

**Before the  
National Telecommunications and Information Administration  
&  
The Rural Utilities Service**

In the Matter of )  
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American Recovery and Reinvestment Act ) Docket No. 090309298-9299-01  
Broadband Initiatives )

**COMMENTS OF SMITH BAGLEY, INC.**

Smith Bagley, Inc. (“SBI”), by counsel, hereby provides comments, as set forth in the Federal Register publication of March 12, 2009.<sup>1</sup>

**I. Introduction.**

SBI provides commercial mobile wireless services in northeastern Arizona, northwestern New Mexico and southern Utah, serving five Native American reservations. SBI is an eligible telecommunications carrier pursuant to the federal universal service fund (“USF”) program, eligible to provide Lifeline service to tens of thousands of low-income households on tribal lands. In addition to participating in the federal USF program, the company has received two RUS grants that have enabled the company to extend broadband service to some of the most remote areas of the Navajo Nation. SBI appreciates the opportunity to provide these brief comments on how programs established by the American Recovery and Reinvestment Act of 2009 (“ARRA”)<sup>2</sup> can improve broadband availability in rural America.

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<sup>1</sup> NTIA & RUS, Joint Request for Information, American Recovery and Reinvestment Act of 2009 Broadband Initiatives, 74 F.R. 10716 (Mar. 12, 2009).

<sup>2</sup> Pub. L. 111-5, 123 Stat. 115 (Division A, Title I; Division B, Title VI).

## II. ARRA Programs Should Dovetail with the Universal Service Goals Established by Congress in the 1996 Act.

As an overarching matter, grants made pursuant to ARRA should, to the greatest extent possible, avoid placing providers of broadband services on different regulatory levels. ARRA program grants should dovetail with the principle set out in Section 254 of the Communications Act of 1934 (“Act”), as added by the Telecommunications Act of 1996:

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications *and information services, including interexchange services and advanced telecommunications and information services*, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.<sup>3</sup>

This principle is the touchstone that Congress set before the Federal Communications Commission (“FCC”) in promoting investment in rural and high-cost areas. NTIA and RUS should devise rules for their grant and loan programs that are not inconsistent with the FCC’s universal service goals, and wherever possible, promote the objectives set forth above.

It is not enough to invest in a single service provider that will require substantial investment in expensive regulatory structures for years to come. Indeed, the ARRA instructs RUS to give priority to applications for broadband systems that will deliver end users a choice of more than one service provider.<sup>4</sup> Consistent with that directive and the FCC’s universal service principle set forth above, selection criteria should seek to promote the principle that consumers in rural and high-cost areas have reasonably comparable choices in broadband service providers as are available in urban areas, at reasonably comparable prices.

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<sup>3</sup> 47 U.S.C. § 254(b)(3) (emphasis added).

<sup>4</sup> ARRA (Division A, Title I, Rural Utilities Service, Distance Learning, Telemedicine and Broadband Program) (“priority for awarding [RUS] funds shall be given to project applications for broadband systems that will deliver end users a choice of more than one service provider”).

### **III. How Can NTIA Determine That a Need Exists and That Private Investment Is Not Displaced?**

Applicants should be required to submit a demonstration that the area to be served is either unserved or underserved. Applicants should have flexibility to make individualized showings, as there are many variables in project plans. For example, an applicant may wish to utilize mapping software, carrier web site maps, or requests for service from consumers.

NTIA should also consider imposing a requirement that an applicant must certify under penalty of perjury, and provide a detailed showing, that its project would not be funded from internally generated capital or other company sources (such as loans or sale of equity) within the time period specified in the statute, if the proposed grant is not made.<sup>5</sup>

### **IV. Establishing Effective and Efficient Means of Carrying Out Program Requirements by the End of Fiscal Year 2010.**

In order to be efficient, NTIA must keep as much of the selection process at the federal level as possible. Moving decision making to the states will greatly increase program cost, result in delayed and inconsistent awards, and introduce significant political considerations in each jurisdiction, favoring parties that have established relationships with state public utility commissions.<sup>6</sup>

With respect to unserved and underserved areas, NTIA should consider establishing a template requiring all applicants to submit an Excel spreadsheet of census blocks, along with the estimated number of unserved and underserved households, businesses and areas where citizens

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<sup>5</sup> See ARRA, § 6001(3)(3).

<sup>6</sup> Delay is a particular concern because ARRA requires NTIA to make all grant awards before the end of fiscal year 2010 and to obtain assurances from grant recipients that projects will be substantially completed according to timelines that do not exceed two years following the date of the award. ARRA, §§ 6001(d)(2), 6001(d)(3).

use mobile broadband services. This will facilitate the agency's ability to make comparisons and score proposals.

NTIA must hew tightly to the statute and minimize the establishment of new rules. The further NTIA strays into new ground, the more likely litigation or other uncertainty will delay implementation.

For example, NTIA should adopt the FCC's *Broadband Policy Statement* without modification.<sup>7</sup>

NTIA should not extend interconnection obligations set forth in Section 251 of the Act.<sup>8</sup>

NTIA should not mandate open access or other quality of service rules.

