



1-1-2001

The FCC's Third Report on Broadband Deployment: Inequitable, Untimely and Unreasonable

Allen S. Hammond IV

Santa Clara University School of Law, ahammond@scu.edu

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>

Recommended Citation

24 *Hastings Comm. & Ent. L.J.* 539

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

The FCC's Third Report on Broadband Deployment: Inequitable, Untimely and Unreasonable

BY ALLEN S. HAMMOND*

Introduction	539
I. The Commission's Finding of "Reasonable and Timely" Deployment	540
A. The Commission's Conclusion.....	540
1. The Commission's Definition of Broadband.....	541
2. The Commission's Use of Subscription Data.....	541
3. The Commission's Use of ZIP Code Data	542
II. The Commission's Methodology is Flawed.....	542
A. The Definition of Broadband.....	542
B. The Commission's Data is Insufficient to Support its Conclusions.....	543
1. The Subscription Data is Insufficient	543
2. The ZIP Code Methodology is Insufficient	543
C. The Commission's Proposed Reliance on the Data Gathering of Others is Misguided and Ill Advised	545
D. Current Deployment is Inequitable.....	547
III. Conclusion.....	550

Introduction

On February 6th, 2002, the Federal Communications Commission issued its most recent report on the status of broadband advanced network and high-speed service deployment in the United States. In its report, made in response to the Commission's ongoing mandate from Congress, the Commission concluded that the current deployment of advanced network and high-speed services is reasonable and timely.¹ The commission based its conclusion on subscription data it says indicates a substantial increase in residential

Director of the Broadband Institute of California, Santa Clara University School of Law, Santa Clara, California. Special thanks are due to the research assistance of Nikki Pope, Ross Trindle and Wilson Lau.

1. Federal Communications Commission, *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*. ex: CC Docket 98-146. 1 (February 6, 2002).

and small business subscription to high speed and advanced services. In addition, the Commission based its findings on information derived from an analysis of ZIP code demography.²

The Commission's conclusion is based on insufficient data and contradicted by substantial evidence that current deployment efforts are inequitable, untimely and contrary to the public's interest. First, the Commission's presentation of gaudy percentage increases in high speed and advanced service subscribership are misleading and the Commission's reliance thereon is misplaced. The actual number of high speed and advanced service subscribers was so low to begin with that a minimal numerical increase results in a substantial percentage increase of questionable significance. Moreover, current broadband deployment is still inequitable when examined in the context of income, race, ethnicity and geography. Second, the Commission's cursory measurement of broadband deployment as a function of ZIP code demography does not and cannot accurately determine the extent of deployment. The use of the "subscriber per ZIP code" method of measurement is problematic and questionable when employed by an "expert" agency in a proceeding conducted pursuant to congressional mandate and requiring carefully weighed, reasoned and supported analysis. The implementation of an inadequate measurement methodology should not be used as a proxy for deregulation. It is also problematic because the future quality of life of far too many Americans will be affected by the availability of broadband technology in their communities.

I. The Commission's Finding of "Reasonable and Timely" Deployment

A. The Commission's Conclusion

Section 706 of the Telecommunications Act of 1996 requires the Commission to periodically ascertain whether the deployment of broadband capability is made available to all Americans in a reasonable and timely manner.³ In its Third Report and Order, the

2. *Id.* at 4-5.

3. § 706(b) requires that the Commission "regularly . . . initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) . . . In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting

Commission concluded that deployment of advanced telecommunications capability is reasonable and timely. It finds that there is “continued and rapid growth in subscription to high-speed and advanced services on a nationwide basis which is indicative of the increased availability of advanced services.” The Commission proposed to continue to monitor deployment to certain categories of consumers so that if deployment ceases to be reasonable and timely in the future, the Commission would recognize that development early.⁴

1. The Commission's Definition of Broadband

Section 706(c)(1) of the Act defines broadband telecommunications capability 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.”⁵

