

**Before the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
And the
RURAL UTILITIES SERVICE
Washington, D.C.**

In the Matter of

American Recovery and Reinvestment
Act of 2009 Broadband Initiatives

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Docket No. 090309298-9299-01

COMMENTS OF AT&T INC.

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EXECUTIVE SUMMARY

AT&T applauds NTIA and RUS for their extraordinary efforts to solicit public input on how to implement the American Recovery and Reinvestment Act of 2009.¹ The intensity of interest testifies to the importance of the Recovery Act's job-creation and broadband-development goals and the need to get funding quickly into the hands of the entities most committed to meeting those goals.

AT&T is strongly committed to broadband investment and deployment. We plan to invest nearly \$18 billion in 2009 and add nearly 3,000 jobs to support our mobility, broadband, and video businesses. Approximately two-thirds of our 2009 investment will extend and enhance our wireless and wired broadband networks to provide more coverage, speed, and capabilities. The broadband elements of the Recovery Act can complement this private investment and further spur demand for broadband investment. AT&T therefore looks forward to assisting federal, state and local governments to help make the Act's programs a success.

AT&T respectfully submits that the most efficient way to disburse funding would be to follow three critical guidelines:

- **Prioritize in both unserved and underserved areas direct grants to public and non-profit anchor institutions so that they can buy the broadband services and equipment they need to fulfill their missions.** These institutions—which include schools, libraries, state agencies, and health-care organizations—are automatically statutorily eligible for funding without any further administrative findings; they have projects on the planning board that are ready for immediate implementation; and they are committed to serving the vulnerable populations that the Recovery Act seeks to protect. By directing grants to these anchor institutions, NTIA can quickly get funding to projects that fulfill the statutory goals of the Act.

¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009) (“Act” or “Recovery Act”). The Act creates the Broadband Technology Opportunities Program (“BTOP”) administered by NTIA, and the Distance Learning, Telemedicine, and Broadband Program administered by RUS (“RUS Program”).

- **When considering direct funding for service providers, focus the public benefits of the broadband programs on the areas most in need.** This can be accomplished by limiting such grants to those areas with truly very limited or no access to broadband services and to service providers with the requisite staffing, expertise and experience. This will ensure the most productive use of the agencies' limited funding, maximize the stimulative effect of the investment, and avoid competitive distortions.
- **Fund programs that remove barriers to broadband adoption, particularly for low-income users.** A high percentage of consumers in areas where broadband service is available do not purchase it. NTIA should fund adoption programs that take an integrated approach to this problem—for example, by supporting low-income users, expanding digital-literacy training, expanding access to publicly available computers, and fostering the creation of additional relevant content.

As the field hearings and roundtables have shown, there is widespread excitement about the role broadband can play in America's economic recovery. Projects undertaken by anchor institutions in support of larger policy goals, such as education and health care, have the best chance of succeeding in the long term while creating jobs in the short term. By targeting funds to those institutions and the other entities discussed above, NTIA and RUS can quickly stimulate the economy while expanding the role of broadband in the lives of millions of Americans.

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INTRODUCTION

As they implement this legislation, NTIA and RUS should give priority to Congress's overarching objectives. The first and most fundamental of these is *stimulating the economy*—a priority underscored by the Recovery Act's very name and statement of purposes. Those purposes, which Congress instructed *all* agencies to promote in distributing Recovery Act funds, include “preserv[ing] and creat[ing] jobs and promot[ing] economic recovery,” “assist[ing] those most impacted by the recession,” and “invest[ing] in . . . infrastructure that will provide long-term economic benefits.” Recovery Act, § 3(a), (b). Congress further directed the agencies to “manage and expend the funds” to achieve these goals “as quickly as possible.” *Id.* § 3(b); *see also id.* § 6001(b)(3)(C), (b)(5) (stressing need within BTOP program for “job-creating strategic facilities” and projects that “stimulate . . . economic growth, and job creation”). In other words, the Act requires NTIA and RUS to bestow Recovery Act funds on projects that promptly address concrete economic needs—for example, by creating or preserving jobs, supplying job training, or providing the infrastructure necessary to attract investment.

