



April 13, 2009

VIA E-MAIL

**Broadband Technology
Opportunities Program,**

U.S. Department of Commerce, Room 4812

1401 Constitution Avenue, N.W.

Washington DC, 20230

ATTN: Mr. Mark Seifert, Senior Adviser,

Office of Telecommunications and Information Applications

Re: American Recovery & Reinvestment Act of 2009
Broadband Initiatives
Docket No. 090309298-9299-01

Dear Mr. Seifert:

I am the CEO of a privately held fiber based telecommunications company. I started the company 9 years ago with venture based capital. American Fiber Systems, Inc. ("AFS") provides metropolitan dark fiber facilities and lit transport services in nine (9) states and we currently employ 78 people and are forecasting that we will employ 86 people by year end. Since inception of the company I have made the conscious decision to deploy fiber optic networks in second and third tier cities precisely because they are underserved. We deploy high strand count (432/288/144) full-spectrum fiber that supports a wide spectrum of bandwidth applications including internet access, transport, disaster recovery, data warehousing, mirroring, streaming audio/video, distance learning and multiple technologies such as IP, SONET, DWDM, Fiber Channel, ATM, Frame Relay and Gigabit Ethernet. AFS, unlike the vast majority of the larger carriers, truly has open network architecture and we are technologically neutral. Our customer base includes bandwidth intensive businesses, Internet Service Providers, wire line carriers and wireless carriers.

AFS applauds the passage of the American Recovery & Reinvestment Act of 2009("Act"). We share and support the goals of the Act, specifically the provision of broadband service to un-served areas, the improvement of access to broadband in underserved areas and the creation of jobs now. As the CEO of a company who lives these issues every day and a company that survived the telecom melt down in 2000-2003, I feel compelled to offer my practical insights as to certain points I recommend be considered when evaluating projects seeking broadband stimulus funds, how the funds are to be used and the impact of certain issues which may not yet have been considered on the ultimate goals of the Act.

1. **Eligible Grant Recipients:** The NTIA should determine by rule that it is in the public interest that all carriers certificated by the Federal Communications Commission ("FCC") and/or state public service commission be deemed eligible grant recipients. We understand the intent of the Act is to permit as many different entities as possible to participate and thereby drive as much job creation as possible. However the population base the Act desires to benefit will be better served if a

100 Meridian Centre, Suite 300 • Rochester, New York 14618
Phone: (585) 785-5801 • Fax: (585) 785-5802
www.afsnetworks.com

preference is given to certificated telecommunications carriers in deploying the facilities. By virtue of the fact that the carrier is certificated, a state or federal regulatory body has already determined that their operations are in the public interest. Further, certificated carriers design, deploy and maintain networks so as to ensure that they are scalable, will grow with demand and will be able to perform its function for decades to come. Certificated carriers must take a long term perspective in the manner in which they design, deploy and maintain their networks. Simply stated, certificated carriers have the mindset to do it right the first time because it impacts their revenue stream. As a long term corporate citizen of the municipalities that a certificated carrier's network is deployed in, certificated carriers have a vested interest in the preservation of Rights-of-Way and maintaining good relationships municipal authorities as well as with state and federal regulatory bodies. We have witnessed construction companies deploy a network they are building merely in the hopes of soon thereafter selling it to a carrier, a build and flip scenario. Such construction companies do not have relevant experience in the ongoing operation of a network, are not concerned about the long term operation of the facilities, the quality of the installation, or damage done to Rights-of-Way. A construction company that builds a network for a quick profit on re-sale will have an incentive to take "short cuts" to meet the deployment schedule yet may not be around when the municipal or state violations come to light. Furthermore, if certificated carriers deploy the facilities State utility commissions and the FCC will have a greater degree of regulatory oversight and will have the ability to ensure compliance with the conditions placed on the use of the stimulus funds and will have quicker and more effective recourse against an offending carrier if there are any condition violations.

