

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Comment procedures established regarding the) GN Docket No. 09-40
Commission's Consultative role in the)
Broadband provisions of the recovery Act.)

COMMENTS OF FREE PRESS

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EXECUTIVE SUMMARY

- The central purpose of the BTOP grants is to fund deployment of broadband to “unserved” and “underserved” areas. To enable the NTIA and states to better prioritize grant applications and ensure fair allocation amongst states:
 - The Commission should work with the NTIA to adopt definitions of “unserved” and “underserved” areas that are based on U.S. Census Bureau geographic boundaries and are informed by the new Commission Form 477 data. Getting this data in a usable state should be a top Commission priority.
 - The Commission should establish a three-tier definition for “unserved area” that includes “completely unserved areas,” “severely unserved areas,” and “moderately unserved areas.”
 - The Commission should define “underserved area” as one where service is widely available, but no provider offers service capable of delivering downstream data at transmission speeds exceeding 3Mbps; or those low-income areas as defined under several existing federal programs.
- The Commission need not adopt any new specific definitions of “broadband” for the purposes of assisting NTIA in the administration of the BTOP program. The Commission and NTIA should simply use the existing categories reported on Form 477 as a guide for qualifying and categorizing a particular grant application. These categories are the “first generation data” and “basic broadband tiers 1-7” established in the 2008 Form 477 Report and Order. This does not mean that the NTIA should avoid establishing specific speed benchmarks or other eligibility criteria.
- The FCC should define the nondiscrimination contractual conditions for broadband grants as follows:
 - Grant recipients must not provide or sell to Internet content, application, or service providers, any service that privileges, degrades, prioritizes, or discriminates against any lawful content transmitted over the grant recipient's Internet access service.
 - Grant recipients must offer bandwidth for Internet access upon reasonable request, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. The nondiscrimination condition should not be construed to prohibit a grant recipient from engaging in reasonable network management consistent with the principle of nondiscrimination.
- The FCC should model the BTOP contractual conditions for interconnection after the “just, reasonable and non-discriminatory” language in Sections 251, 252 and 256 of the Communications Act. This language should be buttressed with interconnection negotiating conditions that are similar to Section 252(b) of the Communications Act.

INTRODUCTION

The Stimulus Act appropriates a total of \$7.2 billion for various programs related to broadband deployment and adoption.¹ Specifically, the Act appropriates \$2.5 billion to the U.S. Department of Agriculture's Rural Utilities Services broadband loan and grant programs, and directs \$4.7 billion to the National Telecommunications and Information Administration for the establishment of the Broadband Technology Opportunities Program (BTOP). From the \$4.7 billion allocated to the NTIA, \$350 million is to be used to implement Public Law 110-385, the Broadband Data Improvement Act.² The NTIA is also directed to allocate at least \$200 million of the remaining \$4.35 billion to expand computer center capacity in various institutions of higher learning and other community centers, and make a minimum of \$250 million in grants aimed at encouraging sustainable adoption of broadband services.

The overarching goal of the American Recovery and Reinvestment Act is to stimulate the economy and create jobs primarily through the temporary Federal funding of various projects and programs, including infrastructure deployment. The President and Congress believe strongly that funding broadband deployment and adoption will create substantial short and long-term economic stimulus, by creating the new jobs needed to implement new construction and training programs, and through the multiplier and network effects that will result from the availability of the new IT-based economic infrastructure.

The core purpose of the NTIA's BTOP program is to provide grants for the deployment of broadband services and infrastructure in currently unserved and underserved areas (it should be noted that the Act explicitly avoids defining the terms "broadband", "unserved" and

¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (2009).

² Broadband Data Improvement Act, Pub. L. No. 110-385 (2008).

“underserved”). However, deployment is not the only focus of BTOP. The Act also envisions grants being made to organizations “to facilitate greater use of broadband service by low-income, unemployed, aged, and otherwise vulnerable populations.” This is a very broad category that could include programs that provide computer training at community centers in low-income neighborhoods, or projects that provide low-cost wireless Internet service in Section 8 housing developments.

