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**Before the  
Department of Commerce  
National Telecommunications and Information Administration  
and the  
Department of Agriculture  
Rural Development  
Washington, DC**

In the Matter of )  
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American Recovery and Reinvestment Act of ) Docket No. 090309298-9299-01  
2009 Broadband Initiatives )  
 )

To: The Under Secretary of Agriculture for Rural Development and the Assistant Secretary of  
Commerce for Telecommunications and Information

**COMMENTS OF CISCO SYSTEMS, INC.**

**CISCO SYSTEMS, INC.**

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## SUMMARY

The Recovery Act offers an unprecedented opportunity to expand and augment the nation's broadband infrastructure, and in so doing to enhance economic opportunity, extend the reach of high-quality medical care, improve education, facilitate public safety, and otherwise further the public interest. High-speed broadband offerings are playing an increasingly central role in American life, and offer even greater benefits in the very near future. But, as the Recovery Act recognizes, many Americans still lack access to core broadband offerings. NTIA and RUS now have a chance to remedy this problem. As NTIA and RUS work to implement the Recovery Act, Cisco urges a clear and steady focus on the importance of deploying high-speed offerings to unserved and underserved Americans. This focus will ensure that the Act's broadband goals are met, and that all Americans can enjoy the many benefits broadband confers on those who are connected. Cisco makes six specific recommendations.

***First, the deployment of network infrastructure should be the primary focus of Recovery Act broadband funding.*** Studies repeatedly show that end-user connectivity bears a direct and significant relationship to economic opportunity, and the Recovery Act's goals can best be met through a focus on that goal. Of course, end-user connectivity improvements may often require enhancements to the "middle-mile" network, and funding choices should reflect this fact. If they do, the resulting infrastructures can form the basis for smart power grids, intelligent transportation networks, distance learning, telemedicine, and other projects envisioned by the Recovery Act.

***Second, NTIA should adopt broad eligibility criteria for the BTOP program.*** Private, for-profit providers have far more experience and expertise than either governments or non-profit companies in the deployment and management of broadband networks. They also have existing supply chains, systems and processes to manage client relationships and account, access to funding, and the flexibility to hire new workers – resources that governmental or nonprofit applicants might lack. Thus, while public and nonprofit entities might well be strong candidates for funding in many cases, for-profit entities should not be precluded seeking BTOP grants on their own.

***Third, the terms "unserved" and "underserved" should be defined from a purely technological perspective.*** The terms "unserved" and "underserved" should be defined to improve Americans' access to core broadband offerings. An area should be deemed "unserved" if there is no terrestrial (non-satellite) service offering downstream speeds of 768 Kbps or above. An area should be deemed "underserved" if a substantial portion of the population lacks access to services capable of accommodating telemedicine, distance-learning, remote location work, VoIP, streaming media, and similar "core" broadband offerings. Moreover, NTIA must recognize that efforts to improve service in *underserved* areas cannot be completely overlooked in favor of efforts to bring service to *unserved* areas.

***Fourth, the evaluation of competing applications should be based on case-specific analysis.*** Proper evaluation of competing applications will necessarily involve case-specific analysis, not easily reduced to mathematical equations or fill-in-the-blanks scoring. NTIA and RUS should therefore reject reductive efforts to eliminate subjectivity from the analysis, and focus on the costs of a given proposal as compared against the benefits, in light of the costs and benefits of other proposals seeking to serve similarly situated communities.

***Fifth, NTIA should not impose interconnection or nondiscrimination requirements beyond those set forth in the FCC’s Internet Policy Statement.*** Cisco supports the FCC’s *Policy Statement* and applauds the important role it has played in shaping the broadband market. The *Policy Statement* declines to impose bright-line rules, recognizing that the needs of consumers will best be served by case-specific analysis that reflects the evolving needs and capabilities of broadband networks. The adoption of additional requirements here would undermine this flexibility, imposing rigid requirements based on potentially fleeting assumptions. Moreover, the instant proceeding is not an appropriate context for developing and implementing new requirements of this sort.