In sum, NTIA should leave broader policy judgments to the Congress and FCC, to be applied to all telecommunications and information service providers, irrespective of whether they are recipients of ARRA funding. Parties using stimulus funding to build networks should not be placed on a different regulatory plane than other, potentially competing providers who do not take stimulus funds.

Applicants able to leverage existing infrastructure to lower costs and deliver substantial value to taxpayers should have additional points added to their applications. Some carriers may be able to overlay facilities, others may leverage existing facilities such as switching and back haul to efficiently "edge out" into unserved areas.

Broadband and throughput speeds should not be defined terms for purposes of the ARRA grant and loan programs. Instead, NTIA should establish an appropriate scoring system that

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<sup>7</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket No. 02-33, CC Docket No. 01-337, CC Docket Nos. 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) ("*Broadband Policy Statement*").

<sup>8</sup> 47 U.S.C. § 251.

rewards higher speeds. This will ensure that applicants have an incentive to offer the fastest speed possible in order to succeed in obtaining a grant.<sup>9</sup>

States may play a significant role in ensuring program compliance. NTIA should streamline its efforts by having states certify as to program compliance each year, similar to the manner in which states certify that an eligible telecommunications carrier is lawfully using universal service support. If a state cannot, or refuses to, certify, then NTIA may trigger compliance steps or commence a proceeding to suspend funding.

## **V. Native American Lands Must Be Given Priority.**

Having served five Native American reservations over nearly twenty years, SBI can attest to the myriad of challenges to driving infrastructure development on tribal lands. They are geographic, demographic, administrative, financial, technical, and many more.<sup>10</sup> To date, federal universal service funding has assisted the company in building mobile voice networks throughout much of the tribal lands where the company is licensed to serve. Yet there is much more to do, as tribal citizens' expectations for service availability and service quality are rising along with the rest of the nation.

Were NTIA and RUS to make a list of areas most in need of infrastructure investment, based on broadband service availability and quality, tribal lands served by SBI must rank at or near the top. For these areas to receive meaningful investment, ARRA program rules must make investment in such areas a priority. Many tribal lands have no wireline voice services, much less

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<sup>9</sup> See ARRA, § 6001(h)(2)(B) (NTIA, in awarding grants, shall consider whether an application will, if approved, provide the greatest speed possible to the greatest population of users in the area to be served).

<sup>10</sup> For example, the Government Accountability Office has found that “[g]eographic isolation has increased the cost of providing service on Navajo lands and limited the number of companies interested in providing telecommunications services.” GAO, Report to Congressional Requesters, “Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands,” GAO-06-189, rel. Jan. 2006, at 78.

a broadband service. Like many foreign countries that have never had landline telephone networks, a significant technological leap frogging can be effectuated in these areas with mobile wireless broadband infrastructure, available now and in the near future.

In order for the benefits of modern infrastructure projects to flow, priority must be given to applications proposing to bring broadband service to tribal lands.

## **VI. Program Funds for Devices Must Be Directed Toward Tribal Lands.**

Title II of the ARRA states, in pertinent part:

[N]ot less than \$200,000,000 shall be available for competitive grants for expanding public computer center capacity, including at community colleges and public libraries; not less than \$250,000,000 shall be available for competitive grants for innovative programs to encourage sustainable adoption of broadband service.<sup>11</sup>

NTIA should make clear that these two Congressional directives authorize NTIA to allow program participants to receive funds for innovative programs that include the use of federal funds to purchase hardware used to access broadband.

With respect to the grant for public computer center capacity, participants should be encouraged to use program funds to purchase not only computers, but the communications devices needed to access the Internet. In the case of wireless broadband, these devices are known as “air cards” or “USB Modems.”

With respect to grants for programs encouraging sustainable adoption of broadband service, some program funds should be dedicated to reducing the cost of broadband-capable mobile wireless handsets.

In both cases, defraying the cost of these devices is critical to sustainability. When SBI began its “VisionOne®” service on tribal lands, the monthly cost of a service plan and the cost of

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<sup>11</sup> ARRA, Title II, Commerce, Justice, Science, and Related Agencies, Department of Commerce, National Telecommunications and Information Administration, Broadband Technology Opportunities Program.

a handset were two barriers to sustainability that had to be surmounted. Fortunately for SBI, CTIA–The Wireless Association,® through its non-profit foundation, donated phones to assist the initial roll-out of SBI’s new service, which allowed consumers to access the network, ensuring that SBI’s investment in the region would be sustainable.

Today, the wholesale cost of 3G-capable handsets, needed to take advantage of mobile broadband services, is \$200 or more. In some tribal lands, where per-capita income levels remain well below those of the rest of the nation, access to low-cost handsets will be critical to sustaining the capital investments needed to build out 3G networks. SBI will undoubtedly subsidize handset costs for consumers to some extent, however NTIA should make clear that innovative programs that share the burden of such subsidies are an appropriate use of program funds.

SBI appreciates the opportunity to provide these comments and welcomes any questions or follow up information requests that the agencies may have.

Respectfully submitted,  
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