The Stimulus Act also appropriates \$350 million for NTIA to implement the Broadband Data Improvement Act (BBDIA), legislation enacted by Congress in 2008. The bulk of this funding will be awarded by NTIA to states or state-designated entities (including non-profits) for the purpose of inventorying and mapping broadband deployment, and administering programs that will aggregate and stimulate demand for broadband service. Funds will also be available to the Small Business Administration to conduct a survey of business use of broadband. The Broadband Data Improvement Act grew out of frustration with the FCC’s data collection efforts, and the perceived (yet unproven) success of state-based programs like that of ConnectKentucky.³

However, the Commission has since made substantial improvements to its broadband data collection program, and further changes are expected this year.⁴ These changes call into question the need for such a large sum of funds for mapping efforts. Given that FCC Form 477

³ See Reply Comments of Free Press, et al., *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 (VoIP) Subscriberhip*, WC Docket No. 07-38, Aug. 1, 2008, pp. 16-26.

⁴ See *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 (VoIP) Subscriberhip*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, 2708; Order on Reconsideration, 23 FCC Rcd 9800 (2008).

Data will likely serve as the basis for the required NTIA National Broadband Inventory Map, we suggest that the BBDIA grants be focused on projects that work to stimulate broadband demand, with requirements for achievement benchmarks and proper program evaluation studies. The latter will help inform how to best allocate future grants to programs that produce tangible positive results. We urge the Commission to develop a plan for how current, and future changes to Form 477 data (e.g. the tentative conclusions on availability data contained in the 2008 FNPRM) will be used to construct a national Broadband Inventory Map. We also urge the Commission to establish a procedure for how states will access to the new Form 477 data so they can use this resource for their maps, instead of wasting money on unnecessary, duplicative and expensive public-private mapping efforts.

THE FEDERAL COMMUNICATIONS COMMISSION’S ROLE IN BROADBAND STIMULUS

Under the Stimulus Act, the FCC is given broad authority along with the NTIA to develop and establish the BTOP. While the NTIA is the final administrator (due in part to the fact that the FCC lacks the legal authority to make grants), the FCC should play the role of equal partner in crafting the BTOP program. The Commission, though its work on the Universal Service Fund, is the single agency that has the most experience in overseeing the subsidization of telecommunications services to both unserved areas and underserved populations. Further, the Commission has far more expertise in the technical and regulatory issues surrounding broadband than any other agency, including the NTIA and of course the USDA.

Defining Unserved and Underserved

The NTIA’s BTOP program has no specific geographic requirements, though a central purpose of the BTOP grants is to fund deployment of broadband to “unserved” and “underserved” areas. While these terms are not defined in the Stimulus Act, provisions in the

original Senate legislation did. In Section 48 of S.AMDT.98, “unserved area” was defined as census tracts “in which no current generation broadband services are provided”, with current generation services defined as 5Mbps downstream/1Mbps upstream on wireline infrastructure, and 3Mbps downstream /0.768Mbps upstream on wireless infrastructure.

This section of the Senate legislation defined “underserved area” based not on the level of broadband service in a given area, but on the income status of a given Census Tract, such as empowerment zones, enterprise communities, renewal communities, or section 45D low-income communities. Using the income of an area as the basis for an “underserved” definition is common in markets such as health care, but is perhaps less fitting for infrastructure-based services like broadband. In telecommunications policy circles, “underserved” usually refers to the quality of service deployed. For example, a single broadband provider, who only offers 512kbps service, may serve an area. This level of service is far below that of what is commonly available in most areas of the country, and thus such an area would be considered “underserved.”

