

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

In the Matter of)	
)	
Inquiry Concerning the Deployment of)	GN Docket Nos. 09-47 and 09-137
Advanced Telecommunications Capability)	
to all Americans in a Reasonable and)	
Timely Fashion, and Possible Steps to)	
Accelerate Such Deployment Pursuant to)	
Section 706 of the Telecommunications Act)	
of 1996, as amended by the Broadband Data)	
Improvement Act)	
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
To: The Commission		

**COMMENTS – NBP Public Notice #28
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

January 8, 2010

*/s/ Richard Harnish, President
/s/ Jack Unger, Chair of FCC Committee*

Stephen E. Coran
Rini Coran, PC
1140 19th Street, NW, Suite 600
Washington, DC 20036
(202) 463-4310
Counsel to the Wireless Internet Service Providers Association

Table of Contents

Summary	ii
COMMENTS	1
Background	2
Discussion	3
1. Existing Federal Government Funding Mechanisms	4
2. New and Improved Funding Mechanisms	5
<i>Grants</i>	5
<i>Loans and Loan Guarantees</i>	5
<i>Universal Broadband Fund</i>	6
<i>Customer-Side Incentives</i>	7
3. Interrelationship of Funding Issues and Spectrum Issues	7
<i>Last Mile Spectrum Needs and Funding</i>	7
<i>Spectrum Propagation and Funding</i>	8
<i>Practical Spectrum Operating Rules and Funding</i>	9
<i>Spectrum Auctions and Funding</i>	10
<i>“Spectrum Homesteading”</i>	10
Conclusion	11

Summary

The Wireless Internet Service Providers Association (“WISPA”), the association that represents the interests of wireless Internet service providers, submits these Comments to recommend ways by which broadband deployment in rural, unserved and underserved areas can be stimulated through private sector and government funding vehicles.

Many WISPs are self-funded small businesses that provide broadband service where other companies do not. Because funding growth through cash flow is a slow process, WISPs are unable to extend service into nearby areas as quickly as demand dictates. As a result, many rural communities do not have broadband, which contributes to the “rural brain drain,” the ongoing flight of young professionals to larger cities that is devastating the economies of rural communities across the country. WISPA believes that with the right regulatory environment and policies, this alarming trend can be reversed. As investment dollars fund broadband deployment in rural communities, jobs and people will stay.

Some WISPs have taken advantage of government loan programs, but too often the application procedures and the compliance obligations are overly burdensome. To make needed funding more accessible, WISPA (and others, including the Communications Finance Association) have made concrete recommendations to RUS and NTIA designed to encourage private investment. In addition, WISPA believes that more extensive use of one-time grants, such as those made in some states, will direct funding to areas where it is most needed. By utilizing loan guarantees, the government would be leveraging its money against private investment, thereby reducing the federal burden while still promoting extension of broadband service into unserved and underserved areas.

WISPA supports establishing a universal broadband fund to subsidize broadband deployment in unserved and underserved areas. Initial funding can be made available from the excess support given to incumbent local exchange carriers and wireless companies that receive funding for legacy voice services. WISPA also believes that adoption of broadband can be improved by providing financial support to end-users that are otherwise unable to pay for service.

In order for funding mechanisms to be truly successful in promoting service to areas where wired technologies do not reach, they must be accompanied by changes to spectrum policies and practices. In its previous Comments, WISPA has made a number of recommendations that would make middle mile and second mile facilities more affordable and greatly enhance the ability of small companies to obtain access to “clean” licensed spectrum. Among other things, WISPA has advocated increased use of “licensed lite” spectrum allocations, especially with respect to TV white spaces, which will lower entry costs yet provide private sector investors with the security of a license and some measure of interference protection. Spectrum auctions do not allow meaningful participation by smaller companies and divert funds from economic

development at the local level to the U.S. Treasury. In WISPA's view, that does little to stimulate either the economy or broadband development in rural, unserved and underserved areas. WISPA also advocates "spectrum homesteading," a concept by which a non-exclusive license could become an exclusive license if the broadband provider satisfied aggressive build-out and service objectives. This would promote the twin goals of expeditious broadband deployment and stimulation of private investment in a reliable, interference-free network.

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

In the Matter of)	
)	
Inquiry Concerning the Deployment of)	GN Docket Nos. 09-47 and 09-137
Advanced Telecommunications Capability)	
to all Americans in a Reasonable and)	
Timely Fashion, and Possible Steps to)	
Accelerate Such Deployment Pursuant to)	
Section 706 of the Telecommunications Act)	
of 1996, as amended by the Broadband Data)	
Improvement Act)	
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
To: The Commission		

**COMMENTS – NBP Public Notice #28
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

The Wireless Internet Service Providers Association (“WISPA”) provides these Comments in response to questions asked in NBP Public Notice #28 to urge the Commission to incorporate into its National Broadband Plan recommendations that will improve the ability of broadband Internet access providers to attract and effectively utilize private sector and government funding.¹

