

**DEPARTMENT OF COMMERCE**

**National Telecommunications and Information Administration**

**DEPARTMENT OF AGRICULTURE**

**Rural Utilities Service**

<b>Joint request for information: American Recovery and Reinvestment Act of 2009 Broadband Initiatives</b>	<b>Docket No. 090309298-9299-01</b>
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**COMMENTS OF THE BENTON FOUNDATION**

## **Executive Summary**

United States communications law did not begin nor does it end with the Recovery Act; it is historically rooted in a commitment to making the best communications networks available and affordable to all Americans. The Nation's shared prosperity depends on extending broadband's reach. Since truly universal, affordable is beyond the resources allocated in the Recovery Act, the projects that NTIA and RUS fund, then, should be viewed as demonstrations of where we're headed.

Since the five purposes of the Broadband Technology Opportunities Program encompass five goals we might include in planning our broadband future, the NTIA should ensure that there are funded demonstrations in each of these five areas. Although each purpose need not be funded equally, some funds should be reserved to ensure that each purpose is addressed. By promoting both the supply of and the demand for broadband, the NTIA grant program will help establish a "virtuous circle" in which an increased supply of robust and affordable broadband stimulates creation of applications that produce wide-ranging, valuable social benefits that then cause citizens to demand even more robust and affordable broadband; which in turn stimulates greater investment in more robust broadband; which then stimulates the creation of even more beneficial applications that cause citizens to demand even more robust and affordable broadband. The NTIA should give priority to projects that leverage these broadband-related programs as well.

NTIA must retain sole authority to approve broadband grant awards. The program demands smart government and NTIA must remain the central figure in the responsibility of dispersing and accounting for use of Recovery Act funds. If a State takes an active role in coalescing stakeholders or aggregating demand... if the State, in short, is active in the creation, endorsement or certification of an application, NTIA should require the State to demonstrate how the project's goals address the State's current broadband priorities. NTIA should also reach out to every state utility regulatory agency and determine if applicants have ever had complaints filed against them and how those complaints were resolved. Our stimulus dollars should not flow to bad actors in the telecommunications sector.

In crafting a public interest eligibility rule NTIA must set conditions, and not merely provide a blanket approval or disapproval for a class of entities. To be clear, the law does not require that private entities be awarded grants, it requires that their eligibility be bounded by the public interest. There's a fundamental difference between the public missions of governments and non-profits and the commercial interests of for-profit companies. No company should be eligible for Recovery Act grants if it is already under a legal obligation to provide broadband services in its service area.

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## **I. Introduction**

Pursuant to the Joint Request for Information and Notice of Public Meeting released by the National Telecommunications and Information Administration (NTIA) and the Rural Utilities Service (RUS) on March 10<sup>th</sup> 2009, the Benton Foundation,<sup>1</sup> hereby submits these initial comments while retaining the right to submit additional comments at a later date.

Section 6001 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) requires NTIA to establish the Broadband Technology Opportunities Program (BTOP) and the Rural Utilities Service (RUS) to make grants and loans for the deployment and construction of broadband systems. The Recovery Act also makes \$7.2 billion available for these programs. To coordinate and facilitate the development of these programs in a timely manner, the Benton Foundation addresses the first three questions in the comments below.

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<sup>1</sup> The mission of the Benton Foundation is to articulate a public interest vision for the digital age and to demonstrate the value of communications for solving social problems. Benton is a longtime supporter of research on universal service and the potential of high-speed Internet connections for improving Americans' lives.

## **II. The Purposes of the NTIA Broadband Grant Program are to Demonstrate the Potential of Broadband to Improve People's Lives**

Section 6001(b) of the Recovery Act identifies five purposes for BTOP.<sup>2</sup> With these in mind, the NTIA asks three questions<sup>3</sup>

United States communications law did not begin nor does it end with the Recovery Act; it is historically rooted in a commitment to making the best communications networks available and affordable to all Americans.<sup>4</sup> Congress has determined that high-speed Internet access, broadband, is our future.<sup>5</sup> The Federal Communications Commission

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<sup>2</sup> American Recover an Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (Recover Act). Section 6001(b) states that the purposes of the program are to –