Because the final Stimulus Act did not define the terms “unserved” and “underserved” the NTIA and FCC have wide latitude in interpreting the language of the Act. We suggest that for the purposes of the BTOP program, these terms be defined as followed:

“Unserved area” should be defined in three stages. “Completely unserved areas” are those Census Blocks (CBs), Census Block Groups (CBGs) or Census Tracts (CTs) where terrestrial non-dial-up Internet access service is only available to less than 10 percent of the occupied residential premises.⁵ “Severely unserved areas” are those CBs, CBGs or CTs where terrestrial non-dial-up Internet access service is available to more than 10 percent of homes, but

⁵ U.S. Census Bureau, “Census 2000 Geographic Definitions,” July 27, 2001, available at http://www.census.gov/geo/www/geo_defn.html.

less than 50 percent of homes. “Moderately unserved areas” are those CBs, CBGs or CTs where non-dial-up terrestrial Internet service is available to more than 50 percent of homes, but less than 90 percent of homes.

“Underserved” areas should be defined as those CBs, CBGs or CTs where terrestrial non-dial-up Internet access service is considered available, but where the level of service is **below 3Mbps in the downstream direction**. “Underserved persons” are those who live in an underserved areas as defined above, or reside in a low-income community designated under Section 45D, an empowerment zone or enterprise community designated under Section 1391, the DC enterprise zone, or a renewal community designated under section 1400E.

These definitions will enable NTIA to effectively target grants to both areas that lack adequate broadband deployment, and low-income areas where broadband deployment may exceed the standard definition of “underserved”, but whose population is likely to adopt broadband at a rate far lower than the general population.

Though the Stimulus Act does not require it, it is very likely that the FCC’s broadband data (collected under Form 477) will be critical for the States, the RUS and the NTIA when they work to identify the unserved and underserved areas, and will also likely be the basis for the NTIA’s national broadband inventory map. This is confirmed in the statement accompanying the conference report, where the conferee’s instructed “the NTIA to coordinate its understanding of these terms [“unserved” and “underserved”] with the FCC, so that the NTIA may benefit from the FCC's considerable expertise in these matters.”

To facilitate applicants and the States in determining which areas are likely to qualify under the above unserved and underserved definitions, the FCC should use the new Form 477 broadband data (reported as of March 16th 2009) to produce and publish lists of Census Tracts

that are likely to be unserved or underserved areas. Specifically, the Commission should develop a tool for identifying likely unserved and underserved Census tracts. We suggest a tool that considers the number of per-capita residential subscribers (by speed tier) in each Census tract. This tool will not be a perfect indicator of un- and underserved households, but will serve as a close proxy. Because this information is only a proxy for actual availability information, a grant applicant, in an affidavit accompanying the grant application, should attest to an area's status.

We recognize that Form 477 reports usually take at least nine months to create from the time the data is submitted. We also recognize that the data reported on March 16th 2009 is new and much more expansive than data reported previously. However, the importance that this data will have to getting the broadband stimulus "right" cannot be understated. It is incumbent upon the Commission to get this data in a usable state as quickly as possible. If this means hiring outside help, then the Commission should use a portion of the funds appropriated for the National Broadband Strategy to ensure that the new Form 477 data is ready for internal use by the Commission, NTIA and RUS, no later than May 15th.

Defining Non-Discrimination and Interconnection Obligations

In the Stimulus Act Congress struck an appropriate balance between the need to get funds out the door quickly, and the need to ensure basic consumer protections and proper accountability. In the BTOP program, Congress rightly recognized the need to proactively ensure that taxpayer funds would not be used to construct a closed Internet. The legislation directs the NTIA and FCC to "publish the non-discrimination and network interconnection obligations that shall be contractual conditions of grants awarded." These conditions "include at a minimum adherence to the principles contained in the Commission's broadband policy statement."

