

BEFORE THE
DEPARTMENT OF COMMERCE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
AND
DEPARTMENT OF AGRICULTURE
RURAL UTILITIES SERVICE

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

**COMMENTS OF THE
KENTUCKY MUNICIPAL UTILITIES ASSOCIATION**

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EXECUTIVE SUMMARY

KMUA represents the municipal utilities of Kentucky. Twenty-nine of KMUA's members are providing, or plan to provide, advanced communications service to their residents, making Kentucky the nation's leading state in terms of municipal utility provision of such services. KMUA members are therefore uniquely familiar with the hurdles faced in bringing broadband services to our nation's less populous and prosperous areas.

NTIA BTOP Initiative.

KMUA urges NTIA to adopt BTOP eligibility and grant application evaluation criteria that (1) encourage applications by municipalities and their utilities and that does not reward incumbent private providers; (2) require that broadband networks receiving BTOP support must be genuinely open and non-discriminatory; (3) take into account the unique financing requirements and limitations applicable to municipalities and their utilities; and (4) provide new broadband competition to incumbent telephone and cable companies.

KMUA strongly recommends that NTIA should not rely on non-transparent broadband mapping of the type provided by Connected Nation/ConnectKentucky in developing the required national broadband map.

KMUA also urges the NTIA and RUS to develop a single, uniform grant application form that can be used to apply for both agencies' broadband grant programs.

RUS Broadband Program.

KMUA advocates that RUS implement its broadband program in a way that (1) fosters municipal utility competition with private incumbent providers; (2) tailors broadband speeds to the rural economic development of each particular community; and (3) gives great weight to proposals offering increased broadband competition and offering broadband service to the greatest number of rural residents lacking access to broadband, and gives little weight to current or former RUS borrowers.

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The Kentucky Municipal Utilities Association (“KMUA”) submits these comments to the Department of Commerce, National Telecommunications and Information Administration (“NTIA”), and to the Department of Agriculture’s Rural Utilities Service (“RUS”) in response to the Joint Request for Information and Notice of Public Meeting (“Joint Request for Information”) regarding the broadband initiatives of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 11-5, 123 Stat. 115 (2009) (“ARRA”).¹

I. INTRODUCTION.

KMUA was formed in 2007 as a result of a planned merger between the Municipal Electric Power Association of Kentucky (“MEPAK”) and the Municipal Water and Waste Water Association of Kentucky (“MWWAK”). Fourteen of MEPAK’s 29 members provide, or are currently planning to provide, advanced communications services to their residents, making Kentucky the leading state in the nation in terms of number and percentage of Municipal Utilities providing such services.

¹ *American Recovery and Reinvestment Act of 2009 Broadband Initiatives*, Joint Request for Information and Notice of Public Meetings, 14 Fed. Reg. 10716 (Mar. 12, 2009).

KMUA members that provide communications services to their residents include the Barbourville Utility Commission, Bardstown Municipal Utilities, Frankfort Plant Board, Franklin Electric Plant Board, Glasgow Electric Plant Board, Hopkinsville Electric System, Mayfield Electric and Water System, Murray Electric System, Owensboro Municipal Utilities, Paducah Power System, Princeton Electric Plant Board, Russellville Electric Plant Board, and the City of Williamstown, Kentucky.

KMUA members are keenly aware that low population density makes deployment of broadband service to rural communities much more expensive than in areas with higher density. Low population densities, together with the issues of traversing vast expanses of remote and often rugged topography, present unique economic and technological hurdles to the deployment of broadband to rural America.

Indeed, access to broadband in rural America still lags behind access in other areas of the country. According to a Pew 2008 report, 38% of people living in rural America have broadband at home, compared with 57% of urban residents and 60% of suburban residents.² As a result, many rural Americans are being denied the many benefits of broadband — benefits that include better health care, education and business opportunities. Meanwhile, according to the USDA, unemployment and poverty rates have been rising significantly in rural areas.³

KMUA and its members welcome the opportunity to comment on the implementation of the ARRA's broadband initiatives. We commend the NTIA and RUS for hosting the many public meetings where divergent views on how to implement the broadband initiatives were

² John B. Horrigan, Pew Internet & American Life Project, Home Broadband Adoption 2008, at 3, *available at* <http://www.pewinternet.org/Reports/2008/Home-Broadband-2008.aspx>.

