Federal-State Joint Conference on Advanced Telecommunications Services

Panel on the FCC's Open Internet Proposals, Section 706, the Communications Act and the Role of the States

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The Main Points

- Sec 706 of the Telecommunications Act of 1996 specifies that the FCC and state public utility commissions have a joint mission to promote affordable and widely available broadband access.
- State Public Utility Commissions ("PUCs") can help the FCC in both assessing the viability of broadband access as well as devising strategies for abating inadequacies, particularly for underserved constituencies.
- While the D.C. Circuit Court of Appeals invalidated the FCC's open Internet rules as unlawfully imposing common carrier duties, the court affirmed the Commission's authority to implement Sec. 706.
- Unlike Plain Old Telephone Service ("POTS"), broadband has substantially diverse characteristics, cost elements, features, services and consumer requirements.

The Main Points (cont.)

- There is no single, "plain vanilla" service, nor is there a single measure of "teledensity."
- While universal service strategy for POTS appropriately concentrated on supply-side stimulation and cost subsidies, optimal broadband strategies require substantial consideration of demand-side factors such as ways to promote digital literacy.
- Population density is only one of several factors affecting the cost of broadband service.

The 706 Mandate

Sec. 706(a) codified at 47 U.S.C. 1302(a), specifies a joint federal/state mission to:

"encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

The Act defines advanced telecommunications capability as:

"high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."

Sec. 706(b) requires the FCC to make an annual determination "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." If not, the Commission "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

The 706 Mandate (cont.)

The FCC has ample flexibility in both the assessment process and in devising strategies for remedying impediments. It has no obligation to emphasize bit transmission speeds, or any single evaluative criterion.

Because measuring bit rate speeds provides a quantitative statistic, which the FCC can calculate with relative ease, the Commission has emphasized this criterion.

The FCC should use a more granular assessment with emphasis on affordability, ease of access and adoption rates.

The FCC has vastly improved its statistical compilation of available bit transmission speeds, but still largely ignores qualitative factors. For example the Commission gladly notes the availability of terrestrial and satellite wireless options without considering the impact of data caps, initial equipment costs, signal latency, cost per megabyte, etc.

Politics influence whether, how and when the FCC creates a threshold for defining success in achieving Sec. 706 goals. Does the FCC declare victory when more than 100 million households have access to actual (not advertised) speeds of 100 megabits per second ("mbps") and all households have least 4 mbps downstream and 1 mbps upstream?

Arguably the FCC does not engage in "mission creep" if it raises the bar, but doing so may create regulatory uncertainty and disincentives for private carrier investment in next generation networks.

Recommended Criteria for Evaluating Progress

The FCC and state PUCs can assess progress in the POTS universal service mission by measuring teledensity, e.g., number of lines per 100 residents. With only 1 service at issue, regulators primarily use subsidies to defray carriers' higher costs in serving the hinterland and reduce telephone service rates for qualifying subscribers.

An accurate assessment of broadband progress requires measuring many factors that affect the availability and cost of specific broadband services.

	Pro	Elite	Max	Max Plus	Max Turbo
Standard Monthly Rate	$38*	$43*	$48*	$53*	$63*
Downstream Speed	Up to 3 Mbps	Up to 6 Mbps	Up to 12 Mbps	Up to 18 Mbps	Up to 24 Mbps
Emailing	✓	✓	✓	✓	✓
Downloading Music	✓	✓	✓	✓	✓
Social Networking	✓	✓	✓	✓	✓
Sharing Photos	✓	✓	✓	✓	✓
Internet gaming		✓	✓	✓	✓
Online Conferencing		✓	✓	✓	✓
Watching TV / Video Clips			✓	✓	✓
Emailing / Uploading Files			✓	✓	✓
Downloading Movies				✓	✓
Streaming Video				✓	✓
Video Conferencing					✓

Source:Alex McKenzie, What Internet Speed Do You Really Need (Feb. 29, 2012); available at: http://unbreak-it.com/2012/02/what-speed-do-you-need/.

Supply-Side Broadband Strategies

- Government issues a vision statement (like the National Broadband Plan) preceded or followed by outreach via workshops, consultations and hearings.

- Direct subsidization (from the general treasury, or surcharges on telecom services); Examples include: universal service funding programs; funding for research and development; grants for test and demonstration projects; total or partial financing of local and regional projects; loan guarantees; tax credits; free or below cost access to public rights of way and land; and free or below market rate access to spectrum.

- Best practices include: technology neutrality in grants; funding community-supported projects rather than specifying a fixed list of existing carrier services; capping government project funding to a percentage of total cost; emphasizing one-time project funding rather than recurring discounts; promoting innovation and creativity in projects by supporting use of technologies with greater efficiency and lower recurring costs; encouraging competition among providers by auctioning off subsidy access; and benchmarking, mapping and tracking market penetration.

Demand-Side Broadband Strategies

- Public and private sector digital literacy campaigns, e.g., loaning or subsidizing the cost of a computer and supporting computer training.
- Governments promote creation and consumption of digital content.
- Regulators establish quasi-common carrier interconnection obligations.
- Regulators impose network neutrality obligations on ISPs.
- Government agencies promote broadband use as an early adopter and provider of electronic services.
- State and federal tax and other financial incentives for demand aggregation by private users.

Sec. 706 and Open Internet Requirements

Despite two appellate court reversals, the FCC has started another ambitious campaign to establish open Internet rules now largely based on Sec. 706.

The FCC now believes Sec. 706 provides direct statutory authority to require ISP transparency and disclosure of specialized networking services. The Commission also wants to re-impose a prohibition on discrimination and blocking of lawful content.

The FCC broadly justifies the need for regulatory intervention based on the incentive and ability of ISPs to limit Internet openness in ways that hamper the ability of the Internet ecosystem to spur innovation, competition, free expression and infrastructure investment.

The Commission reminds readers that the "D.C. Circuit found that the Commission 'adequately supported and explained' that absent open Internet rules, 'broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.'"

Conclusions and Recommendations

- Federal-State "Joint Boards" have performed a major service to the nation by forging workable compromises on many challenging telecommunications issues.
- The Federal-State Joint Conference on Advanced Telecommunications Services has clear statutory authority to assist the FCC in assessing whether accessible and affordable broadband access exists.
- It can highlight whether particular constituencies, such as the elderly, poor, tribal and military base residents and people lacking secondary and above education credentials remain underserved.
- The Conference can identify supply-side and demand side constraints that continue to exist, despite evidence of great progress in overall market penetration.
- It can provide much needed emphasis on demand-side stimulation achieved through computer and digital literacy campaigns that can persuade hard to reach and convince constituencies about the compelling value in Internet access.