***Sixth, NTIA and RUS should confirm that the Recovery Act’s “Buy American” provisions do not apply to broadband projects.*** Recent interim interpretations of the “Buy American” provision seem to have resulted in a disparity that could hamper the goals of the NTIA and RUS broadband programs. These projects rely on an inherently globalized supply chain, with many types of the most important components not produced within the United States at all. NTIA and RUS should thus utilize the waiver authority the Recovery Act grants them to make clear that the Buy American provision does not apply to any broadband projects, whether private or public.

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To: The Under Secretary of Agriculture for Rural Development and the Assistant Secretary of  
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**COMMENTS OF CISCO SYSTEMS, INC.**

Cisco Systems, Inc. (“Cisco”), the world’s largest provider of networking technology, equipment, solutions and services used in the construction and management of next-generation broadband networks, hereby submits these comments regarding implementation of the broadband-related provisions of the American Recovery and Reinvestment Act of 2009 (“Recovery Act”).<sup>1</sup>

The Recovery Act offers an unprecedented opportunity to expand and augment the nation’s broadband infrastructure, and in so doing to enhance economic opportunity, extend the reach of high-quality medical care, improve education, facilitate public safety, and otherwise further the public interest. The Recovery Act recognizes that broadband service has improved the lives of Americans in myriad ways, and that its potential far surpasses even the great use to which has been put to date. The Act envisions a world where Americans living in even the most

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<sup>1</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (“Recovery Act”).

remote areas enjoy next-generation voice, video, and data applications; where residents living hundreds of miles from a city can secure the very best medical care; where energy use and distribution is metered and managed via communications technology to minimize waste; where first responders can rely on a nationwide, interoperable communications network; and where intelligent transportation systems mitigate traffic and minimize fuel use. As the FCC stated just last week:

New, innovative broadband products and applications – whether provided by wireline, wireless, or satellite technology – are fundamentally changing not only the way Americans communicate and work, but also how they are educated and entertained, and care for themselves and each other. Individuals increasingly take advantage of broadband today for everyday communications with family and friends, sharing files with co-workers when away from the office, uploading videos and photos, collaborating on articles, blogging about local happenings and world events, creating new jobs and businesses, finding nearby restaurants, shopping, banking, interacting with government, getting news and information when on the go, communicating through relay services, and countless additional applications.<sup>2</sup>

But, as Acting FCC Chairman Michael Copps also pointed out, “all this progress is only a small part – just prologue – to what this technology is going to do to change our lives in the years ahead.”<sup>3</sup> In implementing the Recovery Act, NTIA and RUS must bear in mind the many opportunities that broadband has opened, and will continue to open, for those with access to next-generation offerings. Other priorities, important though they may be, must take a back seat to the need for infrastructure in unserved and underserved areas – a goal that America’s trade partners and economic rivals are also striving to fulfill. Many of these nations are methodically

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<sup>2</sup> See *A National Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-51 (rel. Apr. 8, 2009).

<sup>3</sup> *Id.*, Statement of Acting Chairman Michael J. Copps.

deploying next generation broadband networks universally, and the United States broadband infrastructure must be in a position to compete effectively. The Recovery Act's goals, and the public interest generally, can best be served by a focus on deployment.

**I. THE DEPLOYMENT OF NETWORK INFRASTRUCTURE SHOULD BE THE PRIMARY FOCUS OF RECOVERY ACT BROADBAND FUNDING.**

In implementing the Recovery Act, NTIA and RUS should maintain a clear focus on the deployment of broadband services to unserved and underserved end users. As numerous studies have demonstrated, end-user connectivity bears a direct and significant relationship to economic opportunity. A recent report published by the Information Technology & Innovation Foundation ("ITIF") found that an investment of \$10 billion in the nation's broadband infrastructure would generate almost 500,000 new or retained jobs.<sup>4</sup> Another recent study, performed by economic consulting firm LECG, concluded that a ten percent increase in the number of broadband lines nationwide would increase the Gross Domestic Product by \$110 billion.<sup>5</sup> Connected Nation has estimated that a seven percent increase in American broadband adoption would produce \$134 billion per year in total economic benefits, including \$662 million per year in reduced healthcare costs, \$6.4 billion per year in reduced costs associated with driving and \$18 million in reduced annual carbon emissions.<sup>6</sup> The Brookings Institute has found that in the United States, every ten