³ USDA Economic Research Service, Rural America at a Glance: 2008 Edition, Econ. Info. Bulletin No. 40, (Oct. 2008), *available at* <http://www.ers.usda.gov/Publications/EIB40/>.

vigorously discussed. KMUA also commends the agencies for their demonstrated interagency cooperation and encourages this continued interagency cooperation.

While the ARRA provides significant funding for broadband deployment through the NTIA's Broadband Technology Opportunities Program ("BTOP") grants and through the RUS grants and loans program, the funding allocated is not sufficient to meet the nation's broadband needs. Thus, both NTIA and RUS have an enormous responsibility in administering their respective programs to ensure that the programs not only comply with the statutory requirements and purposes, but that they maximize broadband deployment, access and connectivity, including high speed broadband deployment. Maximizing broadband deployment and subscribership will also, of course, spur the job creation and economic recovery goals of the ARRA. This is particularly true with respect to rural and lower-income America, where the need for job creation and economic growth has been acute for some time.

II. NTIA BTOP IMPLEMENTATION.

The NTIA asks for information regarding BTOP grant purposes, eligibility, criteria and other areas related to the processes it will follow in implementing the program and awarding grants. NTIA also asks for information on post-award grant monitoring and on how to measure the BTOP's success. KMUA will focus its comments on the questions revolving around the application and awarding of grants processes, as well as the issue of broadband mapping.

A. BTOP Purposes.

The Conference Report accompanying the ARRA states that "[t]he Conferees intend that the NTIA award grants serving all parts of the country, including rural, suburban, and urban areas."⁴ The BTOP enumerates five specific purposes:

⁴ H.R. Rep. No. 111-16, at 774 (2009) ("Conf. Rep.")

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

While all of the enumerated purposes are important, for KMUA members' communities and similar communities across the nation, the key purposes are providing improved access to broadband in unserved and underserved areas, to schools, libraries and healthcare providers, and to low income and disadvantaged groups; improving broadband use by public safety agencies; and stimulating broadband demand, economic growth and job creation.

The NTIA asks several questions regarding the BTOP purposes, including whether there should be percentages of funds allocated for each of the five purpose categories. KMUA does not believe that fixed percentages should be allotted to each ARRA purpose, as all of the

⁵ ARRA, Sec. 2, Div. B, Title VI, § 6001(b), 123 Stat. at 512-513.

purposes are important, and in many instances the purpose categories overlap. For instance, for most KMUA members' service areas, providing access to consumers residing in unserved areas (Purpose 1) and in underserved areas (Purpose 2) would overlap with Purposes 3(A) and (B) (improved access for libraries, schools and healthcare facilities and to disadvantaged groups), 4 (use of broadband by public safety), and 5 (stimulating demand and economic growth).

NTIA should have the discretion and flexibility to apportion the grant money among the most worthy grant applications and not arbitrarily apportion the funding by ARRA "purpose" category. Had Congress intended these categories to be funded by rigid percentages or a set formula, it could have said so, but it did not. Instead, Congress specified that certain minimal funding be awarded to two types of BTOP program grants (the competitive grants for expanding public computer center capacity and the competitive grants for innovative programs to encourage sustainable adoption of broadband service), but left the largest share of BTOP funds for broadband deployment grants.⁶ KMUA agrees that applicants should be encouraged to address more than one ARRA purpose category (and, as noted above, we expect that most applications will encompass more than one of ARRA purposes), but only to the extent it fits with the particular applicant's community broadband needs.

B. The Role of The States.

The ARRA provides that the NTIA may consult with the States with respect to identifying unserved and underserved areas in the particular State, and as to the allocation of grant funds in the State.⁷ The NTIA asks, among other questions, how the grant program should consider State recommendations in awarding grants and what is the appropriate role for States in the NTIA's implementation and awarding of grants under BTOP. The NTIA received extensive

⁶ ARRA , Sec. 2, Div. A, Title II, 123 Stat. at 128.

⁷ ARRA, Sec. 2, Div. B, Title VI, § 6001(c), 123 Stat. at 513.

feedback on this question at the NTIA/RUS public meetings, including at the ones held on March 17 and on March 23, 2009.

KMUA believes that the NTIA should consult with States to the extent practicable, as States in some instances may be well positioned to understand their particular communities' broadband needs. The NTIA should *not*, however, give decisive weight to a State's endorsement of a particular project. Nor should States be given the authority to rank or prescreen all applications within their jurisdictions, as the National Governors Association and NARUC have urged.⁸ The ARRA allows (but does not require) the States to have a consultative role, but not more. KMUA also notes that at the NTIA/RUS March 23 roundtable, some participants and commenters cautioned against giving the States the authority to rank the applications.⁹ NTIA cannot, and should not, delegate its statutory responsibilities both to develop the BTOP grant application criteria and to make the ultimate decisions in awarding the grants.

