

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Commission's Consultative Role in the) GN Dkt No. 09-40
Broadband Provisions of the Recovery Act)
)

COMMENTS OF EMBARQ

The primary purposes of the American Recovery and Reinvestment Act of 2009 (Recovery Act)¹ are (a) to further broadband deployment¹ in unserved areas; and (b) to promote economic recovery through quick disbursement of Recovery Act funds to entities that will create and maintain jobs by investing in broadband infrastructure. The Commission's role to offer consultation to the National Telecommunications and Information Administration (NTIA) regarding implementation of the Recovery Act is vital as it is the expert agency charged with overseeing the industries that are best positioned to accomplish these two purposes. In this consultation, the Commission should focus on simple, and easily administered recommendations that will best accomplish quickly the spread of advanced telecommunications connectivity to consumers in areas where market forces alone are unlikely to provide broadband because of the high cost of deploying and maintaining the service, typically because of low household density. To this end, Embarq submits that:

- (1) the Commission should limit its recommended definition of broadband to the purposes of the Recovery Act;
- (2) unserved areas should be defined by reference to each applicant's proposed service area and the current lack of available broadband service at 1.5 Mbps advertised speed;

¹ Pub. L. No. 111-5, 123 Stat. 115 (2009).

- (3) the definition of unserved areas should be based on the lack of a broadband offering within an applicant's proposed services area delivering 5.0 Mbps advertised speed; and
- (4) the Recovery Act purposes will be best fulfilled if the non-discrimination and network interconnection obligations are implemented through case-by-case application of the Commission's Broadband Policy Statement.²

The Commission's consultation should apply to the Recovery Act broadband support awarded by the Rural Utilities Services (RUS) as well. Although the Commission's consultation is with NTIA in the first instance, its recommendations should inform the RUS implementation of the Recovery Act as well. For example, seventy-five percent of an area to be funded through RUS must be in an area that is determined to lack sufficient "high speed broadband service to facilitate rural economic development." Based on the statutory objectives and structure, "rural economic development" should be defined broadly and include factors such as job growth, benefits provided by the deployment of new broadband service to key entities such as public safety, education, and health care institutions and end users. Therefore, this statutory requirement is substantially the same as the statutory definition of unserved that applies to the BTOP to be implemented by NTIA. Accordingly, the Commission should recommend that *both* RUS and NTIA use the same analysis and arrive at comparable lists of high-priority project areas where Recovery Act-supported broadband deployment can make a real difference for unserved customers.

² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, 20 FCC Rcd 14986 (2005).

I. THE COMMISSION SHOULD LIMIT ITS RECOMMENDED DEFINITION OF BROADBAND TO THE PURPOSES OF THE RECOVERY ACT

The definition(s) of broadband is critical to much of the Commission's work, and the Commission's current tiered approach is sensible. As the Commission noted in the most recent order regarding broadband reporting, what constitutes broadband varies depending on the purpose for which the question is being asked.³ Moreover, broadband is also an evolving concept, with changing technology and customer expectations. It would be unfortunate and damaging to the Commission's work and the public interest were one specific definition of broadband to be locked into effect in places supported by Recovery Act funding. Therefore, NTIA should follow the Commission's guidance and harmonize its definition of broadband in the Broadband Technologies Opportunity Program (BTOP).

This best approach to defining "broadband" is to limit the definition to the narrow scope of fulfilling the purposes of the Recovery Act. The primary purpose of defining broadband in the Recovery Act is to identify areas that are unserved, so NTIA should focus on the definition of unserved rather than attempting to define broadband per se. Indeed, it would be sensible for the Commission to avoid defining broadband in the context of the Recovery Act and, rather, simply define "unserved," "underserved," and any other discrete questions that rely on the concept of broadband. The Commission could further recommend that NTIA and RUS avoid defining what level of broadband service must be provided to be eligible for support. Instead, the agencies should grant a priority to higher levels of transmission speed through the review process, for example by using a scoring system that awards more points for applications proposing faster service levels.

³ See, e.g., *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691 (2008)

Another purpose of defining broadband is to establish what network facilities can be supported. In this regard, the facilities used to provide Recovery Act-supported broadband should be defined to include transport trunks and feeder plant used to provide the supported broadband service. Importantly, there should be no requirement that these supporting facilities be located in an unserved area in order to be supported by Recovery Act funding for that unserved area. If the Recovery Act is to succeed at promoting broadband deployment and creating/maintaining jobs, it must support these “middle mile” facilities both in combination with last mile network in unserved areas and in separate applications dedicated solely to “middle mile” infrastructure.