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<sup>4</sup> See Robert D. Atkinson, Daniel Castro and Stephen J. Ezell, ITIF, *The Digital Road to Recovery: A Stimulus Plan to Create Jobs, Boost Productivity and Revitalize America* (Jan. 2009), available at <http://www.itif.org/files/roadtorecovery.pdf>.

<sup>5</sup> See Press Release, *Study shows significant economic benefits from broadband if overall ICT access and skills are high*, available at <http://www.nokiasiemensnetworks.com/global/Press/Press+releases/news-archive/Study+shows+significant+economic+benefits+from+broadband+if+overall+ICT+access+and+skills+are+high.htm>.

<sup>6</sup> See Connected Nation, *The Economic Impact of Stimulating Broadband Nationally*, available at [http://www.connectednation.org/\\_documents/Connected\\_Nation\\_EIS\\_Study\\_Full\\_Report\\_02212008.pdf](http://www.connectednation.org/_documents/Connected_Nation_EIS_Study_Full_Report_02212008.pdf).

additional broadband lines correlate to one additional job.<sup>7</sup> In short, broadband connections improve American lives.<sup>8</sup> NTIA and RUS should accordingly focus on deploying infrastructure to unserved and underserved citizens as the critical goal in developing Recovery Act policy.

Of course, projects focused on end-user connectivity need not be limited to *last-mile* deployments. End users in unserved and underserved areas may well require new or improved facilities in the last mile, but they will also, in some cases, be in need of new or improved capacity at the “middle mile” – links connecting their homes and neighborhoods to larger backbone networks, and thus connecting them to the host of online offerings that well-served Americans have come to rely on. Even existing middle-mile networks may well be unable in some places to carry the increased traffic loads that will attend any expansion of last-mile capacity. Thus, NTIA and RUS should bear in mind that projects proposing middle-mile capacity improvements will also play a critical role in ensuring adequate service to end users.

Critically, a focus on end-users will also help to ensure that other Recovery Act objectives are satisfied. As noted above, in order to deploy service to unserved and underserved users, broadband providers will be required to construct and/or upgrade high-capacity fiber-optic “backhaul” links used to aggregate and carry the traffic to even higher-capacity Internet backbone facilities. Once built, such backhaul links can easily be utilized to carry additional

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<sup>7</sup> See *The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data*, available at <http://www3.brookings.edu/views/papers/crandall/200706litan.pdf>.

<sup>8</sup> Of course, connectivity also improves lives (and competitiveness) abroad – a point not lost on other nations. For example, just last week, the Australian government announced a plan to spend \$31 billion over eight years to deploy broadband nationwide. See Media Release, *New National Broadband Network*, available at [http://www.pm.gov.au/media/Release/2009/media\\_release\\_0903.cfm](http://www.pm.gov.au/media/Release/2009/media_release_0903.cfm). In this plan’s first phase, over 200,000 homes in the Australian island state Tasmania will be wired with a fiber network offering speeds of 100 Mbps. See *Tasmania first to get Superfast Broadband*, available at <http://www.alp.org.au/media/0409/mspm080.php>.

traffic – traffic generated by telemedicine and distance-learning applications, public-safety and intelligent-transportation networks, “smart” power grids, and so forth. Put differently, the infrastructure used to serve end users will also be available for use by entities and applications serving other public policy goals enunciated by the Recovery Act. Thus, by directing funds toward end-user connectivity, NTIA can ensure that BTOP funds catalyze *additional* deployment by dramatically cutting the costs associated with fulfilling these other objectives.

