
TELECOMMUNICATIONS & ELECTRONIC MEDIA

NATIONAL BROADBAND PLAN

By *Howard Waltzman**

In February 2009, as part of the American Recovery and Reinvestment Act (the “Recovery Act”), Congress directed the Federal Communications Commission (the “Commission”) to develop a National Broadband Plan “to ensure that all people of the United States have access to broadband capability and [to] establish benchmarks for meeting that goal.”¹ This initiative originated with a campaign proposal of President Barack Obama to increase access to broadband services. The Recovery Act also included grants to increase broadband deployment and adoption.

Beginning in April 2009, the Commission hosted a series of regional meetings to study the gap, if any, in broadband deployment, and to formulate policies to be included in the National Plan. The Commission concluded its work and published its National Broadband Plan in March 2010.

The Commission did not formally adopt the National Broadband Plan. Instead, it was drafted by Commission staff at the direction of Chairman Julius Genachowski. Chairman Genachowski then sought a “joint statement of support” signed by all five Commissioners in lieu of a formal vote to approve or adopt the plan.

President Obama praised the National Broadband Plan as bringing America to the cusp of a digital era: “America today is on the verge of a broadband-driven Internet era that will unleash innovation, create new jobs and industries, provide consumers with new powerful sources of information, enhance American safety and security, and connect communities in ways that strengthen our democracy.”² The Obama Administration and the Commission believe their work in implementing the National Broadband Plan will be the driver for building a new digital economy.

I. Background: Understanding Broadband and the Gap in Broadband Adoption

As opposed to “dial-up access” provided over the telephone network, broadband services are dedicated to transmitting large quantities of data specially for Internet access and other computer-based applications. Broadband services are capable of transmitting greater amounts of information, at substantially faster rates, than dial-up services. There are several types of broadband services, including Digital Subscriber Line, cable modem, fiber, wireless, satellite, and Broadband over Powerline.

The Commission acknowledges that private investment and innovation have fostered a vibrant broadband market that now services the large majority of Americans: “Fueled primarily by private sector investment and innovation, the American broadband ecosystem has evolved rapidly. The

number of Americans who have broadband at home has grown from eight million in 2000 to nearly 200 million [in 2009].”³ Approximately ninety-five percent of Americans living in housing units have access to terrestrial, fixed broadband infrastructure.⁴

Nonetheless, the Obama Administration and the Commission start with the assumption that affordable broadband should be ubiquitous, and that the speeds of broadband services should increase exponentially. Despite rapidly increasing access through private sector investment, the Commission contends that nearly 100 million Americans have not adopted broadband at home, even where it is available.⁵ The National Broadband Plan also suggests that broadband-enabled health information technology could improve health care and lower medical costs; that broadband permits students to learn academic material faster; that broadband-enabled smart-grids would increase energy efficiency and reduce dependence on foreign oil; and that broadband improves communications among emergency responders.⁶ In other words, while the private sector has invested billions of dollars to make broadband available to nearly every American home—and continues to improve the speed and reliability of the networks—Americans have not yet fully realized broadband’s potential.

II. National Broadband Plan Recommendations

The National Broadband Plan sets out a series of recommended proposals to be considered by the Commission, Congress, other federal agencies, states, and local governments, each intended to promote broadband deployment and adoption.

A. Competition Policies

The National Broadband Plan includes several proposals to authorize the Commission to evaluate the competitiveness of the broadband market, and even to exercise certain regulatory powers over broadband providers, at least some of which would require new congressional mandates. Because, historically, telecommunications services were provided by monopolies, the Commission has long had broad authority to regulate so-called “common carriers,” such as telecommunications carriers, under Title II of the Communications Act.⁷ This includes the authority to regulate certain discriminatory practices, and to protect consumers. But the Commission does not have such authority with respect to “information service providers,” including broadband providers, which the Commission previously determined, and the U.S. Supreme Court affirmed, not to be common carriers falling under the jurisdiction of Title II.⁸ Absent new congressional mandates, Chairman Genachowski has proposed, as described below,⁹ to reclassify certain broadband providers as telecommunications carriers subject to regulation under Title II.