It is important that any definition of broadband be defined in a technologically neutral manner. Indeed the clear intent of the Recovery Act is that the BTOP be implemented in a technologically neutral manner. Accordingly, the thresholds described below for “unserved” and “underserved” areas should be the same for all technologies and providers. So to should the priority awarded to applications proposing greater transmission speeds, as specified in the statute for the BTOP, be the same for all technologies. This approach best serves the public interest as it focuses on the perspective of consumers, who surely value the quality of service over the identity of the provider or the technology employed.

II. *UNSERVED* AREAS SHOULD BE DEFINED BY REFERENCE TO EACH APPLICANT’S PROPOSED SERVICE AREA AND THE CURRENT LACK OF AVAILABLE BROADBAND SERVICE AT 1.5 MBPS ADVERTISED SPEED

It is vitally important that each applicant be able to define its proposed service area, including aggregating both adjacent and non-contiguous clusters of unserved homes. In addition, each applicant’s proposed service area as opposed to some larger unit of geography should be used when measuring whether an applicant is meeting criteria related to unserved areas. In both

cases, this approach will increase focus on unserved homes and maximize incremental broadband deployment because it will allow applicants to focus their resources on truly unserved areas and, thereby, funnel Recovery Act support to the areas where it can do the most good. For example, to illustrate this point (and not to discuss a specific application that may or may not occur) Embarq might propose deploying broadband in unserved areas around Dillwyn, VA. (*See Attachment A—Proposed Broadband Deployment in Dillwyn, VA*). If such a proposal could be defined by reference to the capabilities of the specific network architecture Embarq would use, nearly all of the currently unserved households could be provided broadband for a reasonable investment. If, instead, Embarq or any other network provider, using wireline or wireless technology, were required to serve the entire physical area around Dillwyn, VA, the cost could very well be prohibitive, thereby depriving many consumers of broadband service.

Unserved and underserved areas should be defined by reference to available Internet access speed levels. NTIA and RUS should define an unserved area as a proposed service area in which terrestrial broadband service with an advertised information transfer rate of 1.5 Mbps in one direction (commonly referred to as “1.5 Mbps service”) is not generally available. The presence of a few households in the proposed service area with access to such service should not preclude an application from being deemed to propose service in an unserved area. This speed threshold is consistent with current market behavior, where offerings of 1.5 Mbps service and up are becoming (and likely have become) the most common offerings. It also is consistent with an emphasis on economic development and jobs as many important applications, such as video conferencing are arguably possible only with 1.5 Mbps service and above. Any higher speed threshold, however, would risk defining as unserved the large number of satisfied customers of 1.5 Mbps service, which seems implausible.

It is critically important that the presence of a broadband provider serving (or proposing to serve) only a *de minimus* number of overlapping homes in the proposed service area is not permitted preclude funding eligibility. Instead, the Commission should recommend that NTIA and RUS consider a proposed service area to be unserved (or underserved) if all but a small percentage of the homes are not currently able to receive service. Otherwise, many unserved customers could be deprived of broadband because a handful of their neighbors receive service from a provider that has no intention or capability to expand its service. This point was recently made forcefully and effectively before the House Subcommittee on Communications, Technology, and the Internet. (See Attachment B—Testimony of Jonathan Large).⁴ One way the Commission could recommend that NTIA and RUS effectively direct Recovery Act funding to unserved areas without excluding some areas based on low or *de minimus* levels of broadband deployment would be to adopt scoring criteria that awarded more points to applications that proposed to serve higher percentage or greater numbers of unserved homes.

Finally, the presence of a mobile wireless broadband provider at the chosen service threshold should not preclude funding eligibility for a wireline applicant, and vice versa. From an economic development perspective, it seems likely that many customers would consider themselves to be unserved, as opposed to underserved, if they do not have access to both fixed and mobile broadband services. Therefore, neither NTIA nor RUS should not consider mobile broadband service and fixed landline broadband service duplicative for the purpose of Recovery Act funding. This determination should be retroactive with respect to how unserved and underserved are considered as it relates to previous RUS loans and grants.

⁴ Embarq is not seeking any input on a possible future application in Meadows of Dan, VA. Nor did Embarq play any role in the creation and submission of Mr. Large's testimony. Rather, Embarq offers this testimony solely to illustrate the harm that would result from an overly restrictive interpretation of "unserved."