Relying on the States, and in particular state public service commissions ("PSCs"), could pose special problems and risks for municipal utilities like KMUA members. The reason is that, under many state laws (including Kentucky's), municipal utilities are generally exempt from most state PSC jurisdiction. As a result, KMUA is concerned that state PSCs are not well positioned to evaluate grant applications by municipal utilities vis-à-vis grant applications by the state PSCs' private sector regulatees. We do not mean to suggest that state PSCs would be

⁸ NTIA/RUS public meeting transcript, Roundtable on the Role of States, Session 2 (Mar. 23, 2009), *available at* <http://www.ntia.doc.gov/broadbandgrants/meetings.html>. *See also* NARUC letter to the Department of Commerce, the Department of Agriculture and to NTIA (dated Apr. 2, 2009) *available at* <http://www.naruc.org/policy.cfm?c=advocacy>.

⁹ At the March 23 NTIA/RUS Roundtable on the Role of the States, the Appalachian Regional Commission representative stated in part: "The comment I would make with regards to the state, they are a great convener, they are a great facilitator. And they have specific plans in mind based upon projects and activities that they have completed. However, I would say that what you do want from them, from the NTIA and the utilities service would be endorsement of project activity, that it is a consistent project activity consistent with their priorities of the state, but I would not ask that they rank the projects." NTIA/RUS public meeting transcript, Roundtable on the Role of the States, Session 2 (Mar. 23, 2009), *available at* <http://www.ntia.doc.gov/broadbandgrants/meetings.html>.

deliberately biased against municipal utility grant applications, but a likely result of a state PSC's adherence to its State law jurisdictional limitations might well create a built-in, institutional bias in favor of applications by the state PSC's regulatees, a bias that it would be unrealistic for the NTIA to expect state PSCs to overcome, assuming that State law would even permit the state PSC to overcome it. Built-in PSC preferences for incumbent private telephone and cable service providers would disserve the ARRA's goal of promoting competition in broadband service and lowering prices.¹⁰

Moreover, having state PSCs review all BTOP applications would make the application process more cumbersome and delay the timely awarding of grants. In addition, state PSCs are not typically in the grant application evaluation business and therefore have no more (and likely less) experience than NTIA in that area. Furthermore, at least in the case of Kentucky, state law denies the PSC of jurisdiction over broadband, and thus State law may deny the PSC access to much of the information needed on which to build any broadband expertise. Accordingly, while KMUA believes the NTIA should welcome input from the States, it should not permit the States' role to be decisive, especially if it comes from state PSCs, and NTIA should independently review and evaluate all applications from a particular State, regardless of the views of that State.

C. Private Entity Eligibility Should Be Limited– the NTIA Needs to Give the “Public Interest” Standard Meaning.

The ARRA provides that private broadband service or infrastructure providers may be eligible for BTOP grants, but only to the extent that the NTIA finds by rule that it is in the public interest.¹¹ The NTIA asks what standard it should use in doing so.

KMUA urges the NTIA to give meaning to the statutory “public interest” requirement.

At the NTIA public roundtable devoted to private entity eligibility, Curt Stamp, the

¹⁰ See ARRA, Sec. 2, Div. A, Title I, 123 Stat. at 118.

¹¹ ARRA, §2, Div. B, Title VI, § 6001(e)(1)(c), 123 Stat. at 513.

representative of the Independent Telephone and Telecommunications Alliance, proposed that any entity with an existing FCC license, state certificate of convenience and public necessity, local franchise or other government license be automatically eligible to apply.¹² Debbie Goldman, representing the Communications Workers of America (“CWA”) agreed.¹³ Grant Seiffert, representing the manufacturing sector, went further, and urged that *all* private entities be eligible to apply for BTOP grants.¹⁴

KMUA strongly disagrees with those three roundtable participants and urges that eligibility *not* automatically be given to any private entity that holds a government license or franchise, and that eligibility *not* be given in any blanket fashion to all private entities. As one public commenter stated at the March 16 roundtable, if Congress had intended for government licensees to be so readily eligible, it could have said so, but it did not.¹⁵ Moreover, making private providers holding government licenses or franchises eligible without any further showing of public interest would have the effect of favoring incumbent private telephone and cable providers over new entrants (whether municipal or private sector), contrary to the Act’s preferences for municipal participation and for increased competition and increased affordability of broadband. Favoring incumbent private providers also would inherently increase the risk that grants would be made for projects that would have occurred without the grant funding, again contrary to the ARRA’s objective. NTIA must require that to be eligible, private entities make a specific, individualized, public interest showing.