Improving access to financing is one of many critical needs that must be met if the goal of ubiquitous broadband is to become a near-term reality. The willingness of third-party financiers to invest in broadband deployments in rural, unserved and underserved areas can only occur if the regulatory environment is conducive to earning a reasonable return on investment. Promoting investment does not exist in a vacuum, but must be combined with improved access to affordable middle mile and second mile

¹ Public Notice, “*Comment Sought on Addressing Challenges to Broadband Deployment Financing*,” DA 09-2610, rel. Dec. 18, 2009.

facilities,² more expeditious access to towers and other infrastructure,³ more effective “licensed-lite” rules for spectrum allocation,⁴ reform of the spectrum auction procedures, and overhaul of the universal service fund mechanism to direct subsidies to broadband deployments in areas of need.⁵ Adopting the suite of WISPA’s recommendations will encourage private investment in fixed wireless broadband deployment to help bring broadband to rural, unserved and underserved areas.

Background

WISPA was founded in 2004 and represents the interests of more than 300 wireless Internet service providers (“WISPs”), vendors, system integrators and others interested in promoting the growth and delivery of fixed wireless broadband services to Americans. WISPA estimates that more than 2,000 WISPs operate in the United States today. WISPA’s ongoing research reveals that WISPs cover more than 2,000,000 square miles in all 50 states. Using primarily Part 15 license-free frequencies and Part 90 licensed-lite services in the 3650-3700 MHz band, WISPs provide broadband fixed wireless services to more than 2,000,000 people in residences, businesses, hospitals, public safety locations and educational facilities.

In general, WISPs are self-funded small business enterprises that often are unable to obtain financing on reasonable terms from traditional investors. Absent funding from

² See Comments of WISPA filed November 4, 2009 in response to Public Notice, “*Comment Sought on Impact of Middle and Second Mile Access on Broadband Availability and Deployment*,” DA 09-2186, GN Docket Nos. 09-47, 09-51 and 09-137 (rel. Oct. 8, 2009).

³ See Comments of WISPA filed November 6, 2009 in response to Public Notice, “*Comment Sought on the Contribution of Federal, State, Tribal, and Local Government to Broadband*,” DA 09-2122, GN Docket Nos. 09-47, 09-51 and 09-137 (rel. Sept. 25, 2009).

⁴ See Comments of WISPA filed October 23, 2009 in response to Public Notice, *Comment Sought on Spectrum for Broadband*, DA 09-2100, GN Docket Nos. 09-47, 09-51 and 09-137 (rel. Sept. 23, 2009) (“Spectrum Comments”); Reply Comments of WISPA filed November, 13, 2009.

⁵ See Comments of WISPA filed December 7, 2009 in response to Public Notice, “*Comment Sought on the Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan*,” NBP Public Notice #19, DA 09-2419 (rel. Nov. 13, 2009) (“USF Comments”).

state and federal grants and loans, which itself presents significant barriers, they can only expand as cash flow permits, significantly inhibiting their ability to add new tower locations and to extend service to new areas that are unserved or underserved because larger broadband access providers choose not to serve rural and remote areas. Moreover, large carriers do not seem interested in covering these markets, a primary reason that rural America lies on the wrong side of the “digital divide.” Perhaps this is because rural areas are too expensive to serve and cannot guarantee a rate of return that their shareholders require.

As WISPA has previously stated, the absence of broadband contributes to the ongoing “rural brain drain” that is profoundly affecting the economic condition of rural communities across the country. Quoting a recent book, WISPA stated that:

Simply put, globalization readiness – without human- and digital-capital investments in the countryside’s labor forces – means that better equipped metropolitan areas will always have the upper hand in attracting and developing new industries. Therefore, it is critical that economic development in rural areas proceed hand in hand with digital investments and human-capital development.⁶

Without a better regulatory environment to support the ability of WISPs to obtain private sector and government financing, economic conditions in rural American will not recover and will continue to deteriorate.

Discussion

In developing its recommendations, WISPA surveyed its members to obtain ideas on the financing vehicles that would best respond to the Commission’s concerns. As

⁶ See Comments of WISPA filed December 4, 2009 in response to Public Notice, “*Comment Sought on Relationship Between Broadband and Economic Activity*,” NBP Public Notice #18, DA 09-2414 (rel. Nov. 12, 2009), quoting Carr, Patrick J. & Kefalas, Maria J., “*Hollowing Out the Middle: The Rural Brain Drain and What it Means for America*,” Beacon Press (2009), at 148-149.

membership made clear, the government can implement and expand a number of programs to more effectively promote financing of broadband deployment in rural areas.