III. THE DEFINITION OF *UNDERSERVED* AREAS SHOULD BE BASED ON THE LACK OF A BROADBAND OFFERING WITHIN AN APPLICANT'S PROPOSED SERVICES AREA DELIVERING 5.0 MBPS ADVERTISED SPEED

In many ways, the Commission should advise NTIA and RUS to focus first on supporting deployment in currently unserved areas as it appears to be more difficult to develop a comprehensive definition of underserved areas. The agencies should not allow any difficulties defining underserved areas to get in the way of rapidly funding projects that will deploy broadband in unserved areas.

The definition of underserved that is most consistent with the statutory emphasis on delivering faster broadband to more customers is one based on a higher service threshold. NTIA should define an underserved area as one in which terrestrial broadband service with an advertised downstream speed of 5 Mbps is not generally available (again subject to a clarification that the presence of a few households having such an option cannot preclude an application). As with unserved areas, the relevant geographic area for measuring whether an area is underserved should be the proposed service area defined by the applicant, including both adjacent and non-contiguous clusters of underserved homes.

IV. THE RECOVERY ACT PURPOSES WILL BE BEST FULFILLED IF THE NON-DISCRIMINATION AND NETWORK INTERCONNECTION OBLIGATIONS ARE IMPLEMENTED THROUGH CASE-BY-CASE APPLICATION OF THE COMMISSION'S BROADBAND POLICY STATEMENT

The Commission should not recommend, and NTIA and RUS should not impose, any new non-discrimination and/or network interconnection requirements beyond existing statutory and regulatory obligations and principles. The quick adoption of procedures and disbursement of funds that is required to fulfill the Recovery Act purposes is a particularly poor venue for deciding important questions regarding non-discrimination and interconnection principles. This

is particularly true given the rapid evolution of technology and markets, which dramatically raises the stakes involved in the inevitable regulatory mistakes that would result from attempting to define and lock in obligations in the context of Recovery Act support.

The Recovery Act broadband programs should be and, indeed, can only be implemented rationally by adhering to current and evolving non-discrimination policies that are adopted by the Commission and applied to *all* broadband services as those policies will always apply far more broadly than Recovery Act funding. Moreover, the purpose of the Recovery Act is to promote investment and job creation/preservation, both of which would be deeply threatened by excessive non-discrimination and/or network interconnection requirements. In addition, the Commission should recommend that NTIA and RUS take notice of the fact that the Commission retains Title I jurisdiction over the supported facilities and services, permitting case-by-case resolution of any public policy harms that might arise.

The Commission's Broadband Policy Statement issued on August 5, 2005 (also known as its "Net Neutrality Principles") provides an effective standard protecting consumers effectively through case-by-case resolution. This approach avoids stifling innovation and letting rules become obsolete. In addition, the economics of rural areas—the very same unserved places to which Recovery Act funding is to be directed in significant measure—would increase the harms from premature and unnecessary additional obligations in rural areas, further damaging deployment and jobs. This is why the Recovery Act does not even impose the Broadband Policy Statement obligations under the program to be administered by RUS.

The requirement that BTOP funding recipients comply with the Broadband Policy Statement should be limited in duration as those principles are sure to evolve over time and it would be unwise to impose obligations on network providers and customers after those

obligations have outlived their usefulness or been superseded. Accordingly, the Commission should recommend that any specific non-discrimination and/or network interconnection principles that are imposed as a condition of Recovery Act funding should “sunset” at the end of the build-out period specified in the funding award. After that time, the Commission’s Title I jurisdiction will remain and should form the sole basis by which any necessary regulations are adopted and applied. To do otherwise would frustrate the purposes of the Recovery Act and risk balkanizing broadband infrastructure in America through a patchwork of differing and, ultimately, inefficient regulatory obligations.

V. CONCLUSION

The Commission will offer the best consultation and contribute the most to the success of the Recovery Act if it: (1) limits its recommended definition of broadband to the purposes of the Recovery Act; (2) recommends that *unserved* areas be defined by reference to each applicant's proposed service area and the current lack of available broadband service at 1.5 mbps advertised speed; (3) recommends that the definition of *underserved* areas be based on the lack of a broadband offering within an applicant's proposed services area delivering 5.0 mbps advertised speed; and (4) finds that the Recovery Act purposes will be best fulfilled if the non-discrimination and network interconnection obligations are implemented through case-by-case application of the Commission's Broadband Policy Statement.

Respectfully submitted,

EMBARQ

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ATTACHMENT A

PROPOSED BROADBAND DEPLOYMENT IN DILLWYN, VA

ATTACHMENT B

**FILED TESTIMONY OF JONATHAN LARGE, DAN RIVER DISTRICT SUPERVISOR
IN ARARAT, VIRGINIA**

**BEFORE THE HOUSE SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY
AND THE INTERNET**

APRIL 2, 2009