The second overarching objective that should guide NTIA and RUS funding decisions is the *promotion of broadband policy goals*. The Recovery Act stresses the need to fund projects that will promote greater use of broadband technology by public-facing “anchor institutions”; greater broadband deployment in unserved or underserved areas; and greater broadband adoption by vulnerable populations. *See id.* § 6001; *id.* at div. A, tit. I. Such projects could include, for example, broadband public-safety initiatives, the connecting of public institutions, and the expansion of networks in rural areas that have no significant access to broadband today.

In many cases, NTIA and RUS should be able to identify projects that serve *both* the economic *and* the broadband-policy objectives of the Act. For example, by focusing its funding initiatives on public and non-profit anchor institutions as is contemplated by the Act, NTIA can

quickly protect jobs that might otherwise be lost in the current economic climate; it can resurrect “shovel-ready” projects that were poised for implementation before recent budget cuts required their cancellation or suspension; and it can support the entities best positioned to meet the needs of America’s most vulnerable communities. Thus, as we discuss below, the presumptive recipients of direct funding from NTIA should be public and non-profit anchor institutions.

The Act’s third main objective is a commitment to *swift, efficient, transparent, and auditable methods of administering these funding programs*. See Recovery Act, § 3(b); *id.* § 6001(d)-(e), (i). Because demand for funding will likely exceed the funds available, NTIA and RUS will need to determine quickly and objectively which applications should have priority. AT&T recommends that the agencies create a points-based scoring matrix that ranks proposed projects according to objective criteria derived from the economic and broadband-policy goals of the Act, such as creating jobs, serving vulnerable populations, and deploying service to previously unserved geographic areas. Additional points could be awarded for projects that receive the endorsement of the relevant States. Projects with the highest point totals would then receive funding. Furthermore, to ensure that projects are auditable, applicants should be required to provide objective information demonstrating that their proposals are genuinely tailored to the Act’s goals, and successful applicants should then be required to confirm and document *after* the fact that they have used their funds in the manner they proposed.

Finally, the agencies should not permit their attention to be diverted from the main purposes of the Act: stimulating the economy, creating jobs, and enhancing broadband deployment. It would be an unwise distraction for NTIA or RUS to take action that could directly or indirectly displace the Federal Communications Commission as the nation’s regulatory policymaker on issues relating to broadband competition and net neutrality. Congress

has charged NTIA and RUS with spending federal money as expeditiously as possible in order to achieve the specific goals of the Act, and the agencies should keep their eyes firmly on those specific objectives.

DISCUSSION

I. The Goals of the Recovery Act Can Be Achieved Most Effectively by Funding Anchor Institution Projects That Serve Concrete Community Needs and By Funding Service Providers with the Requisite Staffing, Expertise, and Experience in Unserved Areas Where Broadband Infrastructure Is Truly Absent.

A. Recovery Act Funds Should Go Primarily to Public and Non-Profit “Anchor” Institutions.

NTIA—which will distribute the bulk of the Recovery Act’s broadband funding—can best achieve the overarching goals of the Act by directing grants primarily to public and non-profit institutions to fund their use of broadband services and equipment. Congress recognized this by naming these institutions as presumptive grant recipients. *See* Recovery Act, § 6001(e)(1)(A)-(B). By funding “anchor institutions” directly—including hospitals, libraries, schools, community colleges, public-safety organizations, community centers, and even governmental agencies—NTIA can address multiple Recovery Act objectives simultaneously.

First, supporting anchor institutions will serve the Act’s economic goals. As discussed at the NTIA and RUS roundtables, many such institutions already have designed “shovel-ready” projects that have been derailed by budget cuts. These projects could easily be completed within the two-year timetable the Act imposes, providing the prompt economic stimulus the Act requires. *See id.* § 3(b); *id.* § 6001(e)(3), (d)(3) (projects must be done “in an efficient and expeditious manner” and be “substantially complete” within two years). Moreover, as the name implies, anchor institutions play a key role in anchoring the economic health of their communities, and facilitating their missions will stimulate economic activity far beyond the walls of the institutions themselves.