The FCC has redefined broadband by dividing broadband capability into two speeds. Advanced services are defined as services and facilities with an upstream and downstream transmission speed of more than 200kbps.⁶ High-speed services are defined as services with over 200 kbps capability in at least one direction.⁷

2. The Commission's Use of Subscription Data

In order to answer the question of whether broadband deployment is reasonable and timely, the Commission reviewed recent data on the growth of high speed and advanced services subscribership, subscribership in relationship to network technology, and population density and income data as a function of ZIP codes. The Commission found that over the past two to three years, there has been a substantial increase in residential and small business subscription to high speed and advanced services provided via DSL, cable modem, satellite or wireless technologies.

competition in the telecommunications market.”

4. Federal Communications Commission, *supra* n. 1, at 38.

5. 47 U.S.C. § 706 (1996).

6. Federal Communications Commission, *supra* n. 1, at 7 (The Commission's rationale for the 200 kbps designation is that the speed is faster than ISDN and allows enough bandwidth to provide e-mail and web browsing. And that the definition is consistent with §706(b)'s requirement of origination and reception.).

7. Federal Communications Commission, *supra* n. 1, at 7 (Service may have asymmetrical upstream and downstream paths as long as both paths provide speeds in excess of 200 kbps to the network demarcation point at the subscriber's premises.).

3. *The Commission's Use of ZIP Code Data*

The Commission also analyzed ZIP codes using as its basic measure the existence of at least one high-speed subscriber per ZIP code. By using data generated by its ZIP code analysis, the Commission surmised that it could “gain useful information into deployment and location of high-speed network infrastructure.” It further surmised that this limited measurement of subscribership reflected availability, responsive service offerings, and affordable pricing. It concluded that its findings indicate where services are being made available. It also speculated that “consumers in ZIP codes with no subscribers may require different solutions to bring them access other than consumers in ZIP codes where last mile infrastructure exists but other barriers prevent access.”⁸ The Commission went on to speculate that the presence of one subscriber for cable modem or DSL indicated that other subscribers to the same system could obtain similar service.⁹

II. The Commission's Methodology is Flawed

A. The Definition of Broadband

The Commission recognized that its choice of speed designations “has major implications” for its analysis of deployment. Networks operating at the lower speeds are likely to be more widely deployed and hence available but are not synonymous with high-speed applications such as video. Because many believe video and other high speed services are likely to be killer applications that will lead consumers to adopt advanced telecommunications capability in great numbers,¹⁰ the FCC's decision to measure lower level deployment is misplaced.¹¹ The Commission would no doubt counter that the demand for high-speed applications has not yet surfaced in great

8. *Id.* at 13, ¶ 21.

9. *Id.* at ¶ 22.

10. Mike Godwin, *Not A Killer App*, *Legal Times*, 76 (Jun. 3, 2002) (online video gaming); Paul Andrews, *Big Pipe Dreams*, *U.S. News & World Report*, 36 (May 13, 2002) (P2P music file sharing); Angela Langowski, *VoDSL: Voice-Over-DSL Looks Promising, But It Has A Way To Go Before It Becomes Marquee-Quality Technology*, *CED*, 45 (Apr. 1, 2001) (voice over DSL); Hank Hogan, *Streaming Video Mainstream?*, *Electronic News*, 28 (Dec. 4, 2000) (streaming media); Steve Caulk, *One Potato, Two Potato, Couch Potato No More... Experts Predict Future Will Involve Tube Participation*, *Denver Rocky Mountain News*, 1B (Nov. 27, 2000) (video recorder with electronic program guide); and *Future Speak*, *SHOOT*, 71 (Nov. 3, 2000) (online shopping).

11. *Id.* at 9, ¶12.

measure¹² and as a result, the FCC is reluctant to impose build-out requirements for a network capability without a market.

Nevertheless, the Commission failed to adequately measure the availability of infrastructure capable of providing the advanced services likely to attract the subscribership the FCC alleges it seeks to foster pursuant to congressional mandate. As a result, the Commission has failed to meet its statutory responsibility.