* *Howard Waltzman is a Partner at Mayer Brown LLP. He previously served as Chief Counsel, Telecommunications and the Internet, at the U.S. House Committee on Energy & Commerce.*

Because, as noted above, nearly every American home already has *access* to broadband services, the Commission posits that lagging participation in certain markets may be the result of prices, lack of choice, or poor service due to a lack of competition. The Commission notes that the large majority of American households have access to two wireline broadband providers.¹⁰ But given the lack of price data available, the Commission was unable to conclude whether a lack of additional competition was distorting prices. The Commission thus proposes to undertake a detailed market-by-market analysis of broadband pricing and competition. In its analysis, the Commission will also have to evaluate the impact of mobile broadband services on pricing and competition.

Similarly, the Commission proposes to require broadband providers to disclose certain pricing and performance information to consumers that is necessary to enable consumers “to choose the best broadband offers in the market.”¹¹ “Increased transparency will incent service providers to compete for customers on the basis of actual performance.”¹²

B. Allocation and Use of Spectrum

In order to encourage the deployment of additional wireless broadband capacity, the Commission proposes to make an additional 300 megahertz of spectrum available for wireless broadband in the next five years, and 500 megahertz of spectrum available in the next ten years.¹³ The Wireless Association estimates that wireless broadband providers will require an additional 800 megahertz of spectrum in that time.¹⁴

The Commission notes that, historically, it has taken as many as thirteen years to redeploy spectrum bands to accommodate a new use.¹⁵ If unable to act quickly, the Commission is concerned that a lack of available spectrum would delay the deployment of new services. The Commission therefore proposes that Congress “consider expressly expanding the [Commission]’s authority to enable it to conduct incentive auctions in which incumbent licensees may relinquish rights in spectrum assignments to other parties or to the [Commission],” and “consider granting authority to the [Commission] to impose spectrum fees on license holders.”¹⁶ These new authorities, the Commission contends, would enable the agency to quickly and efficiently redeploy spectrum from existing sources.

Because of the limited amount of spectrum available, however, the Commission asserts that it would be obligated to reallocate spectrum currently used for other purposes. The Commission will encourage additional efficiencies in the television broadcast industry to reduce the spectrum currently used, including through the use of new sub-channels, channel-sharing, and incentive auctions.¹⁷ The Commission forecasts that reallocated spectrum could be available for use by wireless broadband providers by 2015.¹⁸

While this reallocation would ostensibly be voluntary, television broadcasters are wary. “We were pleased by initial indications from [Commission] members that any spectrum reallocation would be voluntary, and were therefore prepared to move forward in a constructive fashion on that basis,”

stated Dennis Wharton, Senior Vice President of the National Association of Broadcasters.¹⁹ But Wharton asserted that “we are concerned by reports today that suggest many aspects of the plan may in fact not be as voluntary as originally promised. Moreover, as the nation’s only communications service that is free, local and ubiquitous, we would oppose any attempt to impose onerous new spectrum fees on broadcasters.”²⁰ The television broadcasters already recently returned 108 megahertz of spectrum as part of the transition to digital television.

C. Pole Attachments and Rights-of-Way

The Commission also proposes to take regulatory action with respect to the means by which broadband providers deploy their infrastructure. Under the Communications Act, the Commission currently regulates the rates charged to telecommunication providers for renting access to utility poles.²¹ The Commission likewise proposes to regulate the rates charged to broadband providers for accessing utility poles in order to lower the costs of access.²² The Commission also proposes to encourage the use of space-saving devices to increase the number and variety of service providers that can attach to a single pole.

The National Broadband Plan also contemplates a “joint task force” composed of the Commission and state, local, and tribal governments to craft guidelines for rates, terms and conditions for access to public rights-of-way.²³ The Commission believes that a nationally-coordinated policy will be more effective than the current system of local policies, which often differ with respect to determining access to and payment for public rights-of-way. The Commission asserts that a coordinated, national policy would reduce the inefficiencies in creating enhanced regional and national broadband networks.