At the eligibility roundtable, D.C. Public Service Commission Chairwoman Betty Ann Kane endorsed the idea that a private entity could meet the public interest standard if it was

¹² NTIA/RUS public meeting transcript, Roundtable on Private Sector Eligibility, Session 1 (Mar. 16, 2009), Comments of Curt Stamp at 5 *available at* <http://www.ntia.doc.gov/broadbandgrants/meetings.html>.

¹³ *Id.* at 6-7 (Comments of Debbie Goldman).

¹⁴ *Id.* at 11-13 (Comments of Grant Seiffert).

¹⁵ *Id.* (See public comments section.)

partnering with a State in applying for funding.¹⁶ KMUA would agree, if that principle is extended to private entities that partner with municipal utilities. Sasha Meinrath, a panelist representing The New America Foundation, cautioned that if “partnerships” are to be a public interest factor, that should only be so for “true” partnerships with full shared ownership, accountability and control for initiatives.¹⁷ NTIA should consider the public/private partnership concept as well as other specific and measurable options in crafting a public interest rule. KMUA strongly recommends, however, that municipal utility and public/private partnerships be given priority weighting over private sector applicants, especially incumbent private providers (unless they partner with a State or local government).

D. Selection Criteria for Grant Awards Should Remain Flexible and Inclusive.

How the NTIA structures and weighs the BTOP grant awards criteria is critical. At the outset, KMUA notes that the BTOP statutory criteria are broad and include consideration of whether an application to deploy infrastructure in an area -

- a. will, if approved, increase the affordability of, and subscribership to, service to the greatest population of users in the area;
- b. will, if approved, provide the greatest broadband speed possible to the greatest population of users in the area;
- c. will, if approved, enhance service for health care delivery, education, or children to the greatest population of users in the area; and
- d. will, if approved, not result in unjust enrichment as a result of support for non-recurring costs through another Federal program for service in the area;¹⁸

KMUA believes that these criteria should be applied flexibly and as befits the applicant’s particular territory and circumstances. In areas with no broadband service, projects that improve

¹⁶ *Id.* at 9-11 (Comments of Betty Ann Kane).

¹⁷ *Id.* at 8-9 (Comments of Sasha Meinrath).

¹⁸ ARRA, Sec. 2, Div. B, Title VI, § 6001(h), 123 Stat. at 514-515.

affordability and subscribership to the greatest population of users may be more important than projects that provide the greatest possible speed to the greatest population of users. In other areas that already have some basic DSL or cable modem broadband availability but in which residents, businesses, schools, health care facilities and other institutions are in need of much higher-speed broadband services, projects that propose to provide the greatest speed may be the most vital. In such markets, the additional competition provided by a new entrant offering new higher-speed service would also promote the criterion of increased affordability, both directly from the new entrant, and by forcing incumbent operators to increase broadband speed and/or to improve the price/speed value packages they offer.

NTIA asks numerous questions regarding grant criteria, including whether priority should be given to proposals that leverage other ARRA projects. While KMUA agrees that leveraging should be encouraged to the extent it fits a particular applicant's needs, the fact that an applicant can leverage other ARRA project funding should not move that particular applicant ahead of others in the funding line. As many have estimated, the potential pool of applicants for BTOP and RUS program grants is in the thousands. The applicant pool will also be diverse, given the nation's geographic, demographic and socio-economic mix. Leveraging would tend to encourage larger projects over smaller ones, which we do not think the BTOP should do. A particular applicant should not be sent to the back of the funding line because its application covers a small area that makes ARRA project leveraging less likely. All of the BTOP purposes are important, and given the ARRA's broad purposes, every application should be evaluated based on its particular circumstances and merits.