B. The Commission's Data is Insufficient to Support its Conclusions

1. The Subscription Data is Insufficient

The Commission compared currently available data on broadband subscribership with the data it had published in its Second Report on high speed and advanced network deployment. Based on the comparison, the Commission found that there has been growth in the deployment of high-speed services to residential and small business consumers during the time period between the publication of the second and third reports. The Commission cited a 250% increase in the number of high-speed service users during the period in question. The Commission found that roughly eighty-one percent (7.8 million) of the 9.6 million high-speed and advanced network service users were residential or small business users. And, 4.3 million of the 7.8 million are advanced network service subscribers.

The difficulty with the Commission's subscription data analysis is that while the growth percentages the Commission cites are quite large, they are based on changes in a relatively small portion of the U.S. population. Reduced to deployment as a percentage of population, only approximately seven percent of the more than one hundred million American households subscribed to high-speed services at the time of the Commission's *Third Report*. To the extent that subscription is used as a proxy measurement for deployment, less than ten percent of the country's households have access to high speed and advanced network services.

2. The ZIP Code Methodology is Insufficient

Based on the existence of as few as one subscriber, the Commission concludes that broadband service is available to many

12. Jon Van, *Broadband Dream Hits Snag; Most Americans Unwilling to Pay Premium for High-Speed Web Access*, Chicago Tribune, 1 (Nov. 12, 2001); ZONE: CN (High costs, few customers, technology glitches and an unsure regulatory environment are said to be behind decisions by long distance, cable and local exchange carrier firms to slow high speed deployment.).

others in the same immediate geographic area. However, the Commission next concedes that since the boundaries of ZIP codes, cable service areas and DSL wire centers are not coterminous, the existence of a high-speed subscriber does not conclusively indicate the availability of similar service to other residents in the ZIP code.¹³ Thus the presence of one subscriber does not indicate the presence of any others receiving service in a particular ZIP code.

Moreover, the Commission does not even know the identity of the one subscriber in the ZIP code. It does not know whether the subscriber is a large or small business or a residential subscriber. Thus, it cannot adequately state the extent, scope or beneficiary of deployment.

Because it does not truly know the subscriber's characteristics, the Commission cannot even state for whom the finding of sufficient availability, responsive service offerings and affordable pricing applies. The Commission cannot with any degree of certainty state the income of the subscriber. It cannot state with any degree of accuracy how many other similarly situated subscribers exist in the ZIP code and whether the subscriber(s) in question are receiving services from the same network. Nevertheless the Commission concludes that deployment is reasonable and timely.

Based on its data, the Commission reports that there is at least one customer for high-speed service in each of the fifty states and seventy-eight percent of all ZIP codes in the country. It also reports that ninety-seven percent of the country's population lives in the seventy-eight percent of the ZIP codes in which at least one customer/subscriber of high-speed services exists. In addition, the Commission states that multiple providers of high-speed services reported having customers in fifty-eight percent of the ZIP codes.

In a nation of 340 million people, 100 million households, and 33 million small businesses, the Commission finds that deployment is reasonable and timely based on the existence of a minimum of one subscriber per ZIP code reduced in some instances to one subscriber per state. The Commission is right to avoid any assertion that the data is statistically significant. But in doing so, it concedes that its findings possess little credibility for purposes of setting policy. Nevertheless, the Commission asserts that deployment is reasonable and timely.

13. *Id.* at n. 54, ¶ 22.

C. The Commission's Proposed Reliance on the Data Gathering of Others is Misguided and Ill Advised

The Commission states "data collection that required highly detailed reporting at fine geographic levels would have created an appreciable regulatory burden for the firms providing high speed service and a significant administrative burden for firms with national scope." The Commission then suggests that "state commissions and private institutions may be best positioned to collect highly detailed data in discrete geographic areas and among particular communities of the population."¹⁴

The Commission's willingness to abdicate the responsibility to ascertain with any precision the extent of deployment raises a question: how seriously does it take the Congressional requirement to monitor deployment to make certain that it is reasonable and timely? Moreover, relying on state and/or private data that may be generated with a multiplicity of methodologies could render the data unreliable because of discrepancies or lack of uniformity in data collection and survey analysis. Further, to the extent such data is generated by private entities, it may ultimately be proprietary, and may not be readily available to the public seeking to participate in meaningful policy development.