- 1) provide access to broadband service to consumers residing in unserved areas of the United States;
- 2) provide improved access to broadband service to consumers residing in underserved areas of the United States;
- 3) provide broadband education, awareness, training, access, equipment, and support to –
  - (A) schools, libraries, medical and healthcare providers, community colleges, and other institutions of higher education, and other community support organizations and entities to facilitate greater use of broadband service by or through these organizations;
  - (B) organizations and agencies that provide outreach, access, equipment, and support services to facilitate greater use of broadband service by low-income, unemployed, aged, and otherwise vulnerable populations; and
  - (C) job-creating strategic facilities located within a State-designated economic zone, Economic Development District designated by the Department of Commerce, Renewal Community or Empowerment Zone designated by the Department of Housing and Urban Development, or Enterprise Community designated by the Department of Agriculture;
- 4) improve access to, and use, of broadband service by public safety agencies; and
- 5) stimulate the demand for broadband, economic growth, and job creation.

<sup>3</sup> Joint Request for Information and Notice of Public Meetings, 47 Fed. Reg. 10717 (Mar 12, 2009).

a. Should a certain percentage of grant funds be apportioned to each category?

b. Should applicants be encouraged to address more than one purpose?

c. How should the BTOP leverage or respond to the other broadband-related portions of the Recovery Act, including the United States Department of Agriculture (USDA) grants and loans program as well as the portions of the Recovery Act that address smart grids, health information technology, education, and transportation infrastructure?

<sup>4</sup> Communications Act of 1934, as amended Sec 1.

<sup>5</sup> Telecommunications Act of 1996 Sec 706.

("FCC") finds that broadband is vital to economic development.<sup>6</sup> The Nation's shared prosperity depends on extending broadband's reach.

Realizing truly universal broadband is the Nation's goal, but it is beyond the resources allocated in the Recovery Act. Estimates on bringing next-generation, high-speed Internet to all rural areas alone run in the range of \$12 billion<sup>7</sup> therefore, the provisions of the Recovery Act will not get us to universal, affordable broadband. The projects that NTIA and RUS fund, then, should be viewed as demonstrations of where we're headed. The Recovery Act mandates that at least one NTIA grant be awarded in each state.<sup>8</sup> The Benton Foundation applauds with this mandate that will ensure that residents in each state will be able to point to a broadband project that improves people's lives.

Since the five purposes of BTOP encompass five goals we might include in planning our broadband future, the NTIA should ensure that there are funded demonstrations in each of these five areas. Although each purpose need not be funded equally, some funds should be reserved to ensure that each purpose is addressed. If no or few applicants address one or more purposes in the first round of funding, NTIA should conduct

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<sup>6</sup> Fifth Report, 23 FCC Rcd 9615, (2008), p.74.

<sup>7</sup> The National Exchange Carrier Association estimates the additional investment cost of upgrading 5.9 million rural telephone access lines to 8 mbps -- a level capable of delivering voice, video, and data to rural customers -- is \$11.9 billion. Adding operating expenses, overhead expenses, and depreciation expenses, plus a return on investment, translates into a \$3 billion annual revenue requirement, as estimated by NECA. National Exchange Carrier Association. "The Packet Train Needs to Stop at Every Door." June 2006.

<sup>8</sup> Section 6001 (h)(1)

increased outreach to potential applicants and priority should be given to grant applications in these areas in subsequent funding rounds.

The Recovery Act provides a down payment on realizing a true broadband future with provisions for smart energy grids, health information technology, online education, and transportation. The NTIA should give priority to projects that leverage these broadband-related programs as well.<sup>9</sup> The NTIA should not lose sight of the bigger broadband picture, which the FCC will unveil over the next year.<sup>10</sup> Congress asked the FCC to draw up a National Broadband Strategy that addresses using "broadband to improve consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes."<sup>11</sup> BTOP grants should provide a critical demonstration of how broadband can improve Americans' lives in a host of ways.

Taken as a whole, the BTOP provisions of the Recovery Act as well as the additional broadband-related provisions in other sections of the law address, in part, both broadband supply and demand issues. By promoting both the supply *of* and the demand *for* broadband, the NTIA grant program will help establish a "virtuous circle" in which an increased supply of robust and affordable broadband stimulates creation of applications

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<sup>9</sup> See Section 6001(a): The Assistant Secretary shall ensure that the program complements and enhances and does not conflict with other Federal broadband initiatives and programs.

