

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Comment Procedures Established) GN Docket No. 09-40
Regarding the Commission's Consultative)
Role in the Broadband Provisions of the)
Recovery Act)

COMMENTS OF QWEST CORPORATION

Qwest Corporation ("Qwest") submits these comments in response to the March 24, 2009, Public Notice ("Notice")¹ of the Federal Communications Commission ("Commission") offering parties the opportunity to comment on the Commission's consultative role in the broadband provisions of the *American Recovery and Reinvestment Act of 2009*.² As stated by the Commission in the Notice, it has "an important role to play in providing expert, technical advice to NTIA as it establishes the BTOP [Broadband Technology Opportunities Program], [footnote omitted] and the Commission may also provide expert, technical advice to RUS [Rural Utilities Service] as it proceeds with its own programs."³ Because NTIA was directed by Congress to consult with the Commission on five terms and concepts – 1) the definition of "unserved area;" 2) the definition of "underserved area;" 3) the definition of "broadband;" 4) the non-discrimination obligations that will be contractual conditions of BTOP grants; and 5) the network interconnection obligations that will be contractual conditions of

¹ Public Notice, DA 09-668 (rel. Mar. 24, 2009).

² *American Recovery and Reinvestment Act of 2009*, Pub. Law No. 111-5, 123 Stat. 115 (Feb. 17, 2009) ("*Recovery Act*").

³ Notice at p.1.

BTOP grants – the Commission has provided parties an opportunity to comment on the five specific items.⁴ The comments on the five definitional issues that Qwest provides below were also provided by Qwest in comments filed with NTIA and RUS in response to their Joint Request for Information.⁵ These comments are offered in the context of NTIA’s and RUS’s responsibility pursuant to the *Recovery Act* to promptly implement broadband programs that will help stimulate the economy.

I. UNSERVED, UNDERSERVED AND BROADBAND

Qwest proposes that an area be defined as “unserved” if the area does not have access to Basic Broadband Tier 1 service as defined by the Commission for the purpose of Form 477 reporting.⁶ The term “underserved” is not so easily defined. A one size fits all definition for underserved is too rigid. An underserved area has to be defined in the context of what is needed by a particular area or community to make the Internet a useful tool for general communications, engaging in the economy and interacting with, among others, political, governmental, educational, health and social services entities and institutions. In relation to the BTOP and the

⁴ *Id.* at pp.1-2.

⁵ Joint Request for Information and Notice of Public Meetings (“Joint Request”), U.S. Department of Commerce – National Telecommunications and Information Administration and the U.S. Department of Agriculture – Rural Utilities Service, Federal Register Vol. 74, No. 47, March 12, 2009, at p.10716, Docket No. 090309298-9299-01. *See* Comments of Qwest Corporation filed therein on April 13, 2009, at Section II.A.12.

⁶ Broadband service falls into the Basic Broadband Tier 1 category if it offers speeds equal to or greater than 768 Kbps but less than 1.5 Mbps in the faster direction. *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol Subscriberhip*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, 9700-01 (2008).

RUS broadband infrastructure program, broadband should be defined in relation to speed in the download direction, on a technology neutral basis.

II. NON-DISCRIMINATION AND INTERCONNECTION

The *Recovery Act* permits NTIA to publish, in coordination with the Commission, the four broadband and Internet principles adopted by the Commission in its 2005 broadband and Internet *Policy Statement* (“*Policy Statement*”)⁷ as the required contractual conditions for the BTOP.⁸ Broadband service providers have operated under the Commission’s broadband and Internet principles since 2005. The Commission has applied the principles where concerns have been lodged concerning service provider practices. There continue to be different perspectives on the full force and effect of the principles; nonetheless, broadband service providers have demonstrated that they can successfully operate under the principles and balance their interests with those of their customers. Any attempt to do something more or different in the *Recovery Act* context will only unnecessarily delay the speedy distribution of funding and the associated stimulus goals of the *Recovery Act*. It also has the potential to create significant uncertainty and a disincentive to make broadband infrastructure investments at precisely the wrong time. Qwest has urged NTIA to coordinate with the Commission and publish just the Commission’s four principles as the BTOP’s required nondiscrimination and network interconnection contractual conditions.

⁷ See *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket Nos. 02-33, *et al.*, *Policy Statement*, 20 FCC Rcd 14986, 14987-88 ¶ 4 (2005).

⁸ *Recovery Act*, Subsection 6001(j), 123 Stat. at 515.

NTIA sought comment in the Joint Request on a number of issues surrounding the non-discrimination and network interconnection obligations that will be contractual conditions of grants awarded under the BTOP. In addition to asking the general question concerning how these obligations should be defined, NTIA asked: what elements of network management techniques to be used by grantees, if any; should be described and permitted as a condition of any grant; whether the network interconnection obligation should be based on existing statutory schemes and if not, what the interconnection obligation should be; and whether there should be different non-discrimination and network interconnection standards for different technology platforms.