In addition, there is a certain disingenuous tenor to the Commission's off-handed suggestion to let the states monitor deployment. The Commission has recently proposed to preempt state regulation of cable modem provided Internet access by declaring cable modem service to be an information rather than cable service. It has also issued a Notice of Proposed Rulemaking suggesting that telephone provided DSL Internet access is an information rather than a telephone service. Many believe that were the Commission to actually conclude that DSL service is an information rather than a telephone service, states would be preempted from regulating DSL as well.

The Commission proposes to remove cable and telephone provided broadband services from the statutory requirements of Titles VI and II of the Communications Act. These Titles recognize the states' joint jurisdiction, with the federal government, over the very cable and telephone networks used to provide cable modem and DSL broadband services. Viewed in this context, it appears that the Commission, in its "Third Report," is proposing that the states

14. *Id.* at 15, ¶ 26.

measure the deployment of broadband networks and services over which the Commission, in other proceedings, proposes that the states have little jurisdiction.

The Commission qualifies its presentation of data by saying that it is preliminary and descriptive and that FCC assertions as to the relationship between variables do not establish cause-and-effect, leading the Commission to “decline to draw conclusions about the statistical significance of [the] demographic variables.”¹⁵

Despite its professed qualifications, the Commission does not refrain from concluding that deployment is equitable and timely. Nor does it issue a caution to policy makers and the public press that continually site the Commission’s findings of deployment as regulatory fact.

The Commission goes on to acknowledge that reliance on marketplace forces may yield deployment that varies by demography at any given point in time. It finds this result palatable because its reliance is consistent with its interpretation of what Congress via the Act required the FCC to do: promote advanced services deployment within a framework that relies significantly on market forces. The Commission then states that information relating to various demographic variables does not, by itself determine whether deployment is reasonable or timely. It does not assert any basis for its assertion, however. Ultimately, the Commission concludes that some amount of demographic variation, particularly if it is not persistent, may not be inconsistent with reasonable and timely deployment. The FCC concludes that it is appropriate that it continue to monitor demographic relationships in order to identify drivers of deployment in the event government or non-government action is warranted.¹⁶

Later in its Report, the Commission states that the ZIP code data does not allow it to determine how many customers are subscribing to the high speed service or have access in a given ZIP code.¹⁷ Nevertheless the FCC believes “ZIP code data provide a simple . . . unique source of information about where high-speed services are being delivered and where high-speed capable last miles are deployed.”¹⁸ It is a mystery how the Commission could possibly determine where high-speed services are delivered and last miles are deployed. The Commission does not know what cable or telephone

15. *Id.* at n. 78, 16, ¶ 31.

16. Federal Communications Commission, *supra* n. 1, ¶33, 18.

17. *Id.* at ¶ 34

18. *Id.*

based broadband infrastructure can actually be found in any particular ZIP code. It does not know what types of customer/subscribers, are in which neighborhoods, central offices or cable head ends. Nevertheless it insists deployment variations based on demography are appropriate. Furthermore, it does so despite the fact that the Commission does not know of the nature of the circumstances. Based on the methodology employed and the resulting data, the FCC cannot possibly tell whether the variations that do exist are inequitable or persistent. The methodology returns data at such a macro level with so many data points unmeasured and unaccounted for, that the Commission has no way to determine and no mechanism for addressing inequitable deployment.

The Commission is making an assumption that ZIP codes ranked by median household income will necessarily yield data about the income of the high-speed subscriber when it has conceded that it cannot determine whether the subscriber is a business or a residential subscriber. So, it does not in truth know what the data actually show. And, it cannot possibly know what percentage of low-income and rural communities have access.¹⁹

D. Current Deployment is Inequitable

In recent years, numerous groups have expressed concern over the inequitable deployment of advanced network services. Senator John McCain asked the FCC and NTIA to investigate whether current broadband deployment strategies might result in electronic redlining.²⁰ Concern has been raised about the lack of minority community access to advanced networks and services supplied via cable television.²¹

19. *Id.* at ¶¶ 37-38.