1. Existing Federal Government Funding Mechanisms

WISPA members reported that existing Small Business Administration loan programs were effective. The loan and grant programs administered by the Rural Utilities Service (“RUS”) prior to adoption of the American Recovery and Reinvestment Act (“Recovery Act”), however, involved difficult and lengthy processes that proved to be burdensome for small businesses that do not have large office staffs to apply for, maintain and support the compliance burden that large grant or loan programs typically require. For similar reasons, many WISPs elected to not participate in the first funding round under the Recovery Act. Among other things, the Recovery Act restricts the sale of broadband infrastructure for ten years and contains other onerous restrictions that kept private investment money on the sidelines.⁷ When the compliance and post-grant burdens become too great, many broadband service providers are forced to simply forgo the opportunity of applying for government loans or grants.

To improve these programs, in addition to the recommendations WISPA and the Communications Finance Association (“CFA”) have presented to RUS and NTIA, WISPA generally supports relaxing the lending requirements and simplifying the compliance burdens. WISPA believes that the need for private investors to conduct due

⁷ In Comments filed with RUS and NTIA regarding the requirements for the second Recovery Act funding round, the Communications Finance Association (“CFA”) cogently articulated, from the investor’s perspective, the need to materially alter certain of the requirements that limited private investment in first-round proposals. *See generally* Comments of CFA, Docket No. 0907141137-91375-05, filed Nov. 30, 2009. A copy of CFA’s Comments are attached for convenience as Exhibit 1 hereto. Likewise, WISPA filed Comments with RUS and NTIA advocating elimination of certain funding requirements in order to stimulate private investment. *See* Comments of WISPA, Docket No. 0907141137-91375-05, filed Nov. 30, 2009, at 16-18. Both the CFA Comments and WISPA’s Comments cited with approval the recommendations of the House Small Business Committee. *See* Letter dated November 17, 2009 from House Small Business Committee to Hon. Lawrence E. Strickling and Hon. Jonathan Adelstein.

diligence and require borrowers and grantees to comply with covenants as part of standard business arrangements will appropriately shift these needs – and the investment risk – to the private sector, thereby reducing the need for oppressive government oversight. In addition, existing broadband providers that have previously obtained grants or loans should be subject to streamlined application procedures when applying for a new loan, grant or loan guarantee.

2. New and Improved Funding Mechanisms

Grants – WISPA members generally support one-time grants for specific projects such as building a new tower to provide broadband to an unserved community. WISPA members also support one-time grants in the form of matching funds.

Loans and Loan Guarantees – WISPA fully supports the use of loan guarantees as an effective means to promote private investment. Simply put, a lender would be much more likely to risk investment capital if it had the full faith and credit of the federal government to guarantee loan repayment. Loan guarantees should require the borrower to post no more than 20 percent of the project funds.

It is also important for the government to establish priorities for recipients of loans and loan guarantees. First, whenever possible, loans and loan guarantees should be made to established service providers or to companies that have demonstrated that they have experience providing broadband services. Often the availability of government funding attracts a plethora of companies that possess no experience or very limited experience in actually delivering broadband service. Broadband providers that have demonstrated experience actually delivering service or that are currently delivering such services to nearby areas should have priority for such funding opportunities. Second,

funding should be provided to open up and make accessible the middle mile routes that pass through the small communities located between larger cities, thereby enabling service providers to bring economical broadband service to these smaller communities.

State grant funding also can be an effective means of funding broadband development. The State of Vermont, for instance, has made available \$50,000 community broadband grants that have successfully funded fixed wireless deployment in small, rural communities. The grant documents are standardized and easy to understand, and the generally lower level of paperwork required for state projects is more manageable by non-national, local broadband service providers. To encourage build-out, the state retains ownership of the equipment until project milestones have been met, at which time ownership transfers to the broadband provider. States are often able to perform more effective oversight and verification of claims of “no broadband coverage” because state personnel are typically located closer to end-users and are more aware of local issues than federal personnel. This model may be an effective way for local, state and federal governments to fund broadband deployment in rural communities.

Universal Broadband Fund – As discussed in its USF Comments, WISPA wholeheartedly endorses extending the benefits of the Universal Service Fund to facilitate the provision of broadband services to persons in unserved and underserved areas who need access to affordable broadband service. WISPA believes that existing recipients of USF legacy voice support – incumbent local exchange carriers and mobile broadband companies, for example – are obtaining windfall funds that could better be used to subsidize provision of fixed wireless broadband.

Customer-Side Incentives – In other Comments in the National Broadband Plan⁸ and Recovery Act proceedings,⁹ WISPA advocated the use of government-issued vouchers by which low-income consumers could obtain financial assistance for broadband service. Implementation of such a program would encourage WISPs to build out their networks knowing that the end-user will be able to pay for the service.

3. Interrelationship of Funding Issues and Spectrum Issues

The ability of WISPs to secure access to private investment is dependent on the ability of WISPs to obtain affordable access to spectrum. WISPA highlights several recommendations that will make spectrum more accessible and viable for fixed wireless broadband, which in turn will stimulate private investment in areas where broadband needs are greatest.

Last Mile Spectrum Needs and Funding – Last mile wireless service is typically delivered using point-to-multipoint wireless spectrum. Access to “clean” (*i.e.*, interference-free) last mile wireless spectrum is a necessity for delivering reliable wireless service. Put simply, interference slows and then stops wireless signals. The lack of clean spectrum is a significant impediment to the provisioning of broadband fixed wireless service to unserved and underserved citizens.