Second, funding these anchor institutions will directly advance the Act’s broadband deployment and adoption goals. To begin with, such funding obviously will enable these institutions to use broadband to fulfill their missions, which the Act stresses as a priority. *See id.* § 6001(b)(3)(A), (g)(3), (g)(5). In particular, those institutions can bring broadband to bear on the educational, health-care, and job-training needs of “vulnerable” populations—another statutory priority.² *See id.* § 6001(g)(4), (h)(2)(C). And in many cases, providing connectivity to public and non-profit institutions accessible to the public—such as libraries or community centers—may be the fastest means of bringing broadband to the “greatest population of users in the area.” *Id.* § 6001(h)(2)(A)-(B), (b)(1)-(2); *see also id.* at div. A, tit. I.

Direct funding of anchor institutions also will serve the need for expedition and accountability in the administration of this grant program. Such funding will allow NTIA to avoid evaluating the financial viability and reliability of multiple would-be service providers or the value of the particular projects they propose. NTIA can instead rely on anchor institutions to identify community needs that the free market has inadequately served. And, to the extent those institutions need to contract out for telecommunications services, NTIA can and should let them make their own choice from among various providers based on efficient market factors.

Moreover, in choosing among grant recipients, NTIA should focus on fostering not just greater *deployment* of broadband infrastructure, but also greater *adoption* of broadband services by consumers. Indeed, Congress underscored the importance of these adoption-focused initiatives in the Recovery Act itself. It directed that *at least* \$450 million be made available for “innovative programs to encourage sustainable adoption of broadband service,” and for “expanding public computer center capacity, including at community colleges and public

² *See, e.g.,* TNII eHealth Home Page, *available at* <http://www.tnii.net/ehealth> (public-private partnership enabling health-care providers in Tennessee to share patient data securely).

libraries.” Recovery Act, div. A, tit. II. And, with respect to the BTOP program, Congress specifically instructed:

[T]he purposes of the program are to . . . 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; [and] (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.

Recovery Act, § 6001(b)(3).

Put simply, even in areas where broadband service is readily available, many potential customers do not subscribe to it.³ There are many reasons for such undersubscription, ranging from affordability concerns to a lack of interest in the Internet,⁴ a lack of computer training, or a lack of computers.⁵ Thus, adoption-focused initiatives not only would address the broadband goals of the Act, but also should help promote the Act’s economic objectives by facilitating online job training or providing consumers with better access to job sites, government support resources, and the like.

³ Only 57% of urban residents and 60% of suburban residents have broadband Internet connections at home. Overall, 45% of adult Americans have either dial-up service or no Internet access at all. John B. Horrigan, Pew Internet & American Life Project, *Home Broadband Adoption 2008*, at i-ii, 1-4 (July 2008), available at <http://www.pewinternet.org/Reports/2008/Home-Broadband-2008.aspx>.

⁴ A recent survey found that 51% of those without broadband (*i.e.*, those who use dial-up or have no Internet connection at all) do not subscribe because they perceive broadband to be irrelevant to them. The remaining 49% pointed to concerns about usability, price, and availability. See John B. Horrigan, Pew Internet & American Life Project, *Obama’s Online Opportunities II: If you build it, will they log on*, at 2 (Jan. 21, 2009), available at <http://www.pewinternet.org/Reports/2009/Stimulating-Broadband-If-Obama-builds-it-will-they-log-on.aspx>.

⁵ Indeed, some potential subscribers do not even have electricity, let alone computers. NTIA/RUS Roundtable Discussion, Flagstaff, Arizona (March 18, 2009) (“March 18th Roundtable”) (testimony of Sara Presler, Mayor of Flagstaff, stating that in Flagstaff’s Congressional district, one third of the population is without power).

