

## Broadband: Back to the Future?

By: Craig D. Dingwall

Last week we wrote the first of a series of articles about broadband deployment, and offered suggestions to help foster and develop rural broadband through stimulus and Universal Service funds, municipal broadband projects and competitive bidding. In this article, we review the current status of broadband deployment in light of the recent *Comcast Decision* and the FCC's proposed National Broadband Plan.

In the Telecommunications Act of 1996, Congress codified the FCC's distinction between "telecommunications services" used to transmit information and "information services" that run over the network. The FCC later eliminated the regulatory asymmetry between cable companies and other broadband Internet service providers by extending the information service classification to broadband Internet services offered over DSL and other wireline facilities, power lines, and wireless. Today broadband Internet service may be offered as an information service subject to consumer protection, network reliability, and national security laws, rules and regulations, but largely exempt from Title II telecommunications service regulation.

Expressing its resolve to further broadband deployment, Congress recently passed 1) the 2008 Farm Bill directing the FCC to submit to Congress "a comprehensive rural broadband strategy, 2) the Broadband Data Improvement Act to improve data collection and "promote the deployment of affordable broadband services to all parts of the Nation", and 3) the Recovery Act, which appropriated up to \$7.2 billion for broadband services deployment, and required the FCC to develop the National Broadband Plan.

Earlier this year the U.S. Court of Appeals for the District of Columbia vacated the FCC's 2008 *Order* barring Comcast from interfering with its customers' use of peer-to-peer networking applications. *Comcast Corporation v. Federal Communications Commission, et. al.*, No. 08-1291 (D.C. Cir. April 6, 2010). The Court vacated the FCC's Order because the FCC failed to tie its assertion of ancillary authority over Comcast's Internet service to any "statutorily mandated responsibility . . ." *Id.* at 36. With this blow to the FCC's authority to force Internet service providers to keep their networks open to all forms of content, the *Comcast Decision* raises serious questions about the FCC's ability to regulate broadband.

Faced with the reality that approximately 100 million Americans do not have broadband at home, the FCC's July 20<sup>th</sup> announcement that between 14 and 24 million Americans still lack access to broadband overall, and Congress's mandate that the FCC ensure that every American has "access to broadband capability," the FCC rolled out its proposed National Broadband Plan earlier this year. The Plan has six goals "for 2020 to serve as a compass over the next decade", including broadband access for at least 100 million homes at 100Mbps, and affordable access to at least 1 gigabit per second broadband service for every American community. Some critics argue that the FCC's goals are too modest, that they do not adequately promote rural broadband and that they will continue to place the United States behind other nations such as Finland and South Korea.

Seeking more input on the Plan, on June 17<sup>th</sup>, the FCC issued a Notice seeking comments on ways to regulate broadband, including 1) rely on its ancillary jurisdiction, but with a clear explanation of statutory authority, 2) reclassify broadband as a telecommunications service, and 3) reclassify broadband as a telecommunications service, subject to forbearance from certain statutory requirements. More specifically, Chairman Genachowski's so called "Third Way" would treat wired broadband Internet connectivity as a telecommunications service.

Although the FCC Notice states that the FCC is not seeking to regulate anything other than retail broadband Internet access, the stakes are high. Will broadband soon be subject to unbundling, resale, universal service and other obligations? Where does Internet connectivity begin and end, and how will regulators deal with the endless possibilities for arbitrage and inaccurate reporting? Will the Internet be subject to Title II telecommunications service regulations designed for legacy telephone systems, possibly transporting high tech broadband service back in regulatory time? Will sweeping broadband regulations stifle investment and deployment, increase costs, and make broadband even more inaccessible, or are they necessary to foster a competitive market? These are just some of the many questions that must be addressed as regulators grapple with the best way to promote broadband deployment.

A wide spectrum of comments were filed with the FCC on the July 15, 2010 deadline for initial comments, predictably ranging from requests from some carriers and service providers not to assert authority over Internet services, to subscriber pleas for the FCC to reclassify broadband as a telecommunications service. Still others expressed concerns over privacy, discrimination against ISPs, and lack of rural broadband deployment progress.

As Marty McFly said in *Back to the Future*, "If you put your mind to it, you can accomplish anything." Now is the time to put our minds to it and get broadband deployment right. Continuing Congress's resolve for rapid broadband access, now may be the time for new legislation that clears the path for broadband deployment.

Replies are due Aug. 12, 2010. Let us know what you think.

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