

ALERTS AND UPDATES

Sizing Up the FCC's Controversial National Broadband Plan

March 18, 2010

On March 16, 2010, one month after originally scheduled and following a year of study based on more than 30 requests for public comment—generating some 23,000 comments totaling about 74,000 pages from more than 700 parties—the U.S. Federal Communications Commission (FCC) released a 360-page [report to Congress on broadband Internet access services](#). The National Broadband Plan (NBP) encompasses more than 200 recommendations for how Congress, other government agencies and the FCC can improve broadband availability, adoption and utilization, especially for meeting such "national purposes" as economic opportunity, education, energy and the environment, healthcare, government performance, civic engagement and public safety.

Titled *Connecting America* and praised on its publication by President Obama,¹ the NBP presents a wide range of legal, policy, financial and technical proposals, all devoted to meeting the legislative order—first articulated in the American Recovery and Reinvestment Act of 2009 (ARRA)—of recommending ways to make broadband ubiquitous for Americans. Much of the general outlines and major recommendations of the plan were revealed in a series of public appearances and media briefings by FCC Chairman Julius Genachowski over the past several weeks. Only the NBP's [executive summary](#) was made available before the full plan's official March 16 publication. The public release of the entire document reveals the whole plan, including details on the recommendations as well as the reasoning behind them and the FCC's goals.

The ambitious NBP sets as a national goal the delivery to all Americans of 100 megabits per second (Mbps) Internet service within 10 years, informally known as the "10 squared" objective. Its premise is that "[l]ike electricity a century ago, broadband is a foundation for economic growth, job creation, global competitiveness and a better way of life."² The policies and actions recommended in the plan fall into three major categories: fostering innovation and competition in networks, devices and applications; redirecting assets that government controls or influences in order to spur investment and "inclusion"; and optimizing the use of broadband to help achieve national priorities.

The FCC's plan addresses interrelated issues, such as: intercarrier compensation, universal service reform, spectrum reallocation (making 500 megahertz of spectrum newly available for broadband within 10 years), digital literacy, E-Rate (Schools and Libraries Program of the Universal Service Fund) services, set-top-box unbundling, affordability, "smart grid"

electrical services, telemedicine, state and municipal broadband networks, distance education, wireless data services, homeland security and first-responder communications, wireless connectivity to digital-learning devices, Internet anonymity and privacy, data-center energy efficiency, video "gateway" network interface devices, and use of unlicensed spectrum (such as WiFi). The plan includes a proposal for the federal government to repurpose \$15.5 billion in existing telecom-industry subsidies away from traditional landline telephone services to broadband, concluding that—

If Congress wishes to accelerate the deployment of broadband to unserved areas and otherwise smooth the transition of the [Universal Service] Fund, it could make available public funds of a few billion dollars per year over two to three years.³

Release of the NBP marks the start of what is likely to be a long and debated implementation process, as the plan pits the interests of different industry segments against one other and tests the limits of the FCC's regulatory authority.⁴ While lauding the plan's aspirations, some critics in the first days after its release include broadcast television stations that are being asked to "voluntarily" relinquish valuable digital spectrum, satellite and cable companies that object to further regulation of their so-called navigation devices and rural telephone providers that are concerned with the potential loss of substantial Universal Service Fund (USF) revenues. Information technology (IT) and content delivery networks (CDNs) also have expressed concern that the FCC's related net neutrality initiative would circumscribe their ability to offer quality of service (QoS) and packet-prioritized media services. Free-market advocates as well as Republican FCC Commissioner Robert McDowell have already declared that the plan is unnecessary or at least unnecessarily regulatory.⁵

Connecting America details a series of economic and public policy goals for the United States, which according to some studies has fallen in penetration and "adoption" of broadband Internet services from first in the world in the late 1990s to somewhere between 15th place to 20th place as of 2008.⁶ These goals are highlighted below.

1. At least 100 million U.S. homes should have affordable access to actual download speeds of at least 100 Mbps and actual upload speeds of at least 50 Mbps.
2. The United States should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation.
3. All Americans should have affordable access to robust broadband service, and the means and skills to subscribe if they so choose.
4. Every American community should have affordable access to at least 1 gigabit per second broadband service to anchor institutions, such as schools, hospitals and government buildings.

5. To ensure the safety of the American people, every first-responder should have access to a nationwide, wireless, interoperable broadband public-safety network.
6. To ensure that America leads in the clean-energy economy, all Americans should be able to use broadband to track and manage their real-time energy consumption.

