

January 30, 2015

At its open meeting on Thursday, the FCC adopted a revised definition of broadband service and used that revised definition to bolster a determination that broadband service in the US is not "being deployed to all Americans in a reasonable and timely fashion." These actions extended the ongoing battle between the Democratic and Republican commissioners as to the proper scope of the FCC's broadband agenda.

The central element of the decision was the redefinition of broadband service. In 2010, the FCC defined broadband as service with speeds of at least 4 Mbps downstream and 1 Mbps upstream. In this decision, the FCC raised the required speed significantly, to 25 Mbps downstream/3 Mbps upstream. The change was based on several factors, including what services are being offered now; how broadband service is being marketed; what consumers purchase when higher-speed services are available; and the bandwidth requirements of typical households (with a particular focus on the likelihood that more than one person in a household will use broadband service at the same time).

The change in the definition of broadband service was used to support the conclusion that advanced services are not being deployed in a reasonable and timely fashion. The FCC found that 17% of Americans having no access to 25 Mbps/3 Mbps service, including 53% of rural Americans and 63% of the people living in tribal lands and territories. The FCC also found that this gap was not being filled very quickly. At the same time, the FCC concluded that satellite and mobile broadband services were not fast enough to meet the need for advanced services in these underserved areas.

As a result of the finding that broadband was not being deployed in a reasonable and timely fashion, the FCC is required to take "immediate action" to advance deployment under Section 706 of the Telecommunications Act of 1996. To address the question of what action to take, the FCC adopted a notice of inquiry. Rather than proposing specific actions, the notice likely will ask commenters to suggest what the FCC could do to address the deployment gap.

The two Republican commissioners dissented from the report. Commissioner O'Rielly argued that the 25 Mbps/3 Mbps standard was "artificially high" and that the FCC was "applying it in a way that is impossible to meet." Commissioner Pai suggested that the growth in 4G LTE, which now reaches 98.5% of Americans, and Google Fiber's planned expansion to 18 new cities provided evidence that deployment is moving ahead without any FCC action. Both Republicans also noted what they saw as a conflict between the new 25 Mbps/3 Mbps standard and the requirement in the FCC's recently-adopted revisions to the universal service fund rules that carriers receiving funding provide 10 Mbps/1 Mbps service. (In response to this claim, Chairman Wheeler said that the 10 Mbps/1 Mbps requirement was merely a floor for receiving funding, not a definition of broadband.)

Regardless of the merits of the Republicans' complaints about the revision to the definition of broadband service, they likely are correct that the Democrats on the FCC will use this report to further their agenda. The first likely target will be state laws that prohibit municipalities from deploying broadband services. The FCC has a pending proceeding on this issue, and it likely will rely on its powers under Section 706 to support overriding those state laws. It also is possible that the FCC will use this report to bolster its network neutrality decision, but it is unlikely to be the primary basis for that decision, which is expected to turn, instead, on reclassifying broadband service as a common carrier service subject to Title II of the Communications Act.

More broadly, the decision also is indicative of the FCC's ongoing goal of pressing for faster broadband speeds across the board, including its recent efforts to bring 100 Mbps speeds to schools and libraries. It is reasonable to expect more activity to this end, including changes to the federal Lifeline program, which supports service to low income households, and in the broader universal service rules.

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