KMUA also urges NTIA to reject criteria or priorities that have no basis in the statute and that may narrow the NTIA's flexibility in awarding grants. As one example, CWA has urged

that priority in funding should be given to states that have mapping, infrastructure and technology plans in place. The BTOP statutory provisions nowhere mention such a priority. Moreover, as noted in Part II (J) below, many state broadband mapping programs suffer from accuracy and reliability problems, especially those, like Kentucky's, that have been performed by non-profits dominated by private sector incumbents rather than by the state itself. As a result, relying on the results of many current state mapping programs, like Kentucky's, may prove of little use, or even be counterproductive, in identifying unserved and underserved areas.

E. In Evaluating Municipal Applicants, NTIA Must Take Note of Referendum and Other Municipal Financing Requirements.

To meet the ARRA's 20% matching obligation for a broadband project application, many municipalities or their utilities will need to issue bonds and/or to impose a new fee on residents to help pay for the project. In many jurisdictions, state law may require a municipality or a municipal utility to obtain referendum approval prior to issuing bonds or imposing a new fee on residents. Implementing referendum and bond requirements, of course, takes time and money. Give the ARRA's clear intent that municipal and municipal public-private partnerships be eligible for BTOP broadband grants without any separate public interest showing,¹⁹ the 20% matching requirement should not be construed to impose special handicaps on municipal or municipal public-private partnerships grant applicants vis-à-vis private sector applicants. The municipal bond handicap is no small one, especially in light of the current difficulties in the municipal bond market, which the ARRA elsewhere tries to ameliorate.²⁰

NTIA therefore should construe the 20% matching requirement flexibly with respect to municipal grant applicants. NTIA should not require municipal applicants to have obtained any

¹⁹ ARRA, Sec. 2, Div. B, Title VI, § 6001(e), 123 Stat. at 513.

²⁰ See ARRA, Sec. 2, Div. B., Title I, Subtitle F, Part I, §§ 1501-1503, 1213 Stat. at 353-355, and Part IV, § 1531, 123 Stat. at 358-360.

state law-required referendum approval or to have issued municipal bonds as a condition to satisfying either the 20% matching requirement or any grant applicant financial qualifications requirement. Doing otherwise would, as a practical matter, make it extraordinarily difficult for many municipal grant applicants to qualify.

Further, the NTIA should favorably consider granting waivers of the 20% matching requirement to municipal grant applicants where the necessary funding is contingent on subsequent events, such as referendum approval or bond approval and issuance. To prevent abuse, NTIA could make such waivers conditional, with the applicant being granted 100% financing on the condition that the applicant agree to repay to NTIA any amount of grant funding exceeding 80% of the cost of the approved project. That would give the municipality the needed time to fulfill state law referendum or bonding requirements while, at the same time, making sure that, at the end of the project, the federal broadband grant only covers 80% of the project and the municipal applicant satisfies the 20% matching requirement.

Alternatively, the NTIA should tentatively award a grant to a municipal applicant that is relying on subsequent referendum and/or bonding requirements, subject to the successful completion of those requirements by the tentative municipal grant awardee. The grant contract would be executed only after applicable referendum and bonding requirements are fulfilled, and the two-year date for substantial completion of the project would run from the date the grant contract is executed, after any referendum and bonding requirements are fulfilled.

F. Non-Discrimination and Network Interconnection Obligations.

The ARRA requires NTIA, in coordination with the FCC, to develop “non-discrimination and network interconnection obligations that shall be contractual conditions of grants awarded

under [BTOP], including, at a minimum, adherence to the principles contained in [the FCC's] broadband policy statement (FCC 05-15, adopted August 5, 2005).”²¹

Thus, the ARRA makes the FCC's *Broadband Policy Statement* principles the floor, but *not* the ceiling, with respect to what non-discrimination and network interconnection obligations must be imposed on all BTOP grantees.

KMUA believes that the BTOP non-discrimination requirement must go beyond the FCC's current *Broadband Policy Statement* principles to include an explicit non-discrimination requirement. BTOP grant recipients must not unreasonably discriminate among Internet content, application or service providers, in terms of access, or rates and terms of access, to a grant recipient's network. The BTOP non-discrimination requirement should also make clear that grant recipients are not prohibited from engaging in reasonable network management practices, and that recipients may make reasonable classifications in rates, terms and conditions of access, as long as those classifications are reasonable and each classification's access terms are non-discriminatorily available to all that fall within the classification.

Imposing a genuine non-discrimination, or “open” access condition on BTOP grant recipient networks is critical to serve the ARRA's goals. Open networks are inherently better suited to the promotion of increased diversity among competing applications and content providers over a broadband network. That, in turn, will increase the attractiveness, and demand, for broadband services.