## **II. NTIA SHOULD ADOPT BROAD ELIGIBILITY CRITERIA.**

In establishing BTOP eligibility criteria, NTIA should make clear that private, for-profit entities are eligible for funding, whether or not they apply in partnership with governmental or non-profit entities. Private, for-profit providers have far more experience and expertise than either governments or non-profit companies in the deployment and management of broadband networks. These companies have existing supply chains that can be used to secure labor, parts, and other necessary inputs, as well as existing systems and processes to manage client relationships and accounts post-deployment. They also will generally be better suited to provide 20 percent (or more) of the funds necessary to complete a given project. Moreover, for-profit providers will be most able to cover ongoing capital and operational costs long after stimulus funding has been spent. Finally, for-profit companies can most readily create the highly paid, sustainable technology-sector jobs that are critical to the Recovery Act’s success. Thus, in many cases, private for-profit companies will be best suited to serve the Recovery Act’s economic and communications-related goals.

To be sure, there will be projects that can best be undertaken by a governmental entity, a non-profit entity, or a partnership between or among public, non-profit, and for-profit entities. But there is no reason to believe that the public interest will always be served merely by the participation of government or non-profit actors. Rather, each application should be judged on

its own merits, rather than the nature of the applicant. NTIA should therefore adopt BTOP eligibility criteria recognizing the important role that private, for-profit entities have played and will continue to play in shaping our nation's broadband infrastructure. A level playing field for all applicants will open the process to the most effective and innovative applications.

### **III. "UNSERVED" AND "UNDERSERVED" SHOULD BE DEFINED FROM A PURELY TECHNOLOGICAL PERSPECTIVE.**

In defining the terms "unserved" and "underserved" for Recovery Act purposes, NTIA should focus on technological factors – i.e., a customer's ability to access core broadband applications using existing, installed infrastructure – rather than on other indicia. As described above, it is beyond dispute that end users benefit greatly from access, preferably in their homes, to telemedicine and distance learning applications, voice over Internet protocol, streaming audio and video, and other core broadband offerings. These offerings, however, require fairly robust connectivity, and many Americans – rural and urban, rich and poor – therefore cannot access them. NTIA should focus BTOP funds on efforts to remedy this problem.

To that end, in defining "unserved" and "underserved," NTIA should focus on the technological capability of the service currently available in a given area. An area should be deemed "unserved" if there is no terrestrial (i.e., non-satellite) service offering downstream speeds of 768 Kbps or above – i.e., no service qualifying as "basic broadband" under the framework recently established by the FCC.<sup>9</sup> An area should be deemed "underserved" if a substantial portion of the population lacks access to services capable of accommodating

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<sup>9</sup> *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip*, 23 FCC Rcd 9691, 9701 ¶ 20 n.66 (2008).

telemedicine, distance-learning, remote location work, VoIP, streaming media, and similar “core” broadband offerings.

Finally, in its efforts to prioritize competing applications, it is crucial for NTIA to recognize that efforts to improve service in *underserved* areas cannot be completely overlooked in favor of efforts to bring service to *unserved* areas. In unserved and underserved areas alike, end users lack access to high-bandwidth applications that are critically important to economic opportunity, health care, education, and other national priorities. Likewise, in both unserved and underserved areas, it is safe to assume that network providers have concluded that deployment (or further deployment) is not feasible in the absence of a subsidy. Thus, BTOP has a role to play in both unserved and underserved areas. While NTIA should seek to bring broadband to areas that have never enjoyed high-speed service, it should not do so at the expense of areas that are “served” in a formal sense but nevertheless lack sufficient access to support the most critical broadband service offerings.<sup>10</sup> Indeed, in some cases, due to economies of scale, topology, or other factors, an investment in an underserved area’s network could do far more to serve national policy goals than an equivalent investment in an unserved area. NTIA should keep this prospect in mind as it develops a framework for evaluating applications, and should ensure that BTOP funds can be used to improve access wherever users are unable to utilize current and future core broadband offerings.