Thus, any BTOP funded network must be operated in a manner that allow consumers to access the lawful content, applications and services of their choice, and consumers must be allowed to attach any device of their choosing to the network.⁶ It is important to note that the FCC's broadband policy statement applies to all networks, not just networks built with stimulus funds. Therefore this language of the bill merely affirms the obligation to abide by these principles, even in the event that they are modified or changed either by the Commission or by Court action. These provisions in essence ensure "no blocking" and device freedom, but they do not by themselves prevent non-blocking discriminatory behavior, such as favoring one provider's content over another. Thus Congress directed the FCC and NTIA to also incorporate non-discrimination conditions.

The FCC should model the BTOP contractual conditions for interconnection after the "just, reasonable and non-discriminatory" language in Sections 251, 252 and 256 of the Communications Act. We suggest the following language:

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the grant recipient's network: A) for the transmission and routing of telephone exchange service and exchange access and for broadband service and access; B) at any technically feasible point within the carrier's network; C) that is at least equal in quality to that provided by the grant recipient to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and D) on rates, terms and conditions that are just, reasonable and nondiscriminatory.

This language should be buttressed with interconnection negotiating conditions that are similar to Section 252(b) of the Communications Act, which calls for mandatory arbitration by the relevant state commission between the 135th and 160th days after a request for interconnection.

⁶ Federal Communications Commission, CC Docket Nos. 95-20, 98-10, 01-337, 02-33; GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement (rel. Sept. 23, 2005).

In addition to adherence to the four principles contained in the Commission's *Broadband Policy Statement*, we suggest that the FCC define the non-discrimination contractual conditions for BTOP grants as follows:

Grant recipients A) must not provide or sell to Internet content, application or service providers, any service that privileges, degrades, prioritizes or discriminates against any lawful content transmitted over the grant recipient's network; and B) must offer bandwidth for Internet access upon reasonable request, on rates, terms and conditions that are just, reasonable and nondiscriminatory. Nondiscrimination shall not be construed to prohibit a grant recipient from engaging in reasonable network management consistent with the principle of nondiscrimination.

OTHER CONSIDERATIONS

The NTIA is also to consider whether awarding a grant to a project will "result in unjust enrichment as a result of support for non-recurring costs through another Federal program for service in the area." This provision is likely a counterpart to the language in the RUS section of the legislation that prevents a project from receiving both an award from RUS and BTOP. However, we suggest that this provision is also particularly important given that grants will be awarded to fund infrastructure that will in many cases be in so-called "High Cost" areas, where providers are eligible for ongoing support from the Universal Service Fund (USF). Currently most rural Eligible Telecommunications Carriers are supported based on their historical costs -- that is they earn a mandated 11.25 percent rate of return on their historical cost of their network investment. But what if a rural carrier uses grant funds to deploy fiber optics to the customer premise, then use that infrastructure to offer both Internet and local exchange telephone service? It is possible that the provider will, under current USF accounting rules, be able to earn an 11.25 percent rate of return on the "historical cost" of that network, even though that cost was paid for with grant funds, and not by the carrier. The prospect of double-dipping into subsidies from tax payers *and* rate payers is troubling.

We believe this situation, as well as the “unjust enriching” clause, get to the heart of the need for comprehensive USF reform. Under the current model, carriers receive ongoing USF support for local telephone service -- a service that is heavily price regulated and one that only brings in small per-customer revenues. This along with so-called “carrier of last resort obligations” necessitates ongoing universal service support for carriers operating in high-cost areas. But that is now an outdated regulatory model. Today’s technology enables a provider to offer phone, cable TV and broadband Internet over the same infrastructure. This means that carriers can earn far more revenues per customer, lowering or completely eliminating the need for ongoing USF support. This is especially the case if the high upfront costs of broadband network deployment are paid for out of USF or stimulus funds.

We therefore urge the FCC to initiate a proceeding examining the role of the stimulus legislation in the context of broader USF modernization reform. Specifically, the Commission should treat the massive investment in rural broadband as an opportunity to modernize the USF, moving away from a system of ongoing support to a system of infrastructure deployment support.

Respectfully submitted,

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