²¹ ARRA, Sec. 2, Div. B, Title VI, § 6001(j), 123 Stat. at 515. Note that the ARRA incorrectly cites the broadband policy statement as FCC 05-15; the Policy Statement issued *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireless Facilities*, adopted Aug. 5, 2005, is FCC 05-151 (“*Broadband Policy Statement*”).

G. Scoring Criteria for BTOP Grant Applications.

KMUA generally supports Free Press’ “Suggested Scoring Criteria for BTOP Broadband Infrastructure Deployment Grants.”²² In particular, we support Free Press’ proposed method for the awarding of points for competition and for broadband speed level. KMUA also agrees with Free Press that NTIA should not use a “cost-per-customer-served” figure as an evaluation criteria, because it would unduly favor incumbent private providers.

H. BTOP Coordination with the RUS Broadband Program.

The RUS broadband grant program’s focus is on economic development in rural areas, while the NTIA has broad authority to award grants throughout the country – including in rural, suburban and urban areas. NTIA asks what programmatic elements both agencies can adopt to ensure that grant funds are used in the most effective and efficient manner.

As an important first step, KMUA recommends that the agencies adopt a standardized application form that can be used by applicants to apply for either or for both programs if appropriate. KMUA recognizes that because the BTOP and the RUS program have related but different purposes, and related but different eligibility and criteria, a standardized application form would necessarily include subsections that would apply only to one of the programs. However, much of the application information that will have to be supplied, including accompanying documentation, will be the same – *e.g.*, broadband availability data, other demographic and geographic information, applicant organizational information, and financial qualifications, among others. Allowing applicants to use a standardized application form would streamline the process and avoid duplicating resources for those applicants that will be applying for both the BTOP and the RUS grants.

²² Those scoring criteria may be found at <http://www.freepress.net/files/Scoring%20Criteria%20for%20BTOP%20Grants.pdf>.

A standardized application form would also allow NTIA and RUS to easily cross-reference applicants applying for both programs and to better coordinate and maximize awarding their respective grants efficiently and effectively. KMUA further notes that at the NTIA/RUS public roundtable addressing NTIA/RUS coordination, most panelists endorsed a standardized application form.²³

I. Definitions – Unserved and Underserved Areas.

NTIA asks a series of questions regarding definitions, including how to, in consultation with the FCC, define “unserved” and “underserved” areas. As an initial matter, we agree with Free Press that the NTIA should draw no distinction between “unserved” and “underserved” areas in evaluating BTOP applications.²⁴ Once an area qualifies as meeting either definition, NTIA should give no preference to one over the other in evaluating BTOP grant applications.

NTIA also asks how the BTOP should define “broadband service,” including whether BTOP should establish threshold transmission speeds for analyzing whether an area is unserved or underserved and for prioritizing grant awards. KMUA understands and agrees that faster broadband data speeds are obviously better, and indeed, some KMUA members are providing, or will propose to provide, optimal broadband speeds far in excess of the speeds offered by incumbent telephone and cable companies. KMUA does not believe, however, that one single data speed standard should be fixed and applied to all markets. Realistically achievable broadband speed is relative to the cost and topographic characteristics of the area of service. There are some rural areas where terrestrial service is not an option and where wireless service may be the only feasible choice for service. And in many areas, wireless broadband may be the

²³ Mar. 16, 2009 Public Meeting, Session 2, “Roundtable on Coordination with NTIA and RUS on Broadband Industries,” Comments of Brad Ramsay representing NARUC (at 3-4), Comments of Jeff Arnold, representing NACo (at 5), and Comments of Derrick Owens, representing the Western Telecommunications Alliance (at 6, 14).

²⁴ See <http://www.freepress.net/node/49132> (prepared testimony of S. Derek Turner before NTIA/RUS hearing on March 24, 2009).

only affordable broadband alternative to sluggish dial-up service. In establishing threshold speeds, NTIA therefore should establish separate thresholds for different technology platforms. The landline threshold should be higher than the wireless standard.

J. Broadband Mapping.

The ARRA directs the NTIA to establish a nationwide inventory map of existing broadband service capability and availability in the U.S. KMUA applauds that goal, but strongly advises the NTIA, in developing a national broadband map, *not* to rely on any state-level maps that are provided by non-governmental non-profits that are closely tied to incumbent providers rather than by state governments themselves. In particular, KMUA believes that the NTIA should not rely on mapping information provided by Connected Nation (“CN”) or any of its affiliates.