To meet these objectives, NTIA should consider projects that are similar in concept to those undertaken by the One Economy Corporation, a global non-profit organization that uses innovative approaches to deliver broadband technology and information to low-income households. In one recent project, One Economy partnered with AT&T and the city of San Francisco to bring free Wi-Fi service, low-cost computers, free training, and other support to over 2,200 residents in the Sunnydale Housing development.⁶ NTIA also could subsidize services and equipment for libraries and community centers, which would in turn provide centralized and readily accessible broadband service to the public. And NTIA should contemplate funding Internet content and applications developed in response to the particular needs of vulnerable, non-Internet-using populations.

Finally, although Congress recognized that it *might* be appropriate in some contexts for NTIA to fund entities that provide broadband service to end users, it required NTIA first to make an affirmative finding that such funding serves the public interest. Recovery Act, § 6001(e)(1)(C). In areas where broadband infrastructure is very limited or truly absent, it may indeed be in the public interest for NTIA to fund the deployment of new infrastructure by service providers with the requisite staffing, expertise, and experience. But NTIA should conclude that the required public-interest finding is warranted only where *no* provider has deployed broadband service—*i.e.*, in fully *unserved* areas, as defined below.

There are multiple reasons for such an approach. First, it would give appropriate funding priority to the many communities that lack broadband altogether; surely, both the need for infrastructure investment and the potential stimulative effects of such investment are likely to be

⁶ See, e.g., Press Release, *Mayor Newsom Announces Expansion of San Francisco's Free Wi-Fi Network* (Jan. 15, 2009), available at http://www.sfgov.org/site/mayor_index.asp?id=96789.

materially greater in unserved areas as opposed to areas that, even if arguably somewhat underserved, nonetheless enjoy the benefits of at least some broadband capability. Second, this approach would prevent the grant program from violating basic norms of competitive neutrality and distorting the marketplace in unpredictable ways—two results almost certain to follow from funding providers in areas where competing providers already have deployed service.⁷ Finally, an approach that prefers anchor institutions in the majority of cases would also serve as a reasonable counterweight to the RUS program, in which loans and grants will be provided exclusively to service providers.⁸

B. NTIA and RUS Should Consult Closely with the States in Selecting the Projects That Will Receive Funding.

In assessing the relative merits of funding applications, NTIA and RUS need not and should not start from scratch. Instead, they should turn to the States for their informed guidance. Although the final BTOP and RUS provisions do not *require* consultation with the States, they certainly permit it—BTOP explicitly,⁹ and RUS implicitly. Moreover, in the Conference Report leading up to the final bill, Congress made clear that the bill’s drafters “expect and intend that the NTIA . . . will seek advice and assistance from the States in reviewing grant applications.” H.R. Rep. No. 111-16, at 775 (2009) (Conf. Rep.). The Conferees recognized that the “States have

⁷ This should be evident from the FCC’s experience in the universal service context, where the Commission has been forced to cap the amount of universal service support provided to competitive LECs because “funding competition” proved too illogically costly to sustain. *See Order, High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, 23 FCC Rcd 8834, 8834, 8841 ¶¶ 1, 15 (2008).

⁸ There may in fact be underserved areas where direct infrastructure grants—especially to truly rural providers—are warranted, and the RUS program provides an appropriate and established mechanism to do so.

⁹ Recovery Act, § 6001(c)(1)-(2) (“The Assistant Secretary *may* consult a State” in identifying areas or projects that should be funded) (emphasis added).

resources and a familiarity with local economic, demographic, and market conditions that could contribute to the success of the broadband grant program.” *Id.*

As some of the comments from the NTIA/RUS roundtables indicate, those conditions differ from State to State and from community to community. The challenge in some States may be the cost of laying last-mile distribution facilities despite a strong backbone presence.¹⁰ The greatest challenge in other States may be large populations of low-income residents who do not subscribe to broadband, and those States may place special priority on adoption programs.¹¹ In still other communities, the most significant need may be support for rural law enforcement or health-care providers.¹²

Given the time constraints, NTIA and RUS should exploit every available resource to identify the worthiest projects. The States can be enormously helpful both in explaining state-level priorities and evaluating competing proposals from their closer-to-the-ground perspectives. Many States already have technology councils or other bodies that encourage broadband projects designed to enhance the local economy and serve community needs.¹³ And the States often have

¹⁰ See, e.g., NTIA/RUS Roundtable Discussion, Las Vegas, Nevada (March 17, 2009) (“March 17th Roundtable”) (testimony of Jeff Fontaine, Nevada Association of Counties; and Jerry Sandstrom, Nevada Commission on Economic Development).