<sup>10</sup> Section 6001(k)(1)

<sup>11</sup> Section 6001 (k)(2)(D)

that produce wide-ranging, valuable social benefits that then cause citizens to demand even more robust and affordable broadband; which in turn stimulates greater investment in more robust broadband; which then stimulates the creation of even more beneficial applications that cause citizens to demand even more robust and affordable broadband.<sup>12</sup>

Finally, without minimizing the specific purposes of BTOP, NTIA should adhere to the overarching goals of the Recovery Act. The specific goals of the law are to:

- preserve and create jobs and promote economic recovery,
- assist those most impacted by the recession,
- provide investments needed to increase economic efficiency by spurring technological advances in science and health,
- invest in infrastructure that will provide long-term economic benefits, and
- stabilize state and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.<sup>13</sup>

In structuring the grant program, then, the NTIA should ask grantees to consider, estimate and demonstrate:

- how many American jobs have been created and/or preserved by the project;
- the number of people most impacted by the recession that are targeted for service;
- how the project will spur technological advances in science and health;

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<sup>12</sup> Rintel, Jonathan, *An Action Plan for America: Using Technology and Innovation to Address our Nation's Critical Challenges*, Benton Foundation, 2008. (see Attachment A)

<sup>13</sup> Section 3 of the Recovery Act

- how these broadband investments will provide long-term economic benefits; and
- the impact the grants will have on state budgets, if any.

### **III. States Should Not Determine Award Winners**

The Recovery Act requires that, to the extent practical, the NTIA award at least one broadband grant in every State.<sup>14</sup> As the NTIA grants should be viewed as funding demonstrations of our digital, broadband future, every citizen should be able to point to a project that has improved lives in their own state. The NTIA should do whatever is necessary to ensure that outreach is done to potential applicants, so that at least one high-quality, innovative project is supported in each state.

The Recovery Act also allows the NTIA to consult a State, the District of Columbia, or territory or possession of the United States with respect to —

1. the identification of unserved or underserved areas; and
2. the allocation of grant funds within that State for projects in or affecting the State.<sup>15</sup>

From Congress, there is a recognition that States have a unique familiarity with local economic, demographic, and market conditions that could contribute to the success of the

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<sup>14</sup> Section 6001(h)(1)

<sup>15</sup> Section 6001(h)(1)

broadband grant program.<sup>16</sup> The language in the law is meant to encourage States to coalesce stakeholders and partners, assess community needs, aggregate demand for services, and evaluate demand for technical assistance. Congress expects the NTIA to seek advice and assistance from the States in reviewing grant applications, *as long as the NTIA retains the sole authority to approve the awards.*<sup>17</sup> Congress also intended the NTIA to assist the States in post-grant monitoring to ensure that recipients comply fully with the terms and conditions of their grants.<sup>18</sup>

NTIA asks four questions:

- a. How should the grant program consider State priorities in awarding grants?*
- b. What is the appropriate role for States in selecting projects for funding?*
- c. How should NTIA resolve differences among groups or constituencies within a State in establishing priorities for funding?*
- d. How should NTIA ensure that projects proposed by States are well-executed and produce worthwhile and measurable results?*<sup>19</sup>

The NTIA should move swiftly to define the parameters of the NTIA-State consultations while clarifying that States are not to determine who will receive grants. There seems to be a range of possible State involvement. Question d. above recognizes that Congress was looking for State proposals for grants. Some States may want to endorse proposals or certify that proposals address State priorities.

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<sup>16</sup> Report 111-16 page 774. Conference Report to Accompany H.R. 1 February 12, 2009.

<sup>17</sup> *Ibid.*

<sup>18</sup> Section 6001(e)(7)

<sup>19</sup> 47 Fed. Reg. 10717 (Mar. 12 2009).

First, NTIA should make sure that each State wants to have a role. The NTIA should contact every governor's office and ask it to identify the lead state agency or office for consultation and name a contact person. The lead agency or office should be asked to articulate the State's broadband priorities. This information should be published on the NTIA's website before the first round of applications is due. The information would aid applicants and contribute to transparency.

NTIA should make additional requirements of States concurrent with their involvement with the program. If a State takes an active role in coalescing stakeholders or aggregating demand... if the State, in short, is active in the creation, endorsement or certification of an application, NTIA should require the State to demonstrate how the project's goals address the State's current broadband priorities.