D. Universal Availability and Adoption of Broadband

The Commission estimates that the cost to provide broadband access and ongoing service to those Americans not currently subscribing to broadband is \$33 billion (in present value), of which only \$9 billion could be recouped through new operating revenues.²⁴ Many of these potential users reside in rural areas, where the per capita cost of building new network infrastructure exceeds the likely per capita revenue.

The Commission therefore proposes to create a “Connect America Fund” to subsidize the cost of broadband deployment and service to rural Americans.²⁵ The Connect America Fund would provide subsidy payments to one commercial broadband provider in each un-served or under-served area.

The Commission also proposes to “shift” up to \$15.5 billion (in present value) in other revenue sources to support subsidies for broadband access.²⁶ Much of this revenue would come from the reallocation of high-cost universal service subsidies. As much as \$3.9 billion would come from the removal of support previously provided to Sprint and Verizon Wireless for providing service to high-cost areas.

The Commission also welcomed direct appropriations from Congress: “To accelerate broadband deployment, Congress should consider providing optional public funding to the Connect America Fund, such as a few billion dollars per

year over a two to three year period.”²⁷ Likewise, the National Broadband Plan recommends the expansion of direct grant and loan programs, like those grants made available in the Recovery Act.

The National Broadband Plan further recommends allowing states and local governments to directly build, own, and operate broadband networks. The Commission analogizes to the early electrical grids built by municipal utilities and co-operatives, particularly in rural areas. “In some areas, local officials have decided that publicly-owned communications services are the best way to meet their residents’ needs.”²⁸

With respect to consumers, the Commission identifies particular populations who are less likely to adopt broadband, including the elderly and low-income households. The Commission points to several factors for non-use: cost of service, digital illiteracy, and relevance.²⁹ Despite acknowledging that some older and lower-income Americans are not convinced of the value of broadband access, the Commission points repeatedly to cost as being the primary obstacle: “[I]f broadband costs fall because of lower prices or subsidies, consumers might be more willing to try it, in spite of doubts about its relevance or their own abilities to use it.”³⁰ Consequently, the Commission is considering a requirement through which certain spectrum licensees would have to provide “free or very low-cost” broadband access to all households.³¹

E. National Purposes

The National Broadband Plan addresses the use of broadband services in enhancing health care, education, and energy efficiency. For each of these areas, the Commission sets forth actions to be taken by federal agencies to provide greater incentives for the use of broadband services.

With respect to health care, the Commission recommends that the Department of Health and Human Services and the Centers for Medicare and Medicaid Services (“CMS”) permit and incentivize the use of health information technology.³² This would include, for example, storing and sharing medical records electronically. Greater access to medical records would lead to more informed diagnoses and treatments, and, consequently, better medical results. Electronic medical record sharing would also reduce redundant medical tests.

The Commission also recommends encouraging the use of telemedicine and e-care. These programs enable rural doctors to share records with urban hospitals, and likewise permit doctors on urban medical campuses to assist in the treatment of rural patients remotely.³³ The Commission supports the creation of a “Health Care Broadband Access Fund” to subsidize the cost of broadband access by health care providers, particularly in rural areas.

With respect to education, the National Broadband Plan recommends the promotion of online learning.³⁴ In particular, the Commission recommends that the Department of Education create more educational material to be supplied to students online, and that Congress take legislative action to encourage copyright holders to permit free educational use of otherwise-protected material. The Commission also

recommends that school districts provide more online courses and teach digital literacy courses.

As with health care, the Commission also recommends the implementation of digital educational records.³⁵ The Commission proposes that the Department of Education set a national standard for digital records, such that records may be shared freely across the country. In addition, the agency proposes to digitize financial records of school districts and states in order to improve public transparency and accountability.

With respect to energy efficiency, the National Broadband Plan focuses on facilitating a Smart Grid, the “two-way flow of electricity and information to create an automated, widely distributed energy delivery network.”³⁶ The goal is to create a national electricity grid that detects outages, reroutes power more efficiently, and is more resilient to terrorist attack or damage. The Commission also recommends the implementation of a wide range of “smart devices,” that are driven from Internet-based data. For example, the Commission cites GPS devices available to drivers that provide real-time traffic data and allow drivers to avoid traffic congestion.