20. Senator McCain has previously requested that the FCC and the Commerce Department's National Telecommunications Infrastructure Administration study whether broadband technology deployment patterns could lead to "telecom redlining," in which companies avoid investing in low-income, rural areas. It is recognized that "[s]uch action would make it nearly impossible for residents in rural, low-income areas to ride the information superhighway." See Mary Beth Regan, *Internet Access Battle Reaches Congress; Sen. McCain Bill To Seek Study of High-Speed Web Use Patterns*, Chattanooga Times / Chattanooga Free Press, C1 (Apr. 14, 1999).

21. "[M]inority communities have the highest cable penetration rate and watch television more than any other population, yet are frequently the last to receive broadband telecommunication facilities via cable systems. This is an industry-wide problem . . . we allege redlining has occurred in communities served by MediaOne. Based on information available, data and research, and conversations with individuals and organizations, we have concluded that a disturbing pattern has emerged . . . TAP believes that consistent with the Telecom Act, protections against redlining and discrimination

Concern has been raised about the failure of long distance companies to deploy broadband capability to inner city and rural communities.²² Even where redlining to minority communities was not found, lack of availability in inner city and rural communities was still prevalent.²³ And, the recent consensus of many experts is that disparities in broadband access between Americans remains wide with regard to income and population density and location.²⁴ As the GAO has noted, prior Commissions have acknowledged minorities, disabled, low income, inner city and rural Americans remain vulnerable to inadequate broadband access.²⁵ In its most recent

must be enforced.” *Telecommunications Advocacy Project (TAP) Says to FCC: Deny AT&T and MediaOne Merger Or Mandate Nondiscriminatory Practices as Condition of License Transfer*, PR Newswire, (Feb. 4, 2000) (quoting TAP Executive Director, Khalil Munir).

22. Long distance companies, which can provide advanced services, are more interested in providing high-profit services in urban areas, ignoring customers in suburbs, small towns and rural areas. “These companies are allowed to serve rural America, but don’t have the local facilities. But I guarantee you, they will not build them. This is the telecommunications version of ‘redlining.’” See *U S West Head Lashes Out On The Developing Digital Divide*, Communications Today, (Oct. 12, 1998) (quoting US West President, Solomon Trujillo).

23. See Ronald Roach, *Study Examines Whether Broadband Redlining Exists; Black Issues in Higher Education* 35 <www.aei.brookings.org/publications/abstract.asp?pID=186> (January 3, 2002) (reporting on a study of DSL and cable modem deployment by James E. Prieger, titled “The Supply Side of the Digital Divide: Is There Redlining in the Broadband Internet Access Market?”. While Prieger, said he found little evidence of redlining based on income or on Black or Hispanic concentration, he concluded there was mixed evidence of redlining based on American Indian or Asian concentration. His study findings showed that inner-city or rural locations of residents decreased the probability that access to high-speed Internet was available.) .

24. The overall consensus at the National Summit on Broadband Deployment . . . was that ubiquitous, affordable advanced telecommunications services are still a ways off for many Americans. The gap between the “haves” and the “have-nots” remains wide, and it is based largely on location and cost. When it comes to high-speed Internet access in the United States, “density matters, income matters,” said Federal Communications Commission economist Emily Hoffman. According to the latest FCC statistics, 98 percent of the most densely populated ZIP codes have broadband availability, and 96 percent of the wealthiest ZIP codes also have broadband availability, Hoffman said. For the poorest and most rural ZIP codes, she added, those statistics reverse down to single digits. *Rural Broadband Faces Big Challenges*, Broadband Networking News (Nov. 6, 2001).