As noted above, the BTOP can satisfy the requirement under the *Recovery Act* to publish non-discrimination and interconnection obligations that will contractually bind BTOP grantees by adopting the Commission's four principles reflected in its *Policy Statement*.⁹ Section 6001(j) of the *Recovery Act* states:

⁹ Those principles are: (1) to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice; (2) to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; (3) to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers. *Policy Statement*, 20 FCC Rcd at 14987-88 ¶ 4. In the 2005 *Policy Statement*, the Commission also expressly provided that “[t]he principles we adopt are subject to reasonable network management.” *Id.* at 14988 n.15. In the Commission's 2008 Comcast Order, the Commission addressed the meaning of this reasonable network management concept as reflected in the four principles. See *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management”*, File No. EB-08-IH-1518; WC Docket No.

Concurrent with the issuance of the Request for Proposal for grant applications pursuant to this section, the Assistant Secretary shall, in coordination with the Commission [FCC], publish the non-discrimination and network interconnection obligations that shall be contractual conditions of grants awarded under this section, including, at a minimum, adherence to the principles contained in the Commission's broadband policy statement.

In addition to the plain language of the statute permitting NTIA to expedite the implementation of the BTOP by permitting the publication of the Commission's four principles to satisfy the statutory requirement for contractual non-discrimination and interconnection grant conditions, it would be unwise for NTIA to adopt non-discrimination or interconnection rules that go beyond the Commission's four principles. Doing so would create chaos by establishing two sets of interconnection and non-discrimination rules for broadband service providers -- one set of rules for those broadband facilities deployed using BTOP funds and another set of rules for those broadband facilities deployed using non-BTOP funds. Such regulatory balkanization of the Nation's broadband facilities would produce an enforcement nightmare and customer confusion. Trying to ascertain which set of non-discrimination and interconnection rules apply in any given instance would be near impossible, as well as being burdensome and costly.

There is also the overhang of potential legislation. Were NTIA to adopt additional non-discrimination and interconnection obligations, it risks adopting obligations that are at odds with any future action by Congress concerning the *Policy Statement* and the principles contained therein. It would be preferable for NTIA to adopt the Commission's four principles as the non-discrimination and interconnection obligations for the BTOP. All broadband facilities would operate under the same non-discrimination and interconnection obligations. The obligations could be crafted in such a way to allow them to change in conformance to any changes in the

07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008), *appeal pending sub nom., Comcast Corporation v. FCC*, No. 08-1291 (D.C. Cir., *pet. for rev. filed* Sept. 4, 2008).

Commission's broadband and Internet principles, whether those changes are precipitated by the Commission, Congress or the judiciary. All of the questions raised by NTIA concerning non-discrimination and interconnection are, in fact, best addressed by adoption of the Commission's four principles as the required contractual grant conditions under Section 6001(j). The Commission's four principles are widely known and understood. Adoption of the principles, only, obviates the need to revisit the BTOP's non-discrimination and interconnection obligations should the Commission's principles be modified.

Finally, adoption of the Commission's four principles best serves what should be the primary goal in implementing the BTOP -- to ensure that funds are distributed in as speedy a fashion as possible in order to stimulate the economy. There has been much debate over the years about whether non-discrimination or interconnection regulations for broadband are needed, and if so, precisely what service provider actions should be permitted or restricted. The perceived problem to be addressed through non-discrimination and interconnection rules has yet to be clearly defined. That has made the task of developing a more precise formulation than the Commission's principles problematic. Were NTIA to attempt doing something more than, or different from, the Commission's four principles at this time, it would need to proceed in a careful and deliberate manner and base its actions upon a well-developed record that supports a result different than just the Commission's four principles. The failure to do so could risk embroiling NTIA and the BTOP program in litigation. NTIA simply does not have the time to engage in the kind of deliberative process necessary to establish new broadband nondiscrimination or interconnection obligations. The delay associated with doing so would only slow realization of the stimulative effects of the BTOP. Accordingly, Qwest has urged NTIA to adopt just the Commission's four principles and avoid the delay that would be attendant

to developing additional or different broadband nondiscrimination and interconnection contract conditions. Qwest would urge the Commission to support NTIA's publication of just the Commission's four principles as the contractual non-discrimination and interconnection conditions for the BTOP.

Respectfully submitted,

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April 13, 2009

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused today the foregoing **COMMENTS OF QWEST CORPORATION** to be 1) filed with the FCC via its Electronic Comment Filing System in GN Docket No. 09-40; 2) served via e-mail on the a) Wireline Competition Bureau of the FCC at CPDcopies@fcc.gov and b) Spectrum & Competition Policy Division of the Wireless Telecommunications Bureau of the FCC at WTBPolicy@fcc.gov; and 3) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/Richard Grozier

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