¹¹ See, e.g., March 18th Roundtable (testimony of Maureen Jackson, Coconino County, AZ; Betty Buckley, Washington State Communities Connect Network; and Samuel Godin, Flagstaff Family Food Center); NTIA/RUS Roundtable Discussion, Washington, D.C. (March 16, 2009) (“March 16th Roundtable”) (testimony of Emily Sheketoff, American Library Association; and Jim Hermes, American Association for Community Colleges).

¹² See, e.g., March 16th Roundtable (testimony of Jonathan D. Linkous, American Telmedicine Association); March 18th Roundtable (testimony of Kevin Treadway, Flagstaff Deputy Police Chief; and Barbara Jaeger, Arizona State 9-1-1 Administrator).

¹³ See, e.g., NTIA/RUS Roundtable Discussion, Washington, D.C. (March 19, 2009) (“March 19th Roundtable”) (testimony of Betty Ann Kane, National Association of Regulatory Utility Commissioners); see also Galen M. Updike *et al.*, *Broadband Investment for Economic Recovery: Perspectives of an Ad-Hoc Group of State Broadband Entities*, at 1-2 (Feb. 9, 2009)

first-hand knowledge of the capabilities, reputations, and missions of the institutions within their borders.¹⁴

II. NTIA and RUS Should Define the Target Areas and Populations in a Manner Designed to Serve the Needs That States and Anchor Institutions Have Identified.

A. NTIA and RUS Should Define “Broadband” Inclusively to Ensure That Service Is Deployed As Widely As Possible.

The Recovery Act directs NTIA and RUS to fund “broadband” projects, but it does not define that term. Congress did, however, convey a clear intent to define the term inclusively enough to permit funding for cost-efficient means of bringing service to large numbers of people. As the Consumer Federation of America and Consumers Union observe, “maximum coverage should be the goal, rather than chas[ing] a gold-plated network that will restrict the number of households that can be reached in the near future. We need to get people connected for basic communications that open[] the door to economic and civic participation in cyberspace.”¹⁵

Congress shared the same view. The Recovery Act directs NTIA to use BTOP funding to “increase the affordability of, and subscribership to, service to the *greatest population* of users in the area,” and to provide the greatest “broadband speed possible to the *greatest population* of users in the area.” Recovery Act, § 6001(h)(2)(A), (B) (emphasis added). The RUS provision likewise states that “priority for awarding funds . . . shall be given to projects that provide service

available at <http://www.masstech.org/broadband/docs/BroadbandInvestmentMultiStatePaper.pdf> (discussing state efforts to promote broadband).

¹⁴ States that intend to apply for grants themselves should take steps to ensure the neutrality of their recommendations. These steps might include establishing independent entities to help in the evaluation process or confining the States’ evaluative role to an assessment of non-State-affiliated grants and identification of public needs within their jurisdictions.

¹⁵ Comments of the Consumer Federation of America and Consumers Union, *Report on Rural Broadband Strategy*, FCC GN Docket No. 09-29, at 3 (filed March 25, 2009).

to the highest proportion of rural residents that do not have access to broadband service.” *Id.* at div. A, tit. I (emphasis added).

These provisions recognize the basic trade-off between funding services with the highest *speeds* and funding services capable of reaching the most *people* in a cost-efficient manner. And these provisions likewise reflect a preference for coverage over speed in the agencies’ funding decisions. *See also* H.R. Rep. No. 111-16, at 775 (“a specific speed threshold could have the unintended result of thwarting broadband deployment in certain areas”). To be sure, Congress listed speed as a factor that the agencies might consider where appropriate, Recovery Act, § 6001(h)(2)(B), and fast speeds may be required for some projects. But Congress added that NTIA should consider speed only insofar as “practical”—and qualified even that preference by stressing that the goal is to provide high-speed services to the “greatest population of users in the area.” *Id.* In short, the right outcome in many cases may be a less expensive technology that has slightly less aggressive speeds but a broader reach.