25. “In [a] report on the deployment of advanced telecommunications capability (released in August 2000), FCC identified certain categories of Americans who may have difficulty obtaining access to advanced services. These categories include low-income consumers, those living in sparsely populated areas, minority consumers, Native Americans, persons with disabilities, and those living in U.S. territories. In particular, FCC concluded that several barriers might hinder the ability of low-income, inner-city residents to obtain advanced services. Such barriers include the poor quality of the telecommunications plant or of the inside wiring in multiple-tenant buildings, the relatively high price of advanced services, the lower rates of computer ownership among inner-city residents, and the lack of marketing by providers of advanced services to low-

report, the Commission again acknowledges that these same Americans remain vulnerable.²⁶ However, it concludes that disparities are to be expected when relying on marketplace initiated deployment of advanced telecommunications. Consequently, the Commission concluded that deployment was reasonable and timely.

If the only thing at stake was access to entertainment, a conclusion that current advanced network deployment is untimely for rural, inner city, minority, small business and poor Americans would be of far less significance. However, it is recognized that Americans' access to available, affordable advanced network and high-speed services is increasingly essential to democracy, education,²⁷ health care, political²⁸ and economic empowerment,²⁹ not just entertainment.³⁰ This is so because government, educational, medical and financial service delivery is increasingly migrating to the Internet.³¹

Historically, rural, inner city, minority, small business, and poor Americans have enjoyed less access to these services. Recently, many

income populations. FCC also found that for the majority of Americans who live in rural areas, lowest-cost access to advanced services was not readily available." Stanley J. Czerwinski, *Telecommunications-Characteristics and Choices of Internet Users*, GAO Reports No. GAO-01-345 (Feb. 16, 2001).

26. In the 3rd Report, the Commission acknowledged its prior conclusion that certain groups including "low-income consumers, those living in sparsely-populated areas, minority consumers, consumers living on tribal lands, persons with disabilities, and those living in the U.S. territories," were vulnerable to being bypassed by broadband deployment. Federal Communications Commission, *supra* n. 1, at 38. In its 3rd Report, the Commission noted that its new data supported a conclusion that availability had improved but that monitoring was still necessary. *Id.* at ¶ 101.

27. Rep. Ruben Hinojosa, *All Students Need Equal Access to Technology*, Roll Call (Feb. 26, 2001); H.R. Subcomm. On Telecom. and the Internet of the Comm. On Energy and Com., *Hearings on Technology and Education: A Review of Federal, State and Private Sector Programs* (Mar. 8, 2001 (testimony of Hal Krisbergh, Chairman and CEO of WordGate Communications (Wish TV))).

28. Gary Chapman, *The Cutting Edge: Focus on Technology; Digital Nation; Casting A Vote of Caution on Online Voting*, Los Angeles Times, C3 (Mar. 20, 2000).

29. Jane Larson, *'Digital Divide' A Hurdle For Hispanic-Owned Businesses*, The Arizona Republic, E1 (Sept. 18, 1999); H.R. Subcomm. On Reg. Reform and Paperwork Reduction of the Comm. on Small Bus., *Economic Development in Rural America: Small Business Access to the Broadband*, (May 17, 2001) (testimony of Nancy Stark, Director of Community and Economic Development for the National Center for Small Communities).

30. "Streaming media will be a significant application for the Internet, especially as broadband deployments accelerate. For makers of systems, set-top boxes and other emerging products, support for or integration with streaming media will become increasingly important." Hank Hogan, *Streaming Video Mainstream?* Electronic News, 28 (Dec. 4, 2000) (quoting Kevin Hause, an analyst with market research firm International Data Corp., based in Mountain View, Calif.)

31. Andrew Backover, *Relative to The Future Gee-Whiz Technology Closer Than You Think*, The Denver Post, E-01 (Nov. 29, 1999).

of these Americans have experienced a decrease in the availability of these services as costs have increased and service providers have sought to reduce expenses by eschewing brick and mortar service distribution facilities and relying on computer and web based service distribution. Further deferring advanced network and high-speed network deployment will exacerbate the disparity of access to not only the networks, but the services increasingly provided through the networks' use as well.³² Given the inequitable distribution of the aforementioned services, implementation of a policy that exacerbates the disparities by deferring network access is unreasonable and untimely.