KMUA has considerable first-hand experience with the first of the CN affiliates, ConnectKentucky (“CK”), and that experience has not been a happy one. We attach our comments (as Exhibit A) and reply comments as (Exhibit B) of last year in the FCC’s *Development of Nationwide Broadband Data* proceeding, WC Docket No. 07-38. We refer NTIA to the attached comments and reply comments and will not repeat them here. Our basic points, however, are as follows:

First, CN/CK has very heavy ties to the incumbent telephone industry and, to a lesser extent, the incumbent cable industry.

Second, CN/CK is non-transparent. There is no way for the government to verify the accuracy of the data and maps provided by CN/CK because CN/CK is sworn to keep that data confidential – ironically, CN/CK believes this non-transparency to be a selling point.

Third, the effectiveness of NTIA’s (and other federal agency’s) broadband policymaking depends entirely on the accuracy, verifiability and reliability of the broadband capability and

availability data on which the agency relies. If that data is skewed or unverifiable, federal broadband policy will likewise be skewed. And let there be no mistake: The interests of the incumbent providers that participate in CN/CK is for the mapping data to show that (a) the private sector is adequately taking care of the broadband deployment problem, with subsidies only needed to enable incumbent providers to extend their service to currently unserved areas; (b) new municipal or other competitive entry to compete against incumbents is undesirable or wasteful; and (c) the broadband problem is a demand problem more than a supply problem.

Fourth, and perhaps most importantly, KMUA's experience is that CK's broadband mapping in Kentucky has been inaccurate, and appears to be skewed in troubling ways. CK's maps have consistently failed to show municipal broadband service offered by KMUA members as being available where it is in fact available. Conversely, CK's maps also tend to overstate incumbent broadband service availability. For example, CK's maps tend to assume that an incumbent cable operator's broadband service is available throughout the operator's local franchise area when in fact, due to home density system buildout limitations in the local franchise, the incumbent cable operator does not offer service throughout its franchise area.

In sum, KMUA believes it would be unwise for the NTIA to rely on CN/CK broadband mapping data. While the CN/CK model may initially seem attractive to NTIA as a cost or labor-saving device, there simply is no substitute for having all data on which broadband maps are built to be transparent, reliable and independently verifiable by the government. The CN/CK model does not and, at least without removal of that model's current provider confidentiality cloak, cannot meet that test. The NTIA, and the nation, simply cannot afford to take any risk that the critical broadband policy decisions that NTIA must make in the BTOP might be built on skewed and unreliable data.

III. RUS IMPLEMENTATION.

The RUS broadband program's purposes are narrower than the BTOP purposes and are specifically targeted to areas where "at least 75 percent of the area to be served by a project receiving funds . . . shall be in a rural area without sufficient access to high speed broadband service to facilitate rural economic development."²⁵ The RUS broadband program is also different from the BTOP in that the RUS is authorized to provide grants, loans and loan guarantees.²⁶

A. The RUS Broadband Funding Should Be Allocated to Grants Rather Than to Loans or Loan Guarantees.

KMUA urges that the RUS devote all of its ARRA funding authority to broadband grants. As RUS itself acknowledges in the Request for Information, for a number of years "it has struggled to find an effective way to use the Agency's current broadband loan program to provide broadband access to rural residents who lack such access." RUS applicants, too, have struggled with a difficult, cumbersome and lengthy loan application process, difficult collateral requirements, and other application barriers.²⁷ Providing funding for grants only and implementing a streamlined application process will provide a more efficient and quicker means of fulfilling the ARRA's goals that the many rural Americans that lack access to broadband begin to receive it and that "shovel ready" projects are funded as rapidly as possible.

B. Aligning RUS and NTIA Broadband Activities.

The RUS asks how it and NTIA can align their broadband activities. It first asks how to reconcile the RUS statutory language of "at least 75 percent of the area is rural and without

²⁵ ARRA, Sec. 2, Div. A, Title I, 123 Stat. at 118.

²⁶ *Id.*

²⁷ KMUA notes the RUS testimony before Congress on April 2, 2009, where David Villano, RUS Assistant Administrator, also acknowledged past problems with the broadband loan program but stated RUS was aggressively working on regulations to ameliorate the process. Testimony *available at* http://www.energycommerce.house.gov/Press_111/20090402/testimony_villano.pdf.

sufficient access needed for rural economic development”²⁸ with the NTIA’s “unserved” and “underserved” definitions. KMUA believes that there should be a presumption that all counties, or parts of counties, that are designated “rural” are unserved or underserved. And if such rural areas are unserved or underserved – without any access or with only limited access to broadband – it should follow that such areas are “without sufficient access needed for rural economic development.”