Finally, in defining the meaning of “broadband,” the agencies should take advantage of the FCC’s extensive experience in this area. In connection with its proposal to direct universal service funding to broadband providers, the FCC has defined broadband inclusively to encompass services capable of “download speeds equal to or greater than 768 kbps and upload speeds greater than 200 kbps.”¹⁶ Millions of consumers throughout the country purchase this speed level to enjoy the full panoply of Internet services, and anchor institutions can use services with these speeds to serve many of the needs outlined in the Recovery Act. Again, however, in

¹⁶ Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High-Cost Universal Service Support*, WC Docket No. 05-337 (and related proceedings), FCC 08-262, Appx. A ¶ 28, Appx. C ¶ 28 (rel. Nov. 5, 2008).

ranking projects in the context of an objective scoring system, due weight should be given to the added benefits of higher speeds when choosing among competing projects.

B. NTIA and RUS Should Define Statutory Concepts Such As “Unserved Areas” and “Underserved Areas” by Reference to the Level of Broadband Subscribership and the Needs of Anchor Institutions.

Although the Recovery Act directs NTIA to target funding to “unserved” and “underserved” areas, it does not define either term. Recovery Act, § 6001(b). Similarly, Congress required RUS to target its funding to “rural residents that do not have access to broadband service” and “rural area[s] without sufficient access to high speed broadband service to facilitate rural economic development,” but it left the identification of such areas to the agency. *Id.* at div. A, tit. I. NTIA and RUS should ensure that their interpretations of these statutory concepts (1) are consistent and (2) support efforts to provide the broadband-related services each community needs most.

AT&T proposes that NTIA define “**unserved areas**” as those where “broadband” service (as defined above) is not available, or is available only from a satellite provider.¹⁷ Identification of areas that meet this objective definition often will not be straightforward because of the dearth of available mapping data for many States. To overcome this difficulty, NTIA could place the burden on grant applicants to establish the “unserved” nature of the areas they wish to serve. For example, NTIA could require applicants to define the precise boundaries of the “unserved” areas at issue, and it could look to the relevant State to validate and document the applicant’s claim

¹⁷ Satellite-based Internet access services have played an important role in ensuring that rural and high-cost areas receive some of the benefits that broadband service can provide. But because of inherent technological limitations, such services often do not meet the standard for “advanced telecommunications capability” set out in Section 706 of the Telecommunications Act: namely, “high speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(c)(1), 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note).

that a given area is unserved, preferably before submission of the application to NTIA. NTIA should post all such applications online to allow the public to weigh in as well on whether the area identified is truly unserved.

Determining whether an area is **“underserved”** can be more inherently subjective than determining whether it is “unserved,” because the “underserved” designation requires qualitative judgments about what constitutes an appropriate level of service. It also requires an appraisal of the needs of anchor institutions in the area, and an evaluation of the extent to which those needs would go unmet in the absence of Recovery Act funding. One way to ensure objectivity in the identification of “underserved” areas would be to identify the level of broadband subscribership in different geographic areas and give greater priority to requests for funding in the areas with the lowest subscribership. This calculation could be based on the FCC’s broadband subscribership data (or state-provided subscribership data if available) together with population data from the U.S. Census Bureau (perhaps at the census tract level). The geographic areas could then be grouped into quintiles or deciles based on their broadband subscribership rates, and greater weight could be given to requests for funding in the lower quintiles or deciles. Finally, in determining whether an area is “underserved,” NTIA should consider the broadband needs of anchor institutions, with the help of States and local governments. Those locations where anchor institution needs are going unmet could be designated as underserved areas as well; as with the “underserved” ranking that is based on individual subscribership levels, priority under this parallel test could be given to areas based on the relative importance of the anchor institution projects that are needed there.