The bottom line is that private financing sources are reluctant to invest with broadband providers that cannot guarantee the delivery of reliable broadband service. WISPs have traditionally been forced to use license-free spectrum. Although the cost of entry was low, the costs to maintain reliable service delivery are often high. WISPs must

⁸ See Comments of WISPA filed June 8, 2009 in response to *A National Broadband Plan for Our Future*, Notice of Inquiry, FCC 09-31, rel. Apr. 8, 2009 (“NOI Comments”), at 21-22.

⁹ See Comments of WISPA, NTIA Docket No. 090309298-9299-01, filed Apr. 10, 2009, at 12.

devote significant time and money to dealing with interference problems while attempting to maintain reliable service.

WISPA reiterates its request to make more spectrum available on a non-exclusive “licensed-lite” basis.¹⁰ Licensed-lite procedures combine the benefits of low barrier to entry with a license (which investors appreciate because it can be assigned as a remedy) and registration rights (which affords some measure of interference protection). Without modifications to existing spectrum licensing and auctioning policies, the fixed wireless broadband funding questions will be largely moot as there will continue to be little or no access to affordable and reliable point-to-multipoint last mile spectrum.

Spectrum Propagation and Funding – Not all wireless spectrum behaves equally. Each spectrum range has associated propagation characteristics. Higher-frequency spectrum (*i.e.*, above 1 GHz) has correspondingly shorter wavelengths and is very susceptible to signal losses due to the attenuation from trees, buildings and terrain. Spectrum below 1 GHz is much less attenuated by trees and obstructions. WISPs need affordable access to interference-free spectrum below 1 GHz.

WISPA has petitioned the Commission for access to and practical operational rules for TV white space spectrum.¹¹ WISPA hereby reaffirms the need for urgent Commission action to modify its current TV white space operating rules, to create a geo-location database system and to implement an equipment certification process that allows the prompt deployment of reliable last-mile point-to-multipoint broadband fixed wireless service in TV white space spectrum. Again, absent prompt action by the Commission, the

¹⁰ See Spectrum Comments.

¹¹ See Petition for Reconsideration of WISPA filed March 19, 2009 *Unlicensed Operation in the TV Broadcast Bands; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, Second Report and Order and Memorandum Opinion and Order, 23 FCC Rcd 16807 (2008).

funding issues will again be largely moot for lack of both usable spectrum and usable operating rules.

Practical Spectrum Operating Rules and Funding – As explained above, access to clean, affordable spectrum is key to the provision of reliable broadband fixed wireless service to the 24 million U.S. households without broadband access however, even access to clean, affordable spectrum is not enough to assure adequate broadband funding and deployment.¹² Practical operating rules are the final requirement to enable these consumers to obtain broadband service. Wireless providers that attempt to use spectrum that either lacks practical operating rules or that is burdened by the imposition of unrealistic operating rules will not be able to attract funding. For example, the current TV white space spectrum rules require WISPs to use unproven and insecure spectrum-sensing techniques that will damage the ability of WISPs to attract funding. In addition, the lack of licensed-lite operating rules for fixed TV white space spectrum service providers reduces the possibility that WISPs will be able to provide reliable broadband fixed wireless service in the band thereby reducing their chances of obtaining funding.

Further, the possibility of “re-farming” of the television broadcast spectrum and auctioning large parts of it off to large, already well-funded national mobile broadband carriers further reduces the chances for WISPs to provide broadband service to America’s unserved and underserved households and businesses. In sum, lack of access to clean, affordable spectrum below 1 GHz, with practical operating rules, will enhance the ability and willingness of the private sector to invest in WISPs and others that want to bring broadband to rural, unserved and underserved areas.

¹² See Comments of WISPA filed December 22, 2009 in response to Public Notice, “*Data Sought on Uses of Spectrum*,” NBP Public Notice #26, DA 09-2518 (rel. Dec. 2, 2009), at Exhibit 1.

Spectrum Auctions and Funding – The current spectrum auction process has failed to provide meaningful opportunities for local broadband Internet access providers that desire to provide broadband service to unserved and underserved households and businesses. In general, WISPs do not have the financial resources to competitively bid at spectrum auctions against well-heeled national carriers. Moreover, auction revenues do not stimulate the economy in the direct way that investing money in local infrastructure, local workforces and local build-outs do. Auctioned spectrum is too expensive and unlicensed spectrum too unreliable – neither supports private investment.