2. **Create an Incentive for Small Business Growth:** Small businesses like AFS are the growth engine of our economy. We are small and nimble and are best suited for designing and implementing shovel ready projects quickly. We operate in a leaner more efficient manner with less bureaucracy than ILEC's or other large organizations. We are customer focused and spend money as if it was our personal funds, responsibly. An employment boom would result if the NTIA adopted a criterion for funding that the RUS loan program already uses, namely the requirement that any recipient of funds have a 2% or less of the subscriber lines nationally to be eligible to receive funds.

3. **Municipally Owned Utilities Should be Subject to 47 U.S.C. § 224 as a Condition to Receiving Stimulus Funds:** Municipally owned utilities by virtue of their quasi-governmental status have an unfair advantage over commercial carriers in terms of their ability to secure construction permits or obtain more favorable operational terms from their municipal affiliate. Frequently one has to deal with two sides of the same coin first in securing a franchise agreement and then in securing a pole attachment agreement and at each step the governmental entity extracts "in kind" consideration from the carrier in terms of having to convey title to actual facilities or provide free service to the entity in addition to significant Right-Of-Way fees. While creating the perception of being non-discriminatory, municipally owned utilities are able to impose unconscionable terms and conditions upon a carrier who desires to use their facilities to deploy its network, because frequently they are the "only game in town." This situation is further exacerbated by the fact that municipally owned utilities are not subject to 47 U.S.C. § 224, the Pole Attachment Act and so there is absolutely no forum at the state or federal level that a carrier can resort to in order to seek redress of his grievances. To fund the expansion of these types of networks, which are essentially "closed" with stimulus funds will only perpetuate such monopolistic conduct and further disadvantage job creating companies. Although municipally owned utilities are deemed eligible to receive stimulus funds under the Act, the receipt of such funds should be conditioned upon their agreeing to be bound by the terms of 47 U.S.C. § 224.

4. **Require the Use of Open Access Facilities:** AFS networks are truly open. We will lease or IRU dark fiber to any party, carrier or enterprise. Our premium fiber optic networks give our customer's virtually unlimited bandwidth and the flexibility to design the network configuration that best suites their needs. Similarly AFS will lease capacity to any party, carrier or enterprise and our networks can currently accommodate speeds from 1MB to 400GB, with the ability

to scale this further if needed. Companies like AFS, whose networks are technologically agnostic and truly open should be given a preference in the evaluation process over ILEC's and larger carriers who do not make dark fiber available to any and all requesting parties and therefore have closed networks. Any carrier who deploys a fiber optic network using stimulus funds should be required to, on a non-discriminatory basis, lease or IRU the fiber itself or any amount of capacity and conduit to any requesting party, carrier or enterprise at market rates. To do otherwise just encourages the expansion of closed networks at the consumer's expense. In fact in such a scenario the consumer pays at least twice, once because its taxes are providing the stimulus funds and then again in the form of higher retail prices for capacity when it would be more cost effective to use dark fiber. For municipally owned utilities and for any local, state, or federal governmental entities that own or have long term use of network infrastructure including but not limited to fiber, capacity, conduit, Right-of Way and all buildings served, that receive stimulus funds, such grant of funds should be conditioned upon their agreeing to open their entire networks fiber, capacity, conduit, Right-of -Way and all buildings served, on a non-discriminatory basis to all certificated carriers at market rates.

5. **Prohibit the Duplication of Existing Facilities:** In evaluating the eligibility of projects for stimulus funds, no party, but especially a "closed" network operator should be permitted to use stimulus funds to build over another carrier's existing network, especially an open access network.

6. **Scrutinize the Relevant Experience Needed to Complete a Project:** Not all experience is relevant to a particular project. While AFS is a leading provider of metro dark fiber and lit transport services who routinely delivers projects on time and under or at budget, AFS' success in this type of project does not necessarily mean AFS would be the best candidate to erect cell towers. Cell tower construction is not a core competency of AFS and so we would not expect to be able to obtain "on the job training" in cell tower construction by use of stimulus funds. Similarly, a wireless back haul provider would not have the relevant experience to deploy, maintain and operate a fiber optic network and should not be permitted to obtain "on the job training" for the same using stimulus funds.