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<sup>10</sup> Indeed, broadband infrastructure that can barely support current applications will be woefully unable to support future applications. In many locations, the necessary upgrading of infrastructure to support future applications will occur without government intervention in a competitive market driven by consumer demand. While Cisco supports market-led deployment of broadband infrastructure, Cisco also recognizes that in certain locations market forces alone will not be sufficient to upgrade infrastructure to next generation capabilities.

#### **IV. EVALUATION OF COMPETING APPLICATIONS SHOULD BE BASED ON A CASE-SPECIFIC ANALYSIS.**

Proper evaluation of competing applications will necessarily involve searching and case-specific analysis, not easily reduced to mathematical equations or fill-in-the-blanks scoring. There is no simple formula by which NTIA could appropriately compare an application proposing deployment of service to 200 tribal end-users in South Dakota to another proposing service to an Appalachian health-care facility or an inner-city fire department. Even among projects focused on end-user connections, the task of comparing disparate applications may well be too complex for easy scoring: Is the value of serving one unserved person greater than or less than the value of improving service to three underserved persons? Should an applicant proposing to serve 1000 users in a remote village with only moderately high barriers to deployment be preferred over another proposing to serve 500 users on a remote mountainside posing tremendous topological challenges at the same cost? Questions like these – and the many others NTIA and RUS are likely to face – will require fact-specific and even subjective judgments not amenable to self-effectuating selection tools. Congress left these judgments to NTIA and RUS.<sup>11</sup> NTIA and RUS should reject reductive efforts to eliminate subjectivity from the analysis, and focus on three questions:

- How many previously unserved and underserved users will gain access to core broadband offerings as a result of this project?
- At what cost to the public?
- How does this cost compare to the cost of other proposals seeking to serve similarly situated communities?

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<sup>11</sup> The Recovery Act permits NTIA to consult with the states in awarding BTOP grants. Cisco supports this consultative role for the states, but observes that the Recovery Act does not call for – or permit – NTIA to afford the states a dispositive role in the grant selection process.

This framework will recognize the breadth of applications the agencies are likely to receive, and afford them the flexibility to compare vastly different proposals in a meaningful way.

**V. NTIA SHOULD NOT IMPOSE INTERCONNECTION OR NONDISCRIMINATION REQUIREMENTS BEYOND THOSE SET FORTH IN THE FCC'S *INTERNET POLICY STATEMENT*.**

In establishing the conditions for receipt of BTOP funding, NTIA should not impose interconnection or nondiscrimination requirements above and beyond those set forth in the FCC's existing *Internet Policy Statement*.<sup>12</sup> Cisco supports the *Policy Statement* and applauds the important role it has played in policing the broadband market. However, the adoption of additional prescriptive requirements would undermine the flexibility of the *Policy Statement's* case-by-case approach to the market. Moreover, the instant proceeding is not an appropriate context for developing and implementing new requirements of this sort.

Cisco has been involved in this policy discussion from the beginning as a participant in the drafting of the High-Tech Broadband Coalition's "connectivity principles," and therefore has long supported the policies reflected in the *Internet Policy Statement*. In a September 2003 letter and several subsequent filings, the HTBC urged the adoption of four specific "connectivity principles."<sup>13</sup> The FCC's 2005 *Internet Policy Statement* largely reflected those principles.

The *Policy Statement* has proved to be an effective tool in influencing providers' actions. The day it adopted the *Policy Statement*, the FCC warned that "if we see evidence that providers

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<sup>12</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, CC Dkt. No. 02-33 et al., 20 FCC Rcd 14986 (2005).