“Spectrum Homesteading” – In its NOI Comments, WISPA promoted the concept of “spectrum homesteading” and asked that it be included in the National Broadband Plan as a means to promote rapid build-out into unserved and underserved areas and simultaneously stimulate investment.¹³ “Spectrum homesteading” would permit fixed wireless broadband providers to obtain by “licensed lite” procedures non-exclusive rights to spectrum. Over time, if the operator meets an accelerated build-out and service schedule, the non-exclusive license would ripen into an exclusive license for the area in question. If the provider does not meet the build-out and service schedule, its use would remain non-exclusive. WISPA believes that its “spectrum homesteading” proposal would create a powerful incentive to provide expeditious and affordable service to areas that may otherwise be unserved, and the issuance of a “spectrum homesteading” license would encourage investment by third parties.

“Licensed lite” procedures and “spectrum homesteading” offer better alternatives to current spectrum allocation policies. WISPA respectfully requests that the Commission include these recommendations in the National Broadband Plan as an

¹³ See NOI Comments at 14-15.

effective means to make reliable spectrum available and, thereby, stimulate private investment in fixed broadband deployments, help revitalize rural economies and begin to stem the “rural brain drain” that is hollowing out rural America today.

Conclusion

WISPA appreciates this opportunity to participate in the creation of a National Broadband Plan that will significantly contribute to improving the economic well being of American citizens.

Respectfully submitted,

**THE WIRELESS INTERNET
SERVICE PROVIDERS ASSOCIATION**

January 8, 2010

By: */s/ Richard Harnish, President*
/s/ Jack Unger, Chair of FCC Committee

Stephen E. Coran
Rini Coran, PC
1140 19th Street, NW, Suite 600
Washington, DC 20036
(202) 463-4310
Counsel to the Wireless Internet Service Providers Association

Exhibit 1

In the Matter of the

**UNITED STATES DEPARTMENT OF AGRICULTURE
RURAL UTILITIES SERVICE
BROADBAND INITIATIVES PROGRAM
RIN: 0572-ZA01**

-and-

**UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM
RIN: 0660-ZA28**

**JOINT REQUEST FOR INFORMATION
Docket Number: 0907141137-91375-05**

**SUMMARY OF THE COMMENTS OF THE
COMMUNICATIONS FINANCE ASSOCIATION**

The Communications Finance Association ("CFA") has urged RUS and NTIA to revisit and reconsider several provisions that CFA believes will impair BIP and BTOP Awardees' ability to continue or obtain private sector financing for their program projects.

In the Matter of the
UNITED STATES DEPARTMENT OF AGRICULTURE
RURAL UTILITIES SERVICE
BROADBAND INITIATIVES PROGRAM
RIN: 0572-ZA01

-and-

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM
RIN: 0660-ZA28

JOINT REQUEST FOR INFORMATION
Docket Number: 0907141137-91375-05

COMMENTS OF THE
COMMUNICATIONS FINANCE ASSOCIATION

The Communications Finance Association (“CFA”) hereby submits comments in response to the captioned Joint Request for Information (“Joint Request”) issued by the Rural Utilities Service of the U. S. Department of Agriculture (“RUS”) and the National Telecommunications and Information Administration of the U. S. Department of Commerce (“NTIA” and, together with RUS, the “Agencies”).¹ By the Joint Request, the Agencies are seeking public comment on issues relating to their implementation of the Broadband Initiatives Program (BIP) and the Broadband Technology Opportunities Program (BTOP).

Background

CFA is a voluntary membership organization whose membership extends to providers of capital and financial services to companies operating in, or seeking to enter, both the telecommunications and media sectors of the communications industry. CFA’s

¹ 74 Fed. Reg. 58940 (November 16, 2009).

mission is to recognize and address, in appropriate forums, the various business and regulatory issues affecting the communications industry's access to capital, both debt and equity.

Since the enactment of the American Recovery and Reinvestment Act of 2009 ("Recovery Act"),² and the ensuing establishment of BIP and BTOP, CFA's members have recognized that that they will be called upon to provide private sector financing components for many, if not most, of the projects awarded BIP or BTOP funds. In fact, many of the approximately 2,200 pending applicants for first round BIP/BTOP funding are either already customers of CFA members, or are affiliates of such customers.

CFA's members initially looked forward to both the new business opportunities being stimulated by BIP/BTOP, and the opportunity to participate in and facilitate the provision of broadband service to unserved and underserved areas and populations. However, the CFA members' initial enthusiasm has been significantly tempered by certain program requirements and restrictions promulgated by RUS' and NTIA's first Notice of Funds Availability (NOFA").³ CFA members also find that certain provisions of RUS' draft "Loan/Grant and Security Agreement" ("Loan Agreement")⁴ exacerbate the concerns provoked by the NOFA. CFA's members now are concerned that governmental requirements and restrictions will adversely affect the risk profiles of BIP/BTOP funded projects to the point where prudent lenders and investors will find it difficult to justify the provision of private sector funding to those projects.

The purpose of CFA's following comments is to alert the Agencies as to the adverse implications of certain NOFA provisions, and thereby stimulate a rethinking of

² Pub. L. No. 111-5, 123 Stat. 115 (2009).

³ 74 Fed. Reg. 33103 (July 9, 2009).