7. **Oversight, Enforcement & Whistle Blowing:** In the event a recipient of stimulus funds uses the funds for an ineligible purpose, what claw back mechanism if any, is there to recover the funds and re-allocate them for their intended purpose? It is my hope that we will not be repeating the mistakes made in the "Wall Street Bailout" where the funds are disbursed but at the end of the day no one can explain how the funds were used. As a taxpayer and a responsible corporate citizen, I am concerned that in the mad rush to roll out the program, that the opportunities for fraud and abuse will be rampant. With what agency will enforcement responsibility reside? If eligible recipients for stimulus funds were limited to certificated carriers, their will be direct and effective enforcement through the FCC and/or the states who will be directly impacted by these construction activities, without the need to create a new enforcement regime. Will applicants for stimulus funds be subject to the Federal Civil False Claims Act, 31 U.S.C. §§ 3729 *et seq.*? Will there be a private right of action whereby private citizens will have standing to bring a claim against a party for violations of any of the conditions of the grant of stimulus funds?

8. **Relocation Costs:** The vast majority of the \$787 billion dollars being spent under the Act will be spent on infrastructure improvement, roads, bridges and enhancing the electrical grid. Such projects will dramatically increase the number of relocations that a utility with existing infrastructure deployed will be forced to incur. Funds must be made available from the stimulus funds to reimburse utility owners for the cost of relocating their facilities to accommodate stimulus funded projects. While utilities should and do budget for relocations, the sudden availability of stimulus funds to finance the unprecedented scale of these infrastructure projects will far exceed what companies traditionally budget for relocations in a given year. An unanticipated consequence of the Act could be a dramatic increase in the capital expenses of utility companies during a time of when macro economic conditions are causing companies to slash their capital budgets. This increase in non-revenue generating capital costs will leave less capital funds available for revenue generating projects and could

even result in a company instituting layoffs to bridge the gap. While one of the explicit goals of the Act is to create jobs, it could in fact have the opposite effect on utilities, if relocation costs are not reimbursable from the stimulus funds. I recognize that NTIA, RUS & the FCC will only have jurisdiction over about 1% of the stimulus funds to be made available under the Act, I none-the-less bring this to your attention in the hope that you can in turn bring it to the attention of those who can impact this issue.

9. **Broadband:** Initially “Broadband” should be defined as not less than 100 megabits and within 10 years it should be defined as not less than one gigabit, regardless of delivery method.

10. **Underserved:** Any geographical area where 90% or less of the population currently has access to a service at a speed less than 100 megabits from a single provider.

11. **Un-served:** Any geographical area currently receiving no service or service at a speed of 10 megabits or less from two providers or less (excluding re-sellers).

12. **State Participation:** States should be involved in prioritizing proposed projects with input from county and municipal entities that will be directly impacted by the proposed projects. The states prioritization should give a preference to projects that: (a) involve a public/private partnership, (b) have an “Open Network” being deployed and (c) satisfy county and local broadband needs as identified by such entities.

13. **FCC Participation:** The FCC should have input to ensure that stimulus funds are allocated in a way that facilitates the competitive deployment of “open network” broadband facilities and prohibits the further concentration of broadband market share in any given geographical area. Also, to the extent that eligibility is limited to certificated carriers, the FCC would have a role in enforcing any violations of conditions imposed on stimulus fund grant recipients.

14. **Job Creation:** Direct and indirect job creation in the short term and in the long term should be taken into consideration when evaluating whether a particular project should be awarded stimulus funds and a preference should be given to long term job creation.

The Act poses an unprecedented opportunity to facilitate the deployment of broadband facilities to un-served and underserved areas of our country in a manner consistent with FCC policies and thereby open the door of economic opportunity to millions of people at a time when job creation is critical to our economic recovery. Implementation of the points outlined above will enhance the possibility of the Act achieving its fullest potential.

Thank you for your time and consideration.

Very truly yours,



David G. Rusin,
President & CEO

Cc: David P. Grahn, Associate General Counsel, Rural Development
P. Michele Ellison, Acting General Counsel, Federal Communications Commission
Bernadette McGuire-Rivera, Associate Administrator, Office of
Telecommunications and Information Applications