retirement efforts and a new deregulatory framework for all-IP voice services.

Importantly, the FCC must *not* use such trials to impose common carrier regulations established to govern the PSTN on IP network interconnection and traffic arrangements.

- Set a sunset date for the public switched telephone network. In order to focus the efforts of the FCC and legacy voice providers to better ensure that the IP-transition and PSTN retirement process takes place in a timely manner, the FCC should set a deadline for retirement of the PSTN regulatory system. A sunset date should coincide with implementation of a deregulatory framework for voice services in an all-IP world.

- Take targeted steps to remove regulatory barriers to cell site construction. Federal law preempts – and thereby prohibits – regulation of wireless rates and entry by state and local governments. But as the FCC has acknowledged in its *Sixteenth Wireless Competition Report*, "obtaining the necessary regulatory and zoning approvals from state and local authorities" is one of the most "significant constraints faced by wireless services providers that need to add or modify cell sites." The lack of timely built cell sites is an obstacle to achieving nationwide deployment of next-generation wireless broadband networks. The FCC can start by looking for ways to expand on its *Declaratory Ruling* establishing a shot-clock for state and local government action on cell tower siting applications.

Section 332(c)(7)(B) provides that state and local government regulation shall not "prohibit or have the effect of prohibiting" wireless services. The FCC has authority under administrative law precedents to interpret such ambiguous terms. It could define aspects of an "effective prohibition" resulting from what some federal circuit courts have termed "significant gaps in coverage." The FCC could rule that a "significant gap" exists when a wireless provider does not have a sufficiently strong radio frequency (RF) signal, and set RF signal thresholds. As one federal judge has explained in a cell tower siting case, "[o]ur review of an effective-prohibition claim might look different if there were properly promulgated FCC regulations setting particular threshold coverage."

The FCC should also take seriously [PCIA's proposal](#) to establish a definition of "visually unobtrusive wireless facility installations," that includes distributed antenna systems and small cell technologies, and add that definition to the list of facilities excluded from environmental processing because of their minimal impact on visual environments.

- Conduct the incentive spectrum auction in an unencumbered and timely manner.

The lack of available spectrum for commercial use can be attributed, in large part, to regulatory barriers to efficient reallocation. The FCC can help reduce those barriers through the upcoming two-sided spectrum incentive auction. Ensuring the auction's success depends upon the FCC keeping it open to all wireless providers. Barring highly capitalized wireless carriers from participating in the auction would risk scuttling the entire undertaking.

Open eligibility is critical to ensuring the auction produces enough bid revenue to meet the requirements set by Congress. It's also essential to ensuring the most efficient approach whereby those carriers that will pay the most for spectrum licenses can put those resources to their highest use. Any concerns about spectrum concentration resulting from the auction, if proven according to proper evidentiary requirements conforming to due process, can be remedied through a divestiture and resale process once the auction is successfully completed.

- Conduct prompt and principled reviews of mergers and secondary market transactions involving transfers of spectrum licenses. Regulatory barriers to efficient reallocation of critical spectrum resources are also posed by the FCC's process for reviewing spectrum license transfers resulting from mergers and other transactions. Such barriers can be reduced through a more prompt and disciplined review process.

The FCC adheres to an ambitious and open-ended merger review "public interest" standard that presumes an extraordinary amount of agency predictive knowledge. The process invites agency activism and gives rise to what has been termed "regulation by condition." On many occasions the FCC's review process has been too slow. Delays expand outside interest group lobbying and PR campaigns for special restrictions on mergers and secondary market transactions. Agency inaction increases in regulatory compliance expenses and leaves providers unable to vigorously pursue new market opportunities while they wait. Under mounting pressure to obtain FCC approval, merging carriers have resorted to accepting "voluntary" conditions negotiated behind closed doors.

Prior merger and secondary market transaction reviews have overemphasized static market share analysis. And the FCC has relied on *ad hoc* rationales to impose regulatory conditions unrelated to the deal or that are dubious from a consumer welfare standpoint.

Future FCC reviews should be consistently prompt. And any conditions should be related to the transaction and consistent with consumer welfare standards.

Technologically dynamic industries, such as broadband Internet services, should be examined according to a dynamic market-minded outlook that takes stock of market conditions conducive to continuing investment and innovation. A proper analysis of today's wireless market, in particular, should include prospects for continued heavy investment in infrastructure for next-generation wireless broadband networks. Mergers or secondary market transactions involving spectrum licenses can allow providers to more efficiently use such resources and accelerate deployment of next-generation services.

Conclusion

As of June 2012, some 95% of Americans had access to broadband. Closer to 98% had access if 3G wireless is included. And since June 2012, data indicates expansion of 4G LTE network coverage has expanded even more. Under these circumstances, whether or not the FCC's Ninth Report will find that broadband is being deployed on a reasonable and timely basis to all Americans remains to be seen.

But ultimately more important than any positive or negative broadband deployment findings by the FCC are the agency's policy prescriptions. Unfortunately, the FCC has preferred a pro-regulatory approach that leaves old regulatory barriers standing and risks creating new barriers to broadband deployment.

It's time to counter that pro-regulatory approach on its own terms. Regardless whether the FCC issues another negative finding concerning broadband deployment, we still need an alternative policy approach to accelerate broadband deployment that is deregulatory and market-driven, consistent with Section 706.

There are a number of things that the FCC can do to remove regulatory barriers to broadband infrastructure investment. But should the FCC allow such regulatory barriers to remain – or erect new barriers – the agency will have itself to blame for any lack of timely and reasonable deployment of broadband services to all Americans.

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Further Readings

Greg Vogt, "[Achieving Unanimity: Getting to 'Yes' for Incentive Auctions](#)," *FSF Blog* (August 13, 2013).

Greg Vogt, "[Computer III: R.I.P.](#)," *FSF Blog* (July 12, 2013).

Randolph J. May, "[Don't Equivocate – Clear and Reallocate](#)," *FSF Blog* (June 27, 2013).

Randolph J. May, "[The FCC's Incentive Auction: KISS It](#)," *FSF Blog* (June 27, 2013).

[Comments of the Free State Foundation](#), IP Transition Trials Petitions Proceeding (2013).

Seth L. Cooper, "[FCC's Pro-Regulatory Broadband Policy Risks Investment and Jobs](#)," *FSF Blog* (September 11, 2012).

Randolph J. May, "[A Failure to Communicate at the FCC](#)," *Perspectives from FSF Scholars*, Vol. 7, No. 24 (August 29, 2012).

Seth L. Cooper, "[The FCC's Section 706 Report and Wireless Broadband Buildout](#)," *FSF Blog* (August 14, 2012).

Seth L. Cooper, "[4G Wireless Networks Need Relief from Cell Siting Barriers: Economy Would Benefit Through New Jobs and Investment](#)," *Perspectives from FSF Scholars*, Vol. 7, No. 7 (March 29, 2012).

[Comments of the Free State Foundation](#), Section 706 Proceeding (2011).

Randolph J. May, "[Section 706 and the FCC's Pro-Regulatory Proclivities](#)," *FSF Blog* (May 24, 2011).