Before the
Federal Communications Commission

In the Matter of	)	
	)	**GN Docket Nos. 09-47,**
National Broadband Plan	)	**09-51 & 09-137**
	)	

COMMENTS – NBP PUBLIC NOTICE NO. 28

The Communications Finance Association ("CFA"), by its counsel and in response to National Broadband Plan Public Notice No. 28 ("PN-28"),[1] hereby submits limited comments regarding the challenges to broadband deployment financing. For its limited comments, CFA states as follows:

Background

CFA is a voluntary 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 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. CFA's members and their affiliates are, and have been, involved in the financing of the construction, acquisition and operation of numerous telecommunications and media facilities and systems licensed by the Federal Communications Commission ("Commission").

Comments

In order to attract equity and debt financing from the private sector, a broadband project will need to present a risk profile that is reasonably attractive

[1] DA 09-2610, released December 18, 2009.

on wireless licenses issued by the Commission.[3] CFA submits that government financing conditions such as these are counter-productive to the ability of broadband projects to obtain private sector financing, as such provisions reduce the value and security of a lender's collateral. The national broadband plan could do much to encourage private sector financing simply by adopting provisions that would put governmental and private sector financing on more equal footings.

State Regulation of Telecommunications Financing

CFA notes that the facilities and operations of many broadband projects will implicate the regulatory schemes of the various states. Several of those state regulatory schemes include provisions requiring service providers falling within, or submitting to, such schemes to obtain state regulatory clearances for equity and debt financings. In addition, certain of those regulatory schemes impose draconian penalties, including the voiding of the equity or debt interest (and attendant security interests), for failing to obtain required clearances. These non-uniform requirements will interject unwarranted additional costs, delays and risks into the risk profiles of affected broadband projects. Accordingly, the Commission should give strong consideration to encouraging, if not requiring, uniform and efficient standards for state regulation of any financing for broadband projects.

Security Interests in Licenses and Authorizations

CFA suggests that the Commission's development of the national broadband plan mandated by the Recovery Act provides the perfect opportunity for a long overdue reconsideration of the Commission's prohibition on direct liens

[3] See, BIP/BTOP Comments, and *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).

on Commission-issued licenses and authorizations. Lenders' inability to obtain direct liens on certain of their borrowers' principal assets (i.e., Commission-issued licenses and authorizations) is the most often cited negative risk factor in communications finance. Permitting such liens would provide private sources of financing with important assurances that those most important security interests are, in fact, secure.

Access to Spectrum

Many providers of broadband services presently utilize "unlicensed" spectrum. Such use currently is afforded minimal protection against interference and displacement. CFA urges the Commission to expand the availability of hybrid licensing or other low cost spectrum access schemes into the national broadband plan. Potential investors and lenders need to be assured that the business models for which they are asked to provide financing will not have their operations impaired by any loss or diminution of relied upon spectrum.

Need for Effective Remedies

An often overlooked, but essential, factor in financial risk assessment is the availability of effective "remedies" in the event of defaults. Among the remedies the Commission should consider providing in connection with the national broadband plan are the following:

(1) Presently, "workouts" of financially distressed communications entities are subjected to excessive delays and complications associated with regulatory procedures, such as those required by Section 310(d) of the Communications Act. CFA urges the Commission to consider and adopt

expedited transfer and assignment procedures that could be utilized to facilitate both foreclosures and cooperative restructurings.

(2) Given the global nature of the financial markets, it must be anticipated that significant portions of the private sector funds necessary to finance broadband projects will need to come from "foreign" sources. The Commission should provide non-U. S. financial institutions with mechanisms (e.g., insulated workout trusts) by which those lenders can recognize on the value of their collateral without being unduly restricted by otherwise operative limitations on foreign ownership and control.

(3) Various service-specific rules impose strict buildout deadlines on broadband spectrum licensees. Such deadlines constitute additional risks that negatively affect a potential lender's credit analysis. The Commission could reduce the negative credit impact of buildout deadlines by affording lenders additional time to meet the buildout requirements applicable to any licenses acquired in connection with a foreclosure on, or other workout of, a distressed broadband project. Such an arrangement also would have the benefit of expeditiously providing service to the affected areas and populations.

(4) The Commission presently imposes minimum holding periods and unjust enrichment provisions on its broadband spectrum licensees. However, any lender that ultimately needs to resort to foreclosure or other workout arrangements to rescue its collateral's remaining value, will already have suffered significant penalties by virtue of the delays and expenses attendant with a distressed loan. Accordingly, the Commission should adopt procedures to

exempt foreclosures and other workouts from the prohibitions and penalties of the holding periods and unjust enrichment rules.

The above discussion is intended to both alert the Commission to current factors adversely affecting the willingness of investors and lenders to provide financing to the communications industry. As the Commission develops the national broadband plan, it also has the opportunity to remove the identified constraints on private sector financing of the industry.

Conclusion

CFA appreciates the opportunity to provide this input to the Commission's efforts to develop an effective national broadband plan, and urges the Commission to give consideration to mechanisms addressing the issues set forth above.

Respectfully submitted,

COMMUNICATIONS FINANCE ASSOCIATION

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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

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[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 liened 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.

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[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...
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> [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...
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> [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]
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> 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

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[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

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[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,

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[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)

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[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,

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[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.