Under the new Commission's current "monitoring," continued deferral is highly likely. The Commission has developed no adequate method for determining the current state of deployment to the affected groups of Americans. It has established no discernible baseline of deployment against which future deployment may be measured. Consequently it runs the substantial risk of being unable to determine whether future deployment will be reasonable and timely for many Americans.

III. Conclusion

Eschewing documented findings of disparities created by untimely deployment, the Commission instead relies on limited data generated by use of a questionable methodology to make major policy decisions about the adequacy of deployment. In so doing, the Commission ignores contrary findings made by congress, industry and the public. And it turns a jaundiced eye towards continuing legitimate concerns over the adverse impact of electronic redlining. Its response is that it will continue to monitor the situation. Yet, one is left to ask how the Commission will accomplish its monitoring. By what standard will it determine whether deployment is reasonable or unreasonable and timely or untimely? How would it even know in any event, as the Commission's methodology obscures the inequity by failing to measure it? It has not actually defined reasonable and timely, nor has it established the actual or likely extent and speed of deployment to low income and rural communities such that the FCC could ascertain whether deployment ceases to be reasonable and

32. *Id.* See also Vice President Al Gore, *National Press Club Address* (D.C., Dec. 21, 1993) (transcript on file with The White House). ("If we allow the information superhighway to bypass the less fortunate sectors of our society • even for an interim period—we will find that the information rich will get richer while the information poor get poorer with no guarantee that everyone will be on the network at some future date.")

recognize the development early.

The implementation of a laissez faire regulatory philosophy that is not disciplined by credible data and hence is not subject to meaningful review destroys public accountability as it exacerbates the disparities in access to critical resources experienced by many Americans. It is inherently undemocratic and contrary to the public's interest.

It is likely that the current Commission majority experiences a fundamental philosophical and political³³ unease with a rapid build-

33. The current FCC position is consistent with the ultimate Republican position on the Digital Divide. Translated into the Republican lexicon, the divide became an opportunity to be effectuated via an unleashed free market. Then existing Clinton Administration programs to bridge the divide were painted as suspect and superfluous. Early during the presidential campaign, Republican party rhetoric referred to the Digital Divide as a "digital opportunity. . . to ensure that those in underserved communities gain access to new technology and the incredible developments of the Internet age." The means for bridging the divide would come from "unleashing the resources of the free market, [and insuring] a deregulated environment, along with an assault on excise and access taxes." See Robert MacMillan, *GOP Tax Cuts Will Ease Digital Divide*, Newsbytes (Apr. 25, 2000)(quoting Rep. J.C. Watts (R-Okla.); Free market policies were also touted as critical to eliminating the technology gap between urban and rural markets. Ensuring "that the marketplace that has spawned a breathtaking array of innovation and creativity remains unfettered," was viewed as the principal method for bridging the divide. Republicans promised to work to create tax and regulatory relief as well as emphasize an education component encouraging companies to donate computers to schools. See Melanie Fonder, *Watts Leads GOP On Hi-Tech Silicon Valley Tour*, The Hill, 24 (Apr. 26, 2000); and Heather Forsgren Weaver, *Will Wireless Arrive in Time to Help Rural America?* Radio Comm. Report, 10 (May 8, 2000).

In August of 2000, presidential candidate George W. Bush, "a self-proclaimed compassionate conservative attempting to draw more folks into the Republican tent," was believed to be "in no position to oppose bridging the Digital Divide." Jeffrey Silva, *High-Tech Positions Difficult to Distinguish*, Radio Comm. Report, 1 (Aug. 21, 2000). Indeed, on another occasion in September of 2000, candidate Bush was viewed as generally in favor of "a free-market approach, [but was believed to have] . . . offered a plan to extend Internet and telecommunication services to underserved areas. *Bush and Gore: Issue by Issue: An Update*, The National Journal, 3056 (Sept. 30, 2000). Nevertheless, by October of 2000, presidential candidate George Bush opposed federal programs to close the Digital Divide because he was worried about "government funding and government programs that are haphazard and will be obsolete before they're even funded." Patrick Neighty, *Inside the Candidates: The Positions and Policies of the Presidential Contenders*, America's Network, 36 (Oct. 1, 2000).