<sup>13</sup> HTBC Letter to Chairman Powell, September 25, 2003, CS Docket No. 02-52; GN Docket No. 00-185; CC Docket Nos. 02-33, 95-20 & 98-10 ("HTBC September 2003 Letter"). See also HTBC filings in CS Docket No. 02-52; GN Docket No. 00-185; CC Docket Nos. 02-33, 95-20 & 98-10.

of telecommunications for Internet access or IP-enabled services are violating the[] principles, we will not hesitate to take action to address that conduct.”<sup>14</sup> Since then, the FCC has forcefully asserted its prerogative to take enforcement action in connection with violations of the *Policy Statement*.<sup>15</sup> But the *Policy Statement* has played a critical role in the development of the broadband market even in the absence of affirmative enforcement action. For example, the *Policy Statement* articulates the FCC’s expectations regarding how providers may and may not behave vis-à-vis their customers, helping to ensure that users understand their entitlement to access the content and applications of their choice and thereby deterring unreasonable conduct before it occurs.

Importantly, however, the *Policy Statement* declines to impose bright-line rules, recognizing that the needs of consumers will best be served by case-specific analysis that reflects the evolving needs and capabilities of broadband networks. In its recent *Comcast Order*, the FCC “decline[d] to adopt prophylactic rules” regarding broadband interconnection and nondiscrimination, and instead declared its intent “to adjudicate disputes regarding federal Internet policy on a case-by-case basis.”<sup>16</sup> The Commission noted that this course was most appropriate, because “the Internet [is] new and dynamic” and “Internet access networks are complex and variegated.”<sup>17</sup> Moreover, the case-by-case approach was most consonant with

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<sup>14</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14903 ¶ 96 (2005).

<sup>15</sup> *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management”*, 23 FCC Rcd 13028 (2008) (“*Comcast Order*”).

<sup>16</sup> *Id.* at 13045-46 ¶¶ 29-30.

<sup>17</sup> *Id.* at 13046 ¶ 31.

“federal policy advocat[ing] the preservation of the ‘vibrant and competitive free market’ for Internet and interactive computer services.”<sup>18</sup> Then-Commissioner Copps noted that he “ha[d] long advocated ... a case-by-case analysis of the facts in particular cases,” and Commissioner Jonathan Adelstein lauded the “flexibility” afforded by the FCC’s “case-by-case approach.”<sup>19</sup> The adoption of prescriptive interconnection or nondiscrimination rules here would undermine the flexibility that the FCC has worked to maintain, imposing obligations based on assumptions that are fashionable today but may not endure over time.

Moreover, even if it were appropriate to adopt additional prophylactic rules governing broadband interconnection and non-discrimination (and Cisco does not believe that it is), the instant proceeding is not the right vehicle for such action. As NTIA and RUS know all too well, the entire federal government is focused on ensuring that the Recovery Act’s implementation proceeds rapidly to spur job creation and economic growth. Given the importance of quick action, it is essential that NTIA and other entities minimize procedural and substantive hurdles facing recipients of grants and other Recovery Act funding, to ensure that such obligations do not foster uncertainty or chill investment. Moreover, ongoing efforts such as those being undertaken by NTIA and RUS generally do not fall under the auspices of the Administrative Procedure Act, and are largely immune from judicial oversight. In contrast, the FCC has been considering broadband-related issues for at least a decade, and has been expressly considering broadband market practices for over two years.<sup>20</sup> To the extent such rules are warranted, they should be imposed only in the context of a process allowing a similar degree of deliberation, debate, and

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<sup>18</sup> *Id.* at 13046 ¶ 32.

<sup>19</sup> *Id.*, Statement of Commissioner Michael J. Copps; *id.*, Statement of Commissioner Jonathan S. Adelstein.

<sup>20</sup> *See Broadband Industry Practices*, 22 FCC Rcd 7894 (2007).

review, and in a manner that does not single out the very entities looking to spur job growth and promote economic recovery.