⁴ Posted online at <http://broadbandusa.sc.egov.usda.gov/files/ARRAbbLSAgmt%207.pdf>.

such provisions before they are included, without appropriate modification, in the anticipated notice of funds availability for the second round of BIP/BTOP funding.

Comments

RUS and NTIA should recognize that the financing they propose to provide through BIP/BTOP, as well as the financing they expect the private sector to contribute, will fall into the category referred to as “project financing”. The purpose of such financing is to provide the capital necessary for significant projects; most often infrastructure projects such as the “broadband infrastructure projects” targeted by BIP/BTOP.⁵

An important element of project financing is that the credit or risk assessments preceding the extension of such financing are not focused exclusively, or even primarily, on the general assets and creditworthiness of the project sponsor. Instead, credit or risk assessments made in conjunction with a proposed project financing evaluate (1) the collateral value of the specific project’s assets, both existing and projected, and the ability to obtain, perfect and maintain appropriate liens on those assets; (2) the projected cash flow of the project, and the availability of such cash flow for project operations and debt service purposes; and (3) the availability of appropriate creditor remedies, including the ability to (i) take possession and control of the project’s assets and operations, or (ii) cause the project to be reorganized in a manner beneficial to the project’s creditors, or (iii) otherwise realize on the value of lienated project assets, in the event the project entity is unable to comply with the terms of the financing.⁶

CFA believes that several NOFA and Loan Agreement provisions have seriously adverse implications under the credit and risk criteria set out in the preceding paragraph.

⁵ See, e.g., (1) NOFA, Section I, passim, and (2) the Loan Agreement’s definition of “Project”.

⁶ Any credit or risk assessment undertaken in connection with project financing, especially where governmental entities are involved, usually takes into account the “political risk” associated with the proposed project. In the context of the BIP/BTOP projects, the regulatory overlay (*i.e.*, certain program requirements imposed, and certain advantages and priorities claimed, by RUS and NTIA) will be taken into consideration as political risks to any financing by the private sector.

Of specific concern are (1) the scope and priority of the liens required by the Agencies; (2) restrictions imposed on the use of project revenues; and (3) restrictions on the sale, reorganization or other disposition of awardees, projects, project facilities and other project assets.

CFA notes that it is not alone in its concerns. On November 17, 2009, several members of the Committee on Small Business of the U. S. House of Representatives (“Small Business Committee” or “Committee”), including the Committee’s Chairwoman and its Ranking Minority Member, sent RUS and NTIA a letter setting forth several congressional concerns as to how certain current BIP and BTOP rules and procedures will affect small business applicants and awardees.⁷ Particularly pertinent excerpts from that letter are as follows (emphasis added):

The nature of the BTOP/BIP application process has created many barriers to small business participation. Among the greatest challenges include the following: the complex application process, a 10-year limitation on the sale of award funded facilities, a matching contribution requirement, and a first lien rule. Before a second round Notice of Funds Availability or NOFA is issued, the Committee suggests that revisions be made to maximize participation among small firms...

[T]he 10-year limitation on the sale or lease of award funded facilities creates a significant barrier for small firms. To ensure that firms can continue to grow and innovate, the Committee believes this provision should be modified. Applicants should also have greater flexibility to use revenue generated through a BTOP/BIP award. The rules currently limit an award recipient from using subscriber revenues to cover expenses such as technician installation costs, marketing costs, advertising costs, and other expenses associated with running a business during the initial three years. This serves as a disincentive for many small firms to apply. We hope the agencies will modify this provision to, at the very least, clarify that program income refers to profits and not gross income...

[T]he requirement that RUS hold an exclusive first lien on applicant’s assets may present a conflict for some firms. The Committee recommends revising this requirement to ensure that an applicant can participate without violating the terms of already existing loan agreements. During the first round of funding, this requirement prevented many companies from participating.

⁷ The Small Business Committee’s November 16, 2009 news release, which includes the full text of the letter, is at www.house.gov/smbiz/PressReleases/2009/pr-11-16-09-broadband-letter.html.

Although CFA believes the adverse impact of the BIP/BTOP provisions cited by the Small Business Committee will not be limited to, but will extend well beyond, the Committee's small business constituency, CFA also believes that the preceding excerpts from the Committee's letter both validate the fundamental legitimacy of CFA's three corresponding concerns, and warrant their further exposition in comments both responsive to, and expansive upon, the Joint Request. Accordingly, each of CFA's three concerns is addressed more fully below.

