

FCC TO DEVELOP NATIONAL BROADBAND PLAN REQUIRED BY THE STIMULUS ACT

The Federal Communications Commission (FCC) has initiated a proceeding to create a national broadband plan, as required by the American Recovery and Reinvestment Act of 2009. In addition to providing funding for a variety of broadband-related programs, the Recovery Act charges the FCC with establishing and delivering a national broadband plan to Congress by February 17, 2010. As a first step in this process, on April 8, 2009, the FCC released and adopted a Notice of Inquiry (Notice) seeking comment from all interested parties and industry stakeholders to inform the Commission's development of the national broadband plan. Comments are due on **June 8, 2009** and reply comments on **July 7, 2009**.

The Recovery Act requires the plan to include several key elements, including:

- Analysis of the most effective and efficient ways to ensure access to broadband capability for all people in the United States and benchmarks for meeting that goal;
- Strategies for achieving affordability and maximum utilization of broadband infrastructure and services;
- Evaluation of the status of broadband deployment, including the progress of related grant programs; and
- Use of broadband to advance consumer welfare, civic participation, public safety and homeland security, community development, healthcare delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation, economic growth, and other national purposes.

To meet its task, the FCC seeks comment on each key element, with detailed questions in each broad category. It also seeks comment on establishing benchmarks and goals and definitions for "broadband capability" and certain other terms. In general, within these key elements, the FCC identifies several categories of programs or policies that it will review in deciding how to implement the plan, including open networks, affordability and existing programs, wireless service policies, market mechanisms and competition, and privacy. The following is a brief description of each key element and a sampling of questions and issues raised in the Notice.

ESTABLISHING GOALS AND BENCHMARKS

The Recovery Act requires the plan to "establish benchmarks for meeting [the] goal" of ensuring that all people of the United States "have access to broadband

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capability.” As an initial matter, the FCC notes that broadband can be defined in various ways and asks how the Commission should define “broadband” and “broadband capability.” The Notice asks whether the definitions for “high-speed,” “broadband,” and “advanced telecommunications capability” should be the same and whether, for example, the Commission should (1) raise the speeds that define broadband; (2) define broadband numerically or by some other metric (such as bandwidth or performance metrics); or (3) adopt a dynamic definition with speed tiers that adjust with changes in technology. It also asks whether the definition should vary based on the technology used and whether broadband services delivered via unlicensed devices should be included in the plan.

In addition, the Notice raises a number of questions regarding what it means to have access to broadband capability, such as: should the Commission take into account different locations such as home, work, schools, in-transit, libraries and public Wi-Fi hotspots; should the Commission consider the extent to which consumers have a choice of providers or technology; to what extent should affordability be considered; and what does it mean for a person with disabilities to have access. The Commission notes that its *2005 Internet Policy Statement* is committed to preserving the open character of the Internet by incorporating the following principles into its ongoing policy activities: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers.¹ The Notice asks whether the FCC should elaborate further on these principles in light of the evolving telecommunications environment; whether it should apply these principles more broadly in developing the national broadband plan; and whether it should turn the principles into rules through a rulemaking.

¹ The FCC notes that the extent to which the principles in the *Internet Policy Statement* apply to wireless providers is currently pending before the Commission in another proceeding.

The Notice also asks how the FCC should measure progress and how existing and/or new data collections can be used to determine whether the benchmarks are being met.

EFFECTIVE AND EFFICIENT MECHANISMS FOR ENSURING ACCESS

The Recovery Act tasks the FCC with analyzing “the most effective and efficient mechanism for ensuring broadband access by all people of the United States.” The Notice identifies certain programs and policies that the Commission will review as part of this analysis, including: market mechanisms, deployment costs, existing universal service programs, wireless service policies, open networks, and competition.

As an initial matter, the Notice asks how effective existing mechanisms have been in ensuring consumer access to broadband capabilities and whether such mechanisms have been market-based or have been supplemented by activities of governmental or non-governmental entities. The Notice asks how the grants and other programs under the Recovery Act should inform the analysis. The Commission notes that market mechanisms have been effective in many areas and asks why the market has been unsuccessful in ensuring access in other areas; what role regulation should play in the broadband infrastructure and service market; and to what extent the broadband plan should encourage the combination of market-based policies with other mechanisms. It asks whether there are appropriate ways to estimate deployment costs and, if so, what the costs and benefits would be of bringing broadband to the least densely populated areas.

The Notice also raises a series of questions about the impact of broadband on existing universal service programs and whether existing programs should be modified. Commenters are asked how existing and new wireless service policies regarding, for example spectrum use and access, licensing rules, and construction requirements, can help meet or constrain the goal of efficient and effective access to broadband. The Notice also seeks comment on how the FCC can promote the use of satellite-based platforms for access to broadband, particularly in rural and remote communities.

In addition, the Notice seeks comment on the value of open networks as a mechanism to ensure broadband access and how “open” should be defined. It asks whether development of the broadband plan should factor in broadband infrastructure and competition, interconnection, nondiscrimination, and openness. Commenters are also asked about the costs and benefits of applying open network policies to wireless networks and whether competition between broadband network providers is an effective means of meeting the Recovery Act’s goals.

AFFORDABILITY AND MAXIMUM UTILIZATION

The Recovery Act charges the FCC with establishing “a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service to the public.” To do so, the FCC seeks comment generally on how to interpret this task, whether affordability and maximum utilization are interrelated, and how to define affordability. In addition, the FCC asks what factors beyond affordability, such as digital literacy skills or lack of a computer or other broadband access, affect broadband use and choice; who is not using broadband; and how consumers and businesses are using broadband. The Notice also asks a series of questions on consumer expectations regarding broadband privacy and whether the Commission should consider as part of its plan whether to exercise ancillary jurisdiction to address broadband privacy issues.

STATUS OF DEPLOYMENT

The Recovery Act requires the Commission to evaluate “the status of deployment service, including progress of projects supported by the grants made pursuant to this section.” This section raises a series of questions relating to tracking and mapping subscribership data and how the Recovery Act grant and loan programs fit into the national plan to be developed by the Commission. For example, the Notice seeks comment on how the current FCC forms for collection of data regarding broadband subscribership can be used in tracking and which additional measures will help the Commission assess deployment status, including a means for obtaining data for stimulus grant and loan programs.

SPECIFIC POLICY GOALS OF THE NATIONAL BROADBAND PLAN

The Recovery Act requires that, in developing the broadband plan “for use of broadband infrastructure and services,” the FCC advance a series of public policy goals, including (1) advancing consumer welfare; (2) civic participation; (3) public safety and homeland security; (4) community development; (5) health care delivery; (6) energy independence and efficiency; (7) education; (8) worker training; (9) private sector investment; (10) entrepreneurial activity; (11) job creation and economic growth; and (12) other national purposes. In seeking comment on these public policy goals, the Commission raises numerous questions in each of these areas on how to interpret and implement that directive. For example, the FCC seeks comment on, among other things:

- how consumer welfare is advanced by open access and how to incorporate consumer rights addressed in its *2005 Internet Policy Statement* and *Consumer Protection in the Broadband Era NPRM* into the national broadband plan;
- the role that privacy protections can play in enhancing consumer welfare;
- how advances in technology are helping to advance consumer welfare;
- how the national broadband plan should address the advancement of cybersecurity and how developments in broadband technologies impact public safety and homeland security goals; and
- what role wireless broadband services should play in helping public safety entities fulfill their missions.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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