**VI. NTIA AND RUS SHOULD CONFIRM THAT THE RECOVERY ACT'S "BUY AMERICAN" PROVISIONS DO NOT APPLY TO PRIVATE BROADBAND PROJECTS, AND SHOULD WAIVE THE REQUIREMENTS FOR PUBLIC ONES.**

The Recovery Act includes a "Buy American" requirement specifying that "[n]one of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States."<sup>21</sup> Significantly, the Act provides for a waiver of this requirement where "the head of the Federal department or agency involved finds" (1) that application of the requirement "would be inconsistent with the public interest," (2) that "the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality," or (3) that "inclusion of ... manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent."<sup>22</sup>

In its interim guidance released on April 3, 2009, the White House Office of Management and Budget ("OMB") addressed the Recovery Act's "Buy American" requirements at length.<sup>23</sup> Among other things, OMB adopted an interim rule defining the term "public building and public work" to mean "a public building of, and a public work of, a governmental entity (the United

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<sup>21</sup> Recovery Act § 1605(a).

<sup>22</sup> *Id.* § 1605(b). These provisions are indicative of Congress' concern that strict application of the ARRA Buy American requirements could work at cross-purposes with the desired economic stimulus purpose of the law.

<sup>23</sup> Peter R. Orszag, Director, OMB, *Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009* (Apr. 3, 2009).

States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; and multi-State, regional, or interstate entities which have governmental functions).”<sup>24</sup> This definition excludes projects undertaken by private companies – including those funded using federal assistance. Thus, the OMB guidance appears to exclude Recovery Act-funded broadband deployment projects pursued by private entities from the scope of the Act’s “Buy American” provision.

Cisco supports exclusion of private networks from Section 1605(a)’s reach. The communications sector relies on a completely globalized supply chain. Many types of the most important components – including semiconductors, DSLAMs, core routers, edge routers, optical switching equipment, radio access networks, multiplexers, fiber-optic transmission equipment, integrated circuits, memory chips, and wiring boards – are not produced in the United States. Moreover, there would be no cost effective way for network equipment providers to modify their practices to reflect new “Buy American” requirements in the time frames contemplated by the Recovery Act. These entities have developed and organized their production and distribution practices to comport with the market as it exists, and with the various pre-existing trade laws and related requirements shaping global commerce. These processes cannot be easily reengineered and supplanted in a matter of weeks or months. Indeed, such a radical departure from existing practices would be grossly inefficient, given that the underlying requirements would apply only to a single round of funding and a single production cycle.

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<sup>24</sup> *Id.* at 150-151. “These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.” *Id.* at 151.

Cisco notes, however, that the existing rule appears to create a disparity between private projects (which are exempted from Section 1605(a)) and public projects (which are not). This incongruity could itself distort and undermine the Recovery Act's broadband programs. Among other things, the disparate rules would be difficult to administer, could artificially favor some applicants over others, and could discourage public-private partnerships by saddling such enterprises with obligations that would not apply to private entities acting alone.

Thus, Cisco asks NTIA and RUS to waive the Recovery Act's "Buy American" mandate with respect to public projects, and to thereby place all applicants on an equal footing in this regard.<sup>25</sup> The waiver should be based on public interest grounds. A public interest waiver is appropriate in this case because, as detailed above, disparate rules will be difficult to administer, could produce incongruous results, and would discourage public-private partnerships. In addition, the public interest in generating jobs cannot be served if network construction on public projects is delayed while grantees search among a limited and/or unfamiliar subset of network equipment manufacturers. Such a waiver will serve the Recovery Act's broader goals, facilitating the timely deployment of high-speed networks to the American public, stimulating growth, and creating sustainable jobs throughout the economy.

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<sup>25</sup> If, in the view of NTIA and RUS, Cisco has misinterpreted the OMB guidance such that both private and public projects remain subject to Section 1605(a), then Cisco strongly urges the agencies to adopt a blanket public interest waiver covering both public and private broadband projects. In this case, a public interest waiver is needed for an additional reason. If private network service providers seeking to expand their service area are disqualified from dealing with their preferred vendors, they may be reluctant to pursue program participation if they are forced to extend networks with equipment that is not of their choosing and potentially not compatible with existing network plant.

## **CONCLUSION**

For the reasons stated above, Cisco respectfully asks NTIA and RUS to implement the Recovery Act in the manner described herein.

Respectfully submitted,

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