Scope and Priority of Liens

The NOFA, at Section IX.B.1.g.v. Security, states that "The loan portion of the award must be adequately secured", and specifies, *inter alia*, that, "(1) The loan and loan grant combination must be secured by the assets purchased with the loan or loan/grant funds, as well as all other assets of the applicant and any other signer of the loan documents that are available to be pledged to RUS... [and]... (2) RUS must be given an exclusive first lien, in form and substance to RUS, on all of the assets purchased with the loan or loan/grant funds. RUS may share its first lien position with one or more lenders on a *pari passu* basis if security arrangements are acceptable to RUS (emphasis added)." In addition, the draft Loan Agreement contains several potentially objectionable provisions, including the following (emphasis added):

Article I - Definitions: "Collateral" shall mean any and all property pledged as security for the Loan and other amounts owing to RUS under the Loan-Grant Documents, including, without limitation, the property described in Article IV and on Schedule 2.⁸

Section 4.1 Conditions Precedent to Closing, which requires "executed, filed and indexed financing statements covering all of the personal property and fixtures of the Awardee"; and

⁸ [CFA] notes that, although the definition of Collateral references a "Schedule 2", no page identified as "Schedule 2" is included in the electronically posted Loan Agreement. However, the posted Loan Agreement does include a two page "Schedule 3", which specifies that "Collateral shall include...all property, assets, rights, privileges, licenses, and franchises (emphasis added)." It is this all-inclusive claim as to the extent of Collateral that also is of concern to CFA.

Section 7.5 Negative Pledge, which prohibits “any lien, mortgage, pledge, assignment, or other encumbrance on, or security interest on [an Awardee’s] property...”

CFA submits that the cited provisions are unrealistic, fundamentally unfair and, if strictly applied as written, would constitute counter-productive overreaching on the part of the Agencies. As the Agencies clearly anticipate the need for additional funding from the private sector,⁹ they need to affirmatively demonstrate that private sector financing will be afforded the opportunity to obtain such liens as are usual and commercially reasonable, both as to the scope of assets and as to the priorities afforded such liens.

The Agencies must recognize that already existing creditors of Awardees will be to some degree resistant, if not adamantly opposed, to surrendering their existing lien priorities on any assets realized through the use of previously provided capital. In addition, potential lenders will be reluctant to commit funds unless they are assured that they can obtain priority liens on such assets as may be necessary to continue project operations after a default by an Awardee borrower. And, in both cases, existing creditors and potential lenders will find it extremely difficult to provide the Agencies with the “first lien position...on a *pari passu* basis” now required by the NOFA, if such a lien extends to assets that the Agencies refuse to fund; e.g., spectrum.¹⁰

RUS’ administration of BIP also raises a unique concern as to the scope of the liens required under the NOFA. In 2004, the FCC adopted a policy that “permit[s] commercial and private wireless, terrestrial-based licensees to grant security interests in their FCC licenses to RUS, conditioned upon the Commission’s prior approval of any

⁹ See, e.g., Loan Agreement, Section 5.5 Additional Project Funding.

¹⁰ See, NOFA Section V.D.2.b.vii, which specifies that “award funds may not be used for any of the following purposes...to fund costs incurred in acquiring spectrum as part of an FCC auction or in a secondary market acquisition (emphasis added).” Of course, if the Agencies change the BIP/BTOP rules so as to permit program funds to be used to acquire presently restricted assets, they can expect private sector lenders to withdraw the corresponding objections to the Agencies obtaining liens on such assets.

assignment or transfer of *de jure* or *de facto* control.”¹¹ As that policy “permit[s] RUS – but only RUS – to take a conditional security interest in an FCC license,”¹² it provides RUS the opportunity to obtain what no other entity can; the ultimate lien on a spectrum license, a direct security interest in that license. When this unique and exclusive FCC policy is juxtaposed with both the NOFA’s prohibition on any funding of spectrum acquisition costs and the NOFA’s above-cited requirement that RUS be provided with a lien on all “assets...that are available to be pledged to RUS,” it is not unreasonable for existing creditors and potential lenders to be concerned that they will be faced with an unacceptable usurpation of their rightful priority liens on critical assets the usurper will not fund.

CFA firmly believes that the scope and priority of the liens seemingly required by the NOFA and the Loan Agreement, especially to the extent they implicate an Awardee’s spectrum, will exert a strong chilling effect on the willingness of existing creditors and potential lenders to either accommodate BIP/BTOP funding or provide additional capital to BIP/BTOP Awardees. Accordingly, CFA strongly urges the Agencies to clearly and unequivocally indicate that (a) their lien policies and objectives are aspirational rather than mandatory; (b) the scope and priorities of their liens vis-à-vis other creditors and potential lenders will be set on an *ad hoc* basis, and only after good faith negotiations; and (c) they are ultimately ready and willing to have their lien rights, and their relationships with other creditors, set and governed by intercreditor agreements that incorporate terms that are normal and commercially reasonable in light of the circumstances of each project financing. In addition, CFA believes it is critical that RUS

¹¹ *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, 19 FCC Rcd 19078, Para. 51 (2004).

¹² *Id.*, Para. 55.

unequivocally renounce its exclusive right to seek direct security interests in spectrum licenses held by Awardees.

Use of Project Revenue

The NOFA requires that, “for purposes of BIP and BTOP, any program income generated by a proposed project during the grant period shall be retained by the grant recipient and shall be added to the funds committed to the project by RUS or NTIA and the recipient. The grant recipient should use program income to further eligible project objectives...”¹³ CFA believes this provision has the effect of limiting the use of project revenue to meeting only such costs as are eligible under BIP/BTOP.

