

ALERT

FCC Examines Increase in Minimum Broadband Speed Benchmark, Sets Future Gigabit-Speed Goal

November 7, 2023

On November 1, 2023, the Federal Communications Commission (FCC or Commission) released the Seventeenth Notice of Inquiry (NOI) into the state of broadband availability to all Americans, as required by Section 706 of the Telecommunications Act of 1996 (Section 706).

In light of the increasing uses and demands for high-speed broadband highlighted during the COVID-19 pandemic, as well as Congressional directives in the Infrastructure Investment and Jobs Act (IIJA), the NOI seeks to assess the Commission's standards for evaluating broadband deployment and availability. Most notably, the NOI proposes to raise the Commission's national fixed broadband speed benchmark from 25/3 Mbps to 100/20 Mbps, and to set a long-term goal for fixed broadband service, with a benchmark of 1 Gbps/500 Mbps.

Comments and Reply Comments in response to the NOI are due by December 1 and December 18, 2023, respectively. A brief overview of the NOI is provided below.

Background

Section 706 requires the Commission to annually conduct an inquiry "concerning the availability of advanced telecommunications capability to all Americans" as part of an effort to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." "Advanced telecommunications capability" is defined as "high-speed, switched, broadband telecommunications capability that enables users to

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originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” This NOI is the first such inquiry that the Commission has undertaken since Congress provided additional guidance on Section 706 in the IJJA.

In the IJJA, Congress described Section 706 as setting out “the statutorily mandated goals of universal service for advanced telecommunications capability[,]” which the Commission interprets as a directive to determine whether advanced telecommunications capability is available universally throughout the country. The IJJA also refers to Section 706 as embodying “the statutorily mandated goals of universal service for advanced telecommunications capability[,]” which the Commission reads as a directive to examine multiple universal service goals in addition to the physical deployment of service.

Pursuant to the IJJA, in August 2022 the Commission released a Report on the Future of the Universal Service Fund (USF Report), determining the broadband universal service goals of Section 706 to be “universal deployment, affordability, adoption, availability, and equitable access to broadband throughout the United States.” The Commission proposes to use these same goals to conduct this Section 706 inquiry.

The NOI

The issues on which the NOI seeks comment fall into two overarching categories: (1) the standards the Commission uses to determine what constitutes “advanced telecommunications capability” and, (2) the goals the Commission settled upon in the USF Report.

(1) Defining Advanced Telecommunications Capability—in the Short and Long Term

The Commission proposes to raise the download/upload speed benchmark necessary for fixed broadband service to constitute “advanced telecommunications capability” from 25/3 Mbps to 100/20 Mbps.

The FCC based its decision in large part on the fact that the IJJA provides that broadband networks funded by the \$42.45 billion Broadband Equity, Access, and Deployment Program (BEAD Program) must provide a 100/20 Mbps service at a minimum, and that any areas that do not meet these requirements are considered underserved. The Commission further found that increased bandwidth consumption and demand for faster broadband service stemming from the COVID-19 pandemic, coupled with recent market behavior of consumers and ISPs and the fact that many broadband funding programs already call for speeds well in excess of 25/3 Mbps, make it clear that a speed benchmark of at least 100/20 Mbps is needed to allow fixed broadband service to satisfy the definition of “advanced telecommunications capability” in Section 706. The NOI seeks comment on these conclusions and raises several related questions, like whether higher benchmark speeds, or even a symmetrical, 100/100 Mbps standard, would be more appropriate.

The NOI also seeks comment on whether the Commission should adopt a long-term speed goal for fixed broadband service of 1 Gbps/500 Mbps. The FCC notes that some states may still be using 25/3 Mbps as their standard for some broadband funding programs, and that a lack of a long-term goal may be sending the wrong signal to other policymakers.

The NOI further asks:

- Whether the Commission should consider fixed service quality factors like latency in making its determination for this inquiry. For instance, the NOI asks (among other questions) whether the FCC should adopt the BEAD Program's requirement for networks to provide latency that is sufficiently low to allow reasonably foreseeable, real-time, interactive applications.
- Whether the Commission should, for the first time, adopt a speed benchmark to assess whether mobile services provide advanced telecommunications capability, and if so, what that benchmark should be. The NOI also seeks comment on whether the Commission should consider mobile service quality characteristics like latency, jitter, and packet loss.

Looking ahead to the next report, the Commission proposes to include an assessment of the number of fixed and mobile broadband provider options that consumers have access to, and seeks comment on whether the agency should continue to treat fixed and mobile services as full substitutes for one another.

(2) Evaluating Section 706's Universal Service Goals for Broadband

The NOI also seeks comment on how each of its proposed universal service goals for broadband—deployment, affordability, adoption, availability, and equitable access—can be defined, evaluated, and assessed.

The Commission proposes to evaluate whether broadband has been universally deployed by evaluating the physical deployment of broadband networks that are capable of providing service at the speed benchmark(s) the Commission will ultimately adopt, and proposes to use availability data collected by the Commission's recent Broadband Data Collection to make this evaluation. The NOI also seeks comment on how to measure affordability as part of this inquiry and proposes to examine adoption by examining the rate at which people who have a service available to them actually subscribe to it.

In terms of availability, the NOI requests comment on factors that lead to a service being physically deployed but unavailable in certain locations. As for equitable access, the Commission notes that available data suggests that minority groups often do not have the same access to broadband and that subscription figures from the Commission's Affordable Connectivity Program indicate that 54.2% of program subscribers chose to use their monthly benefit for mobile broadband rather than fixed broadband. The NOI asks whether the FCC can identify a lack of equitable access from these figures.

Looking Ahead

The NOI comes in the midst of a pivotal moment for U.S. broadband policy. For example, last month the FCC adopted a Notice of Proposed Rulemaking, proposing to re-classify broadband internet access service as a telecommunications service and restore net neutrality requirements. Meanwhile, the National Telecommunications and Information Administration announced its funding allocations for the BEAD Program in June of this year, and states are currently working through how they will administer the historic level of

funding that has been allocated.

Wiley's deep and experienced bench of attorneys assists clients on a wide range of broadband-related matters. If you have any questions about the NOI or are interested in submitting comments, please contact one of the attorneys listed on this alert or your usual Wiley contact.