To be sure, such a ranking methodology relies in part on subscribership as a proxy for availability and can only be as useful as the underlying data that feed into it. Such data should

therefore be publicly available, objective, reasonably granular, and easily assessable. So long as that condition is met, this approach, while admittedly not perfect, would give NTIA a reasonably objective way to rank funding requests on a sliding scale.

To promote the administrative goals of the Act, RUS should target funding using the same principles as NTIA. Specifically, RUS should use the same “underserved” calculation when identifying “rural area[s] without sufficient access to high speed broadband service to facilitate rural economic development.” Recovery Act, div. A, tit. I. And when implementing Congress’s mandate to target funding to “rural residents that do not have access to broadband service,” RUS should use the same standard NTIA uses to identify “unserved” areas. *Id.*

C. NTIA and RUS Should Adopt Selection Criteria That Carefully Balance All of the Recovery Act’s Goals and the Needs of Communities.

NTIA and RUS can expect to receive many applications for Recovery Act funding. And Congress gave the agencies very little time in which to consider those applications. Accordingly, NTIA and RUS should devise a straightforward, easy-to-deploy system that will help them make difficult funding decisions quickly.

One way to ensure quick apples-to-apples comparisons among applications is to assign points to projects based on their ability to serve each of the goals that Congress enumerated in the Recovery Act. A point system alleviates the need to assign different subjective values to different projects, and provides an objective means of evaluating the “funding-worthiness” of any project.¹⁸ Such a system would also most efficiently serve the purposes of the Act, because funding priority would be given to projects that are capable of serving a number of the statutory goals simultaneously. By adopting such a system, NTIA and RUS could obtain the greatest

¹⁸ As noted above, points should also be awarded depending on whether the relevant State has endorsed the project.

return for the taxpayers' investment—both in terms of the number of people served and the number of statutory goals served.

III. NTIA and RUS Should Carefully Tailor Any “Non-Discrimination and Network Interconnection Obligations” to Comport with the FCC’s Regulatory Policies and Should Apply Them in Their Appropriate Context.

The primary goal of the Recovery Act is to distribute funds quickly in order to create new jobs now and stimulate prompt economic growth. To keep this already quite daunting task on track, NTIA and RUS should rely, wherever possible, on existing federal regulatory policy, and they should avoid miring this stimulus program in unresolved long-term policy controversies now pending before the Federal Communications Commission. Nowhere is this point more compelling than in the context of the “non-discrimination” and “interconnection” requirements contemplated by Section 6001(j) of the Recovery Act.

The Act requires NTIA to work “in coordination with” the FCC in defining contractual “non-discrimination and network interconnection obligations,” and adds that those obligations should include, “at a minimum, adherence to the principles contained in the Commission’s [2005] *Broadband Policy Statement*.”¹⁹ As this final clause makes clear, Congress viewed the concepts of “non-discrimination” and “network interconnection” as integrally related to the four principles in the *Policy Statement*. Those principles provide that, “to preserve and promote the open and *interconnected* nature of the public Internet, *consumers* are entitled to access the lawful Internet content *of their choice*” and “are entitled to run applications and use services *of their choice*, subject to the needs of law enforcement.”²⁰ Within this context, the term

¹⁹ Recovery Act, § 6001(j) (emphasis added and capitalization altered) (citing Policy Statement, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986, 14987-88 ¶¶ 4-5 & n.15 (2005) (“*Broadband Policy Statement*”).

²⁰ *Broadband Policy Statement* at 14988 ¶ 4 (emphasis added). The principles also provide that “consumers are entitled to connect their choice of legal devices that do not harm the

“interconnection” under the Recovery Act refers to the same “interconnect[edness]” the FCC sought to “preserve” in the *Broadband Policy Statement*: the interconnected nature of the various publicly accessible IP networks that, in the aggregate, constitute the public Internet. Thus, the *Broadband Policy Statement* ensures “interconnection” by entitling every consumer of a broadband Internet access service to reach any lawful destination on the public Internet. It likewise ensures “non-discrimination” by protecting each consumer’s right to access the Internet content and applications of his or her choice, free from arbitrary and unreasonable blocking or service degradation.