Costs and expenditures for which project funds may be utilized are specified in Part V of the NOFA.¹⁴ CFA is constrained to point out that, while that Part makes no provision for project funds to be utilized for debt service, there is a prohibition on the use of award funds “to fund operating expenses of the project, including fixed and recurring costs of a project.”¹⁵

CFA submits that both the NOFA’s failure to permit the use of project revenues for debt service, and the NOFA’s effective prohibition on the use of project revenues to fund operating costs will be extremely detrimental, if not fatal, to an Awardee’s attempt to meet the project financing credit or risk assessment considerations outlined above. Accordingly, CFA joins in the Small Business Committee’s above-cited recommendation that the Agencies provide Awardees “greater flexibility to use revenue generated through a BTOP/BIP award.”

Restrictions on Disposition of Facilities

As noted above, CFA is deeply concerned about the restrictions in the NOFA and the Loan Agreement regarding the sale, reorganization or other disposition of awardees,

¹³ NOFA, at 33113 (emphasis added) .

¹⁴ Id., at 33110-13.

¹⁵ Id., at 33112.

projects, project facilities and other project assets.¹⁶ The Small Business Committee also expressed concern about such restrictions, particularly the “10-year limitation on the sale of award funded facilities.”¹⁷ And, apparently, concerns about the cumulative effect of the various program restrictions on, at least, the sale of assets have already been voiced to an extent that the Agencies have specifically asked commenters to address that issue.¹⁸

CFA recognizes that these restrictions were intended to (a) prevent any unjust enrichment to result from the award of BIP/BTOP funds; and (b) to prevent the degradation of the Agencies’ liens or the Collateral supporting such liens. However, CFA must alert the Agencies that such provisions, as presently promulgated, not only will act as disincentives to otherwise qualified potential program Applicants, but also will negatively impact program financing credit or risk assessments. Simply put, to the extent program restrictions on sales, leases, transfers of control, or mergers and other reorganizations will operate to prevent or impair a creditor’s full exercise of its otherwise available and legal remedies, those restrictions will be viewed as having the potential to adversely affect a lender’s ability to provide project financing on a prudent, properly secured basis.

CFA recommends that the Agencies revise their restrictions on sales and transfers with an eye to limiting the objectives of such restrictions to (a) preventing enrichment that is patently unjust, while not impairing an Awardee or its principals from realizing some reasonable return on their investments of time, capital and effort; and (b)

¹⁶ There are several NOFA and Loan Agreement provisions that impose limitations on the “transferability” of assets and interests in the Awardees. For example, the Loan Agreement, in Section 7.18 Restrictions on Transfers of Property, specifies that an “Awardee shall not sell, lease or transfer any Collateral to any other person or entity (including any subsidiary or affiliate of the Awardee) without the prior written consent of the RUS.”

¹⁷ Apparently a reference the clause set forth in NOFA Section C.2, Sale or Lease of Project Assets, allowing the Agencies to waive their prohibition on “the sale or lease of any portion of the award-funded broadband” if such sale or lease occurs “after the tenth year from the date of issuance of the grant, loan or loan/grant award.”

¹⁸ See, Joint Request, Section II.E. Sale of Project Assets.

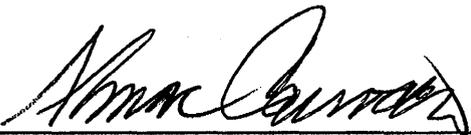
preventing unwarranted disposals of the Agencies' Collateral for less than true value. To the extent the Agencies see a need to protect themselves against degradations of their liens vis-à-vis the liens of other creditors or potential lenders, CFA suggests that such objective is best served through the good faith negotiation of appropriate intercreditor agreements on an ad hoc basis, as discussed above.

Conclusion

As demonstrated above, several of the BIP and BTOP program requirements and prohibitions have unintended, but adverse consequences that threaten to inhibit, if not prevent, the availability of private sector funding for BIP/BTOP projects. Accordingly, the Agencies should reexamine the rules promulgated by the NOFA, and revise or eliminate those rules, at least before adapting or adopting them for the anticipated notice of funds availability for the second round of BIP/BTOP funding.¹⁹

Respectfully submitted,

COMMUNICATIONS FINANCE ASSOCIATION

By: 

A. Thomas Carroccio
A. Thomas Carroccio PLLC
1140 Nineteenth Street, N.W., Suite 600
Washington, D. C. 20036
202.296.8870
Tom.Carroccio@CarroccioLaw.com

Counsel for
Communications Finance Association

¹⁹ Although the Agencies rejected any suggestion that the rules promulgated in the NOFA be modified for purposes of the first round of funding, CFA urges the Agencies to rethink their position in that regard. In the long-run, pre-award modifications will be more credible, efficient and efficacious than case-by-case waivers necessitated by Awardee's inability to obtain adequate private sector funding because of the unintended barriers existing under the extant program rules.