

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of)
The Commission’s Consultative) **GN Docket No. 09-40**
Role in the Broadband Provisions)
of the Recovery Act)
_____)



**COMMENTS OF
THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL (ALEC)**

In performing its consultative role to the administration and implementation of the Broadband Technologies Opportunities Program, the Commission should refrain from advocating the adoption of any new laws or regulations of regulation over broadband. The Commission should instead rely upon its existing definitions and policies in defining “broadband” and to the non-discrimination and network interconnection obligations that will be contractual conditions broadband grants provided by the *American Recovery and Reinvestment Act of 2009*. Ensuring a competitive and flexibility environment for innovation best serves the *Recovery Act’s* purpose of fostering expansion of broadband and economic growth.

STATEMENT OF INTEREST

The American Legislative Exchange Council (ALEC) is the nation's largest nonpartisan, individual membership organization of state legislators. ALEC's mission is to promote Jeffersonian principles of limited government, federalism, free markets, and individual liberty. ALEC establishes public policies for modern communications and broadband through its Telecommunications and Information Technology Task Force. Official ALEC policies concerning modern technologies seek to preserve free-market principles, promote competitive federalism, uphold deregulation efforts, and keep the advanced technologies free from new burdensome regulations.

ALEC Supports Minimal Regulation to Promote Competition

Through its *Resolution Regarding the Regulation of Intrastate Telecommunications Services in Healthy and Sustainable Competitive Environments*, ALEC declares that “full and open competition, not multiple layers of regulation, should drive healthy and sustainable competitive marketplaces.” The *Resolution* voices ALEC's support of “minimal, competitively neutral state and federal regulation of all telecommunications providers, including incumbent and competitive wireline carriers, wireless carriers and cable telephony providers,” and its further support of “the current minimally regulated status of the Internet and Internet-based services.”

ALEC's Resolution Supporting Pro Consumer Public Policy for Voice, Video, and Data Services articulates that “all public policy must be driven by free market principles for the benefit of consumers in this Nation and its states,” that “a competitive marketplace, not multiple layers of regulation, will most efficiently provide consumers with voice, video and data choice in the marketplace today,” and that “Government policies should encourage the private sector to provide competitive choices.” The *Resolution* recognizes that “any government policy that unnecessarily delays and impedes providers from offering new and existing voice, video or data service choices over their own networks restricts investment, reduces consumer choice and is not in the public interest,” Accordingly, the *Resolution* reasserts ALEC’s “support of minimal, federal, state and local regulation of broadband networks.

Numerous other official ALEC policies contained in model state legislation adopted by ALEC provide for the removal of unnecessary layers of regulation and barriers to access to modern telecommunications and broadband services. These policies emphasize removal of regulatory barriers and burdens in favor of competition and consumer choice. *ALEC opposes* the reversal of these policies through re-regulation.

ALEC Supports Flexibility for Reasonable Network Management

ALEC's *Resolution on Network Neutrality* affirms that "the exponential growth of the Internet has flourished as a result of both the government's 'hands off' approach, ever increasing competition, as well as fierce consumer interest." It recognizes that "companies that invest in broadband and broadband-related applications should be afforded the flexibility to explore fair and competitive business models and pricing plans for their products and services." The *Resolution* also declares that "mandated net neutrality regulations would impede future capital investments in the U.S. broadband infrastructure."

The *Resolution* adopts the terms of Commission's principles for broadband access to the Internet over wireline facilities,¹ recognizing that consumers are entitled to access the lawful Internet content of their choice, receive meaningful information regarding their broadband service plan, run applications of their choice, and benefit from marketplace competition. ALEC believes it important that those principles should be understood in light of "limits on bandwidth and quality of service of their service plans," and the imperative that consumers must not "harm the provider's network or interfere with other consumers' use of the broadband service."

¹ *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCCR 14986 (2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.

ANALYSIS

Through the *American Recovery and Reinvestment Act of 2009*, Congress directed the Commission to undertake a consultative role with the National Telecommunications & Information Administration (NTIA) concerning the establishment of a national broadband service deployment and expansion program.² The “Broadband Technology Opportunities Program” (BTOP) created by the *Recovery Act* will be administered by NTIA and provide grants for developing and expanding broadband services. The Conference Committee Report to the *Recovery Act* instructed NTIA to coordinate its understanding of five undefined key terms and concepts of the Act concerning broadband service with the Commission.³

ALEC takes no position concerning the first two terms and concepts set out in the Commission’s *Public Notice*; namely, “unserved area” and “underserved area.”⁴ However, with respect to the remaining three terms and concepts, ALEC recommends that Commission adopt the definitions and understandings set out below in carrying out its consultative role.

² See Pub. L. No. 111-5, Stat. 115 (2009), § 6001(a).

³ See Conf. Rep. 111-16, at 776. See also *Recovery Act*, § 6001(j).

⁴ See *PUBLIC NOTICE: Comment Procedures Established Regarding the Commission’s Consultative Role in the Broadband Provisions of the Recovery Act*, Federal Communications Commission, GN Docket No. 09-40 (March 24, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-668A1.pdf.