III. Classification of Broadband Providers

Some of the proposals set forth in the National Broadband Plan, particularly in connection with competition policies and consumer protection, would require direct regulation of broadband providers by the Commission. As described above, while the Commission has broad authority to impose such regulations upon common carriers under Title II of the Communications Act, the Commission previously determined, and the Supreme Court affirmed, that broadband providers and other information service providers are not common carriers subject to the jurisdiction of Title II.³⁷

Until recently, some had thought that the Commission could rely upon its “ancillary authority” under Title I of the Communications Act to regulate interstate and foreign communications in order to regulate broadband providers. However, the U.S. Court of Appeals for the D.C. Circuit recently held that the Commission lacked such authority necessary to impose network management regulations on broadband providers.³⁸ Chairman Genachowski has asserted that this opinion “cast serious doubt on the particular legal theory the Commission used for the past few years to justify its backstop role with respect to broadband Internet communications.”³⁹

Consequently, Chairman Genachowski has proposed to reclassify the telecommunications transmission component of broadband services as a telecommunications service subject to the Commission’s Title II jurisdiction.⁴⁰ According to the Chairman, this proposal would provide the statutory basis for imposing a wide range of regulations, including those necessary to implement the National Broadband Plan. However, recognizing that this reclassification would subject broadband providers to “extensive regulations ill-suited to broadband,” Chairman Genachowski also proposed to “[a]pply only a handful of provisions of Title II” by forbearing the application of other provisions of Title II that he believes are “unnecessary and inappropriate for broadband access service.”⁴¹ In sum,

the Commission would choose which provisions of Title II the agency thought necessary to implement the National Broadband Plan and appropriate to apply to broadband providers.

Endnotes

- 1 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D) (2009).
- 2 Press Release, The White House, Statement from the President on the National Broadband Plan (Mar. 16, 2010).
- 3 National Broadband Plan, F.C.C. Doc. No. 09-51, at xi (Mar. 16, 2010) (the “National Broadband Plan”).
- 4 *Id.* at 20.
- 5 *Id.* at xi.
- 6 *Id.*
- 7 47 U.S.C. § 201, *et seq.*
- 8 Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C. Rcd. 14853 (2005); In the Matter of United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, WC Docket No. 06-10, Memorandum Opinion and Order, 21 F.C.C. Rcd. 13281 (2006); Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53, Declaratory Ruling, 22 F.C.C. Rcd. 5901 (2007).
- 9 *See infra* Part III.
- 10 National Broadband Plan, at 37.
- 11 *Id.* at xi-xii.
- 12 *Id.* at xii.
- 13 *Id.* at 43.
- 14 *Id.* at 84.
- 15 *Id.* at 79.
- 16 *Id.* at 75.
- 17 *Id.* at 89-92.
- 18 *Id.* at 92-93.
- 19 Press Release, Nat’l Ass’n of Broadcasters, NAB Statement on the FCC’s National Broadband Plan (Mar. 15, 2010).
- 20 *Id.*
- 21 47 U.S.C. § 224.
- 22 National Broadband Plan, at 110.
- 23 *Id.* at 113.
- 24 *Id.* at 136-137.
- 25 *Id.* at 145.
- 26 *Id.* at 147.
- 27 *Id.* at 151.
- 28 *Id.* at 153.
- 29 *Id.* at 168.
- 30 *Id.* at 170.
- 31 *Id.* at 173.
- 32 *Id.* at 200.
- 33 *Id.* at 215.
- 34 *Id.* at 226.

35 *Id.* at 234.

36 *Id.* at 249.

37 *See supra* Part II.A and notes 6-7.

38 Comcast Corp. v. FCC, No. 08-1291 (D.C. Cir. Apr. 6, 2010).

39 Statement of Chairman Julius Genachowski (May 6, 2010), *available at* <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html>.

40 *Id.*

41 *Id.*