More recently, the Bush Administration has sought to deny funding to Department of Commerce and Department of Education programs that have been instrumental in increasing minority, rural and low-income access to the Internet. The actions have met with significant criticism from the Benton Foundation. "The Benton Foundation said the Bush Administration was abandoning a national strategy to bridge the digital divide. Benton said the White House stripped more than 100 million in public investments for community technology grants and information technology (IT) training programs from its 2003 budget. 'The budget's clear message is that the digital divide is no longer a concern for the government—the problem will somehow solve itself,' the Benton Foundation said.

out of advanced network infrastructure with government involvement supplementing market forces.³⁴ However, an agency decision to change the prior policy of market place reliance tempered by government initiatives addressing market failures to one of sole reliance on purely market driven initiatives must be justified pursuant to the Administrative Procedure Act.³⁵ Such justification is particularly necessary where the policy being implemented has been deemed untenable by prior commissions, congress and many experts.

In addition, members of the Commission may argue that any regulatory requirement for an equitable build-out of infrastructure contradicts market dynamics and may impose burdensome costs on providers during a time of economic difficulty.

These arguments conflate efforts to acquire adequate knowledge

The Administration tried to justify the budget choices in its report released last week, entitled *A Nation Online*, the latest nationwide study by the Commerce Dept.'s NTIA. The report said low-income individuals and minorities were going online at a faster rate than more affluent or white Americans. But Benton disputed the report, saying its own analysis of data showed that gaps in technology access for citizens of different educational, income, racial and geographical backgrounds weren't abating. Stated Benton Foundation Senior Director Tony Wilhelm, "With the nation in an economic slump, technology has been a proven catalyst in increasing productivity and economic growth, especially in rural and underserved communities." *Industry Notes*, Washington Internet Daily (Feb. 12, 2002).

34. "I think the term [Digital Divide] sometimes is dangerous in the sense that it suggests that the minute a new and innovative technology is introduced in the market, there is a divide unless it is equitably distributed among every part of the society, and that is just an unreal understanding of an American capitalistic system. I think there is a Mercedes divide. I would like to have one, but I can't afford one. I'm not meaning to be completely flip about this. I think it's an important social issue, but it shouldn't be used to justify the notion of, essentially, the socialization of deployment of the infrastructure." Alan Pearce, *Closing the Gap: Smart Taxation Could be Key in Solving the Problem of the Digital Divide*, *America's Network*, 29 (Sept. 1, 2001) (quoting Commission Chairman, Michael Powell).

35. "A finding without substantial evidence to support it - an arbitrary or capricious finding - does violence to the law." *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 277 (1933). The Commission's findings should be examined under the Administrative Procedures Act to determine if the findings are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or whether its findings failed to meet statutory, procedural, or constitutional requirements. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971); see also 5 U.S.C. § 706(2)(A)-(D). The FCC's action may be arbitrary and capricious if "it has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Brower et al v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2000) (citing *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1448 (9th Cir. 1996)). See also *City of Brookings Municipal Telephone Company, et al., v. Federal Communications Commission*, 822 F.2d 1153 (D.C. Cir. 1987).

of the current state of deployment with a separate policy decision to require equitable build-out of facilities. While it would certainly be argued by many that evidence of substantial inequity in deployment should justify government policies to alleviate deployment inequities, knowledge of the inequities does not necessarily require the application of overly burdensome regulatory remedies. To the extent the Commission seeks to avoid the alleged dangers of regulation by avoiding the acquisition of sufficient knowledge of the status of deployment, it engages in regulatory artifice in contradiction of its congressional mandate.

* * *