NTIA should seek the expertise and advice of States, but cannot abdicate responsibility and control of Recovery Act funds to the States. States should not act as the first level of reduction or exclusion before the application is reviewed by the NTIA. The Recovery Act plainly defines NTIA with the responsibility to determine how and when grants should be awarded. If States are awarded grants to re-grant within the State, NTIA would lose control but retain its responsibilities under the Recovery Act. Although some may argue that state re-granting would simplify the program, in fact, it would raise its own set of complications. For example, how would the monies be fairly distributed to the States –

equally, by size of population, by size of area, by some measure of need? If States receive money in partnership or as a re-granter must be subject to recovery the Act accountability process. The Recovery Act includes money for administrative costs that would include this.

NTIA should reach out to every state utility regulatory agency and determine if applicants have ever had complaints filed against them and how those complaints were resolved. NTIA should also determine if applicants have any unfulfilled legal obligations to States (i.e. merger conditions). Our stimulus dollars should not flow to bad actors in the telecommunications sector.

Finally, in identifying unserved or underserved areas, a State's assessment of need could be most helpful if it is *data driven*. This data should be publicly available for all to evaluate; it should demonstrate which carriers are serving where, with what service, at what price; and it should have been collected by entities that do not have a conflict of interest (i.e. telecommunications carriers, organizations with board members from the telecommunications industry or organizations receiving contributions or memberships from the telecom industry).

#### **IV. NTIA must adopt an Effective Public Interest Rule for Broadband Grant Eligibility**

The Recovery Act identifies two types of entities eligible to apply for and win NTIA broadband grants -- 1) state and local governments and 2) non-profit organizations.<sup>20</sup> But the Act includes an opening for any other entity to become eligible. Specifically the Recovery Act says "any other entity, including a broadband service or infrastructure provider, that the [NTIA] finds by rule to be in the public interest. In establishing such rule, the [NTIA] shall to the extent practicable promote the purposes of this section in a technologically neutral manner."<sup>21</sup>

The Recovery Act's conference report, although it is not governing, indicates an intent to create a broad definition of eligible entities -- "as many entities as possible," in fact -- including wireless carriers, wireline carriers, backhaul providers, satellite carriers, public-private partnerships, and tower companies.<sup>22</sup> These carriers and companies are the private entities that could contribute to the Recovery Act's build-out goals, but not *all* the goals of the Act.

This language means that the NTIA is required to determine by rule whether it is in the public interest and in line with the overall purposes of the grants to open-up eligibility.

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<sup>20</sup> Section 6001(e)

<sup>21</sup> Section 6001(e)(1) (C)

<sup>22</sup> Report 111-16 page 775.

And, so, *the NTIA asks what standard to apply to determine if it is in the public interest for entities to be eligible.*<sup>23</sup>

The phrase "in the public interest" is paramount here.<sup>24</sup> Congress wanted to expand the class of recipients, but only on terms that serve the public interest. This means that NTIA must set conditions, and not merely provide a blanket approval or disapproval for a class of entities. To be clear, the law does not require that private entities be awarded grants, it requires that their eligibility be bounded by the public interest.<sup>25</sup> There's a fundamental difference between the public missions of governments and non-profits and the commercial interests of for-profit companies.

The law clearly favors publicly-accountable entities in the creation of the NTIA grant program.<sup>26</sup> It is a 180 degree turn from the previous philosophy that only the private sector should be involved, and that the government and non-profits should only become involved in the event of "market failure."<sup>27</sup> Private broadband providers argue that in areas in the US that are unserved or underserved for broadband, economies do not exist to make service sustainable. The Recovery Act, then, finds it is in the public interest to correct this.<sup>28</sup>

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<sup>23</sup> 47 Fed. Reg. 10717 (Mar. 12 2009).

<sup>24</sup> Section 6001(e)(1) (C)

<sup>25</sup> Id.

<sup>26</sup> Section 6000(e)

<sup>27</sup> Feld, Harold. "From Broadband Market to Broadband Ecology" Public Knowledge. February 18, 2009 (see <http://www.publicknowledge.org/node/1999>).

<sup>28</sup> Section 6001(b)

Governments and non-profits share a number of characteristics that ensure they pursue altruistic goals:

- their missions are to undertake activities whose goal is not primarily to earn a profit;
- no person owns shares of a government or non-profit or interests in their property; and
- the property and any income of a government or non-profit are not distributed to any "owners," but instead are recycled into their public benefit mission and activities.

Both governments and nonprofit organizations, in a sense, are "owned" by and accountable to the public. They have extensive reporting and disclosure requirements, in some cases well beyond those imposed on for-profit enterprises. They also have limitations on activities meant to influence public opinion and the legislative process.