It has now been four years since the FCC adopted the four principles at the heart of the *Broadband Policy Statement*, and no market need has arisen for any principles beyond those. To the contrary, the FCC has intervened in the broadband services market only twice since that market’s inception in the late 1990s—in the *Madison River* and *Comcast* orders—and both times it appropriately handled the alleged misconduct within the framework of the existing four principles.²¹ That experience proves the sufficiency of those principles. In all events, even if NTIA were *not* required to coordinate federal policy on these issues with the FCC, there would be no basis on the merits for imposing any new “non-discrimination” or “interconnection” obligations on broadband providers beyond the existing four principles. AT&T hereby incorporates by reference the detailed advocacy it submitted to the FCC in connection with that

network” and “to competition among network providers, application and service providers, and content providers.” *Id.*

²¹ See, e.g., Memorandum and Order, *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028, 13047, 13049-50 ¶¶ 35, 39 (2008), *petns. for review filed sub nom. Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. filed Sept. 4, 2008); Order, *Madison River Commc’ns LLC*, 20 FCC Rcd 4295 (2005).

agency's ongoing inquiry into net neutrality issues. *See, e.g.*, Comments of AT&T Inc., *Broadband Industry Practices*, WC Docket No. 07-52 (June 15, 2007).

Moreover, any “non-discrimination” and “interconnection” conditions must be applied in a manner that is rationally related to the circumstances of the grantee. Specifically, when grants are awarded to end users of broadband capabilities, rather than to communications service providers, NTIA should apply the condition by ensuring that end users are able to obtain the network capabilities needed to achieve the purposes set forth in their grant applications.

For example, a rural health-care system could properly receive grant money to build its own managed IP network for the exchange of real-time medical images between far-flung rural clinics and centralized hospitals. No one would seriously suggest that the rural health-care system would have to make the resulting network capacity available to others who wish to use it for unrelated purposes or allow third parties to connect devices to the network that are not approved by the health-care provider. The grantee should be expected to “discriminate” in favor of some applications (medical imaging) over others (such as music downloads or on-line gaming) and in favor of some devices (heart monitors) over others (Xbox 360s), and it should not be expected to “interconnect” with any other network or service provider that wishes to share the finite capacity on its managed health-care network.²² Indeed, those conclusions follow directly from the core unifying theme of the *Broadband Policy Statement*: the promotion of *consumer* interests. Each of the four principles is explicitly phrased in terms of what “consumers are entitled to” have, including access to the lawful Internet content of *their choice*” and the

²² *See, e.g.*, David Farber & Michael Katz, *Hold Off on Net Neutrality*, Wash. Post, Jan. 19, 2007, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/18/AR2007011801508.html> (noting absurdity of rules that would forbid a network operator “to favor traffic from, say, a patient’s heart monitor over traffic delivering a music download”).

ability “to run applications and use services of *their choice*.”²³ In these circumstances, the sole federal objective is to preserve the grantee’s choice to construct and operate the network that it seeks to develop, not to effectively override that choice by requiring “openness” obligations that undermine the very value of that network to the grantee.²⁴

The example of the rural health-care system illustrates a key underlying point: “non-discrimination” and “interconnection” conditions will have more practical impact when applied to grantees that are *providers of Internet access services* to the public, not to institutions that operate managed networks, do not typically sell capacity on those networks to third parties, and are properly viewed as end users in their own right. To the extent that NTIA makes grants primarily to anchor institutions (such as community colleges or health-care systems) that are not service providers and that intend to use the money for institution-specific projects, questions about the precise content of any “non-discrimination” and “interconnection” requirements will largely be moot.

Respectfully Submitted,

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²³ *Broadband Policy Statement* at 14988 ¶ 4 (emphasis added).

²⁴ Of course, if the grantee wants to procure Internet access service that is subject to the four principles, it can choose to do so.