All of these goals are supported by proposals for the federal government to become more deeply involved in collecting and assessing statistical metrics on the availability, speed and use of broadband services and that the FCC impose "performance disclosure requirements" and "performance standards" on broadband service providers, including wireless and cellular carriers.⁷ As the trade publication *Telecommunications Reports* notes:

This recommendation illustrates how the plan could bump up against independent congressional initiatives. Sen. Amy Klobuchar (D.-Minn.) introduced a broadband performance management bill along similar lines that directed an FCC rulemaking action, rather than NIST standards, and which mandated industry use of the terms as the FCC defines them.⁸

In some of its more controversial recommendations, the NBP proposes that broadband success be measured not only by the statutory objective of "access to broadband capability,"⁹ but also by adoption percentages and affordability, using a national commitment to "inclusiveness" as the principal justification. "While it is important to respect the choices of those who prefer not to be connected, the different levels of adoption across demographic groups suggest that other factors influence the decision not to adopt. Hardware and service are too expensive for some. Others lack the skills to use broadband."¹⁰ The FCC also proposes creation of a Digital Literacy Corps, modeled after President John F. Kennedy's Peace Corps initiative, to educate minority and disadvantaged citizens on the use and importance of computers and Internet services. Having successfully subsidized the connection of more than 95 percent of America's classrooms to the Internet, the FCC's plan further recommends that the E-Rate program be expanded to cover off-campus network use, e-readers and a variety of even newer functions. Among the recommendations for congressional action, the highest price tag—up to \$16 billion—would be for grants to cover capital and operational costs of an interoperable public-safety mobile broadband network. As was revealed previously, the NBP also proposes auctioning the 700-megahertz "D block" rather than allocating it to public safety and first-responder services.

There are likely to be numerous FCC notice-and-comment rulemakings, legislative hearings and policy workshops initiated over the next 12 to 18 months to implement the NBP. As *Connecting America* emphasizes in its executive summary:

Public comment on the plan does not end here. The record will guide the path forward through the rulemaking process at the FCC, in Congress and across the Executive Branch, as all consider how best to implement the plan's recommendations. The public will continue to have opportunities to provide further input all along this path.

The FCC has stated it will publish a timetable of actions in the near future and is anticipated to begin what may be considered more challenging NPRM proceedings, such as USF reform, within 60 to 90 days. Whether in the IT, telecom, energy or healthcare industries, companies involved in a wide range of different markets are likely to be affected by the National Broadband Plan for years to come and should consider participating in the rulemaking and parallel legislative processes.

For Further Information

If you would like more details on the National Broadband Plan or its implementing proceedings, please contact [William K. Keane](#) or [Glenn B. Manishin](#), any of the [attorneys](#) in the [Information Technologies and Telecom Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. "President Obama Hails Broadband Plan," *Washington Post*, March 16, 2010, available at http://voices.washingtonpost.com/posttech/2010/03/president_obama_hails_broadban.html.
2. *Connecting America* at xiv, 9.
3. *Connecting America* at xiii.
4. See, e.g., "FCC Chairman Genachowski Confident in Authority over Broadband, Despite Critics," *Washington Post*, March 3, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/02/AR2010030203715.html>.
5. "FCC's National Broadband Plan Raises Divisive Issues," *USA Today*, March 17, 2010, available at http://www.usatoday.com/money/industries/technology/2010-03-17-fcc17_ST_N.htm. Compare B. Reed, "Who Else Wants National Broadband?" *Business Week*, March 16, 2010, available at <http://www.businessweek.com/idg/2010-03-16/who-else-wants-national-broadband-.html>, with J. Chambers, "Why America Needs a National Broadband Plan," *Business Week* March 16, 2010, available at http://www.businessweek.com/technology/content/mar2010/tc20100316_597997.htm.

6. *Connecting America* at xiv.
7. *Connecting America* at 35–36. "The FCC and the U.S. Bureau of Labor Statistics (BLS) should collect more detailed and accurate data on actual availability, penetration, prices, churn and bundles offered by broadband service providers to consumers and businesses, and should publish analyses of these data." *Id.* at 35.
8. *T.R. Daily*, March 15, 2010, at 2.
9. ARRA § 6001(k)(2)(D), 123 Stat. 115, 516 (2009).
10. *Connecting America* at 23.