As the NTIA crafts the "in the public interest" rule, it should keep in mind these characteristics of non-profits and governments to ensure all eligible entities are aligned with the public interest and the goals of the Recovery Act. The NTIA's rules should counterbalance the characteristics of for-profits -- maximizing revenues and values for shareholders -- that may conflict with the broader public's interest and ensure that entities' use of government funds are transparent so the public may hold them accountable.

The public interest rule, then, should require that applicants have a statement of values and code of ethics, a well-defined conflict-of-interest policy, and a Whistleblower Protection policy. The eligibility rule should require applicants to allow independent reviews of their financial procedures, controls, and policies in order to provide strong financial safeguards. And, to the extent a for-profit entity uses an award to improve or extend a portion of an existing project or network they should have to adhere to these conditions to the entire network benefited.

Since the NTIA is, in essence, donating money to these entities in a shared, public mission as defined by the Act, the entities should adhere to a donor bill of rights. The public should retain the rights to:

1. Be informed of the organization's mission, of the way the organization intends to use donated resources, and of its capacity to use the grant effectively for their intended purposes as defined by the Recovery Act.
2. Be informed of the identity of those serving on the organization's governing board, and to expect the board to exercise prudent judgment in its stewardship responsibilities.
3. Have access to the organization's most recent financial statements.
4. Be assured our grants will be used for the purposes for which they were given.

5. Receive appropriate credit for the funding of projects.
6. Be assured that information about our grants are easily accessible via the Internet. Specifically, all information about NTIA-funded projects should be shared immediately for the NTIA mapping project and with the Federal Communications Commission for use in its National Broadband Strategy.
7. Be able to track an entities' solicitation of NTIA grants.
8. Directly or through the NTIA or other government agency question the entities about a grant and to receive prompt, truthful and forthright answers.

At a March 16 public meeting at the Department of Commerce, a coalition of commercial telecommunications providers suggested that any currently licensed or sanctioned provider be automatically eligible for NTIA broadband grants.<sup>29</sup> They tout their experience and expertise. At the same meeting, a member of the National Association of Regulatory Utility Commissioners suggested any entity in a public-private partnership be eligible.<sup>30</sup>

The Benton Foundation has reservations on both proposals. First, BTOP grants are, in part, for the purpose of broadband buildout. Currently, there is no federal license or state or local franchise for the provision of broadband. Therefore, the currently-held licenses

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<sup>29</sup> 47 Fed. Reg. 10717 (Mar. 12 2009), March 16, 2009 Meeting.

<sup>30</sup> Id.

do not guarantee the provider is or will build and provide broadband in the public interest. Moreover, if a currently-held license or franchise is used a litmus test for BTOP eligibility, NTIA should apply the public interest obligations of that license or franchise to the providers planed network. If any currently-licensed/sanctioned provider is eligible, the NTIA should conduct a review with the regulatory agencies that oversee these applicants to make sure they are in good standing. Our stimulus dollars should not flow to bad actors in the telecommunications sector. There should also be a review of any existing legal obligations (i.e. merger conditions) on the provider. Recovery Act funds are meant for projects that would not have been without an award<sup>31</sup> – not projects that providers had previously agreed to do.

Finally, if a State is active in the creation, endorsement or certification of an application, the State should be required to demonstrate how the project's goals address the State's current broadband priorities.

## **V. Conclusion**

For the above stated reasons, the NTIA should adhere closely to the historical commitment of U.S. communications law making the best communications networks available and affordable to all Americans. Key element in this effort will be ensuring that each state and each program goal is addressed by at least one grant award. The NTIA should be thinking holistically, leveraging the many broadband-related investments envisioned by the Recovery Act and addressing both broadband supply and demand

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<sup>31</sup> Sec 6001(e)(3).

issues. Outreach to States should be done immediately to identify their broadband priorities and plans so that applicants will know how to address them. And, finally, the NTIA must adopt and enforce a strong public interest eligibility rule that will make private entity applicants and awardees accountable to the public.

Respectfully submitted,

By: /s/ Charles Benton, Chair

Charles Benton  
Chairman and CEO  
BENTON FOUNDATION  
1625 K Street, NW 11th Floor  
Washington, DC 20006  
847.328.3040  
[cbenton@benton.org](mailto:cbenton@benton.org)

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