Definition of “broadband”

The Commission’s existing definition of the term “broadband” is sufficient for the consultative role it has been assigned by the *Recovery Act*. It is therefore unnecessary for the Commission to adopt a new definition. The term “broadband” is currently defined by the Commission as:

advanced communications systems capable of providing high-speed transmission of services such as data, voice, and video over the Internet and other networks. Transmission is provided by a wide range of technologies, including digital subscriber line and fiber optic cable, coaxial cable, wireless technology, and satellite.⁵

Non-discrimination and interconnection obligations that will be contractual conditions of BTOP grants

ALEC believes that the principles contained in the Commission’s *2005 Broadband Policy Statement* should serve as the non-discrimination and interconnection obligations for BTOP grants. According to the *Policy Statement*, “[t]o 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...

consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement...

⁵ <http://www.fcc.gov/broadband>

consumers are entitled to connect their choice of legal devices that do not harm the network...

consumers are entitled to competition among network providers, application and service providers, and content providers.⁶

By its terms, the *Recovery Act* provides that the *Policy Statement*—which applies only to *wireline* broadband—shall serve as the floor for conditions attached to BTOP grants.⁷

There are important reasons why the Commission should exercise its discretion to reaffirm the principles in its *Policy Statement* and thereby adopt a minimalist approach for non-discrimination and network interconnection obligations. The deployment of broadband and flourishing of broadband service offerings to consumers has taken place under a governmental “hands off” approach. Imposing a new regulatory and never-before-seen regime over broadband through contractual conditions for receiving BTOP grants, however, threatens to interfere with an economic environment that thrives on flexibility and innovation. Experimentation with different technologies and

⁶ Note 1, *infra*, at 14988.

⁷ The *Recovery Act* provides that the Assistant Secretary of NTIA:

shall, in coordination with the Commission, 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...

Recovery Act, § 6001(j).

business models is key to encouraging private investment in broadband infrastructure and spurring competition. But regulatory uncertainty posed by new regulations will not spur increased private investment in broadband. New regulations would thwart the investment-backed expectations of broadband service providers who have made significant investments in broadband networks in reliance upon a light-touch regulatory regime.

Given the problems and difficulties posed by imposing a set of grant conditions that will infringe upon broadband service providers ability to engage in reasonable network management, conditioning BTOP grants on the Commission's *Policy Statement* best serves the primary purpose of the *Recovery Act*: spur investment and economic growth. The Commission should define BTOP obligations in keeping with the *Recovery Act*'s purpose of fostering economic expansion. Extraneous purposes and regulatory policy agendas should be kept separate from the administration of the BTOP. Those policy debates can be more fully explored in the future. But unrelated ends should not distract from the primacy of the more immediate goal of economic recovery in setting the terms of BTOP operations. Economic investment and expansion will best be achieved by establishing the Commission's *Policy Statement* as the entirety of non-discrimination obligations.

ALEC believes that network interconnection obligations should be defined as those existing, minimal, direct or indirect interconnection regulations and practices for telecommunications providers who also provide information services.⁸ Consistent with the terms of the *Recovery Act*, the network interconnection obligations should be understood in light of the Commission's *Policy Statement* discussed above.⁹ Importantly, the *Policy Statement* should be understood on its own terms and not be re-interpreted to somehow impose a broader set of regulations for broadband technologies. In order to best preserve the "hands off" approach to broadband and the Internet and to further the *Recovery Act*'s purpose of spurring investment and rapid economic growth, the Commission should *not* define network interconnection obligations to include any new regulations.

⁸ *Cf. Nat'l Cable & Telecomm. Assoc. v. Brand X Internet Serv.*, 545 U.S. 967, 975-976, 125 S.Ct. 2688 (2005):

The [Telecommunications Act of 1996] regulates telecommunications carriers, but not information-service providers, as common carriers. Telecommunications carriers, for example, must...design their systems so that other carriers can interconnect with their communications networks, [47 U.S.C. § 251(a)(1)...These provisions are mandatory, but the Commission must forbear from applying them if it determines that the public interest requires it. §§ 160(a),(b)...the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign commerce, see §§ 151-161.

(upholding *Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002)(declared an information service)); *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd 14853 (2005)(declared an information service), *aff'd* by *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *BPL-Enabled Internet Access Services Order*, 21 FCC Rcd 13281 (2006)(declared an information service); *Wireless Broadband Internet Access Services Order*, 22 FCC Rcd 5901 (2007) (declared an information service).

⁹ See Notes 1 and 6, *infra*, and accompanying text.

CONCLUSION

It is ALEC's position that the Commission should *not* advocate for any new layers of regulation in its consultative role to the NTIA. Rather, ALEC believes that the Commission's existing definitions and policies adequately speak to the definition of "broadband" and to the non-discrimination and network interconnection obligations that will be contractual conditions of BTOP grants provided under the *Recovery Act*. In ALEC's considered view, ensuring that providers broadband infrastructure and services are afforded flexibility to pursue technological and business model innovation best serves the *Recovery Act*'s purpose of fostering expansion of broadband infrastructure and services, as well as overall economic growth.

Respectfully submitted,

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