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## **FCC Struggles To Define “Broadband”**

*Paul J. Feldman*  
*feldman@fhhlaw.com*  
*703-812-0403*

The American Recovery and Reinvestment Act of 2009 (the “ARRA” or “Stimulus Bill”) requires that by February 17, 2010, the FCC must deliver to Congress a National Broadband Plan (NBP) that seeks to ensure that every American has access to broadband capability, and establishes clear benchmarks for meeting that goal. The FCC has worked diligently towards this goal, releasing a Notice of Inquiry (NOI) for comments, and holding numerous workshops with various stakeholders in order to discuss issues and seek data in different ways. Indeed, it appears so far that working on the NBP is the new FCC’s highest priority.

One of the most difficult issues, however, is one of the most basic: what is the definition of “broadband”? The matter is not trivial or academic, as any plan with benchmarks for “broadband” development must first define that term in order for the plan to be meaningful. It is widely believed that the impact of defining the term “broadband” will be huge, primarily because that definition may be used in funding the construction and development of new services, and evaluating the status of the service providers. Yet, the process of defining that term is strewn with difficult technological, economic and political questions: Should the term describe the current state of technology, or should it set a target for the future, since the definition should not be one that is quickly outdated? Should the term be defined so that achieving the goal of universal broadband is easily and quickly achieved at a lower level of technology (and lower cost), or is that counter-productive? Should the definition recognize the current lower data through-put capabilities of wireless carriers, or would that be unfair to wireline carriers and subscribers? Should the definition be set to encourage the same level of high-speed service in rural areas as in urban, or would that be unrealistic and wasteful? Should the term be defined solely by data through-put speed (*e.g.*, 1 Mb of data per second), or should other criteria such as latency, jitter and mobility be part of the definition?

In response to the NOI, the FCC received a lot of responses, but most of the comments were at a very high level policy level, with little hard data or technical rationale for the positions taken. As a result, FCC Broadband “Czar” Blair Levin complained publically that the commenters were not taking the question “seriously”, and the FCC issued a

subsequent Public Notice asking for more detailed responses on the matter of defining “broadband”.

The comments filed in response to the FCC’s Public Notice were a bit more detailed, and while there were some interesting arguments made, they likely will not provide the strong and clear record that the FCC is seeking. The answers varied widely, with advocated minimum data through-put levels of 768 kbps to 100 Mbps. Some commenters suggested use of only a single definition, while others suggested use of multiple definitions for wireline vs. wireless provision, or for tracking of current status of provision vs. future aspirational goals. Some commenters thought that the definition should include criteria of latency and jitter, while others argued that use of such criteria was improper since they are often caused by factors outside of the control of the broadband provider.

Most incumbent providers supported the status quo or a very low “bar” in terms of the level of service necessary to meet the definition of broadband. Perhaps the strategic or tactical goal of these commenters is to ensure that their current service is not classified out of the category of broadband, for the purposes of marketing or receiving funding. On the other hand, some think tanks, academics, and other industry elements focused more on setting rigorous targets. One interesting argument made in support of such an approach is that the only current federal definition of broadband is in or is based on Section 706 of the Communications Act, and that statutory definition’s emphasis on high-speed, two-way video capabilities provides a basis for a pretty advanced definition of broadband.

At this point, it is hard to predict how the FCC will come out in defining the term broadband. We can predict that their answer will reveal how forward-looking and ambitious the new FCC wants to be in its first major task. We can also predict, of course, that many stakeholders will be dissatisfied with the definition. The breadth and level of that dissatisfaction may determine, at least in part, the utility of the entire NBP. Stay tuned.