The RUS also asks how both agencies could structure their eligibility requirements and other programmatic elements. As KMUA recommended in Part II (H) above, NTIA and RUS should adopt a standardized application form, so that applicants targeting both programs do not duplicate resources and efforts. A standardized application form would also make it easier for RUS and NTIA to conserve their limited resources. It would enable both agencies to easily cross-reference applications and more efficiently and effectively administer their respective programs. While it might be practical to also standardize the eligibility and other criteria, the programs are different and cannot be completely reconciled. Any standardized application will necessarily have to include subsections that apply only to the BTOP or the RUS program.

C. Defining Sufficient Access Needed for Rural Economic Development.

The RUS also asks questions revolving around what particular level of broadband is needed to facilitate economic development, including how to define “rural economic development,” and what broadcast speeds are needed to facilitate economic development. KMUA will not proffer a precise definition for rural economic development since what constitutes rural economic development may vary by region. There may be more than one given broadband speed that will facilitate rural economic development. In unserved areas that lack *any*

²⁸ *Supra*, note 25.

access to broadband, 3 Mbps broadband speeds may enable economic development, while in underserved areas where there is some broadband access but the broadband speeds may be limited, higher speed broadband, such as 30 or 40 Mbps, may be necessary for the area to be able to compete with more developed urban and suburban areas.

D. RUS Funding Priorities.

The ARRA provides that priorities are to be given to projects that: (1) provide broadband systems that deliver end users a choice of more than one provider; (2) provide service to the highest proportion of rural residents that do not have access to Internet service; (3) are projects of current and former RUS borrowers; and (4) are fully funded and ready to start once they receive funding. The RUS asks what value should be assigned to the different priorities.

KMUA believes that priorities (1) and (2) are clearly the most important ones. KMUA members are in the business of providing broadband service to residents that the private sector has chosen not to serve, of competing with incumbent telephone and cable operators in the broadband market in areas where all provide service, and of bringing to their residents higher-speed broadband, at more affordable prices, than their private incumbent telephone and cable competitors. It is only through such competition, higher-speed service, and service availability extension that communities served by KMUA members can grow and compete with other larger population centers across the nation. Therefore, priorities (1) and (2) should be weighted most heavily. Priority (3) – projects proposed by current and former RUS borrowers – should receive the least weight. The RUS's preexisting telephone service loan program is much too skewed to incumbent private local exchange telephone companies, and this conflicts with the RUS program's goal of increased competition.

IV. CONCLUSION.

NTIA must set its sights high in implementing BTOP. The program provides a unique opportunity to serve as a catalyst for the nation to catch up with many other developed nations in terms of broadband infrastructure and for rural and less-developed regions of our nation to catch up with the more developed areas. It is an opportunity that NTIA must fully exploit by implementing BTOP in a wise and forward-thinking manner.

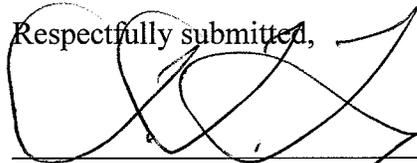
KMUA strongly encourages NTIA to frame BTOP implementation, application and evaluation criteria in a way that available funds can be used both to promote deployment of broadband services to rural unserved areas of the nation and also to “raise the bar” in areas of the nation that are underserved in terms of their broadband needs. That will necessarily mean a sliding scale definition of “underserved” areas. The goal should be to “raise the bar” significantly in terms of broadband speed, in underserved areas.

KMUA also urges NTIA to structure BTOP eligibility and application evaluation criteria in a manner that (1) encourages applications by municipalities and their utilities, as well as public/private partnerships involving municipalities and their utilities, and that does not reward incumbent private providers; (2) requires that networks receiving BTOP support be genuinely open networks; (3) takes into account the unique financing requirements and limitations applicable to municipalities; and (4) provides new broadband competition to incumbent telephone and cable companies.

KMUA strongly believes that NTIA should not rely on non-transparent broadband mapping of the type provided by CN/CK in developing the required national broadband map.

KMUA urges RUS to implement its broadband program in a way that (1) fosters municipal utility competition with private incumbent providers; (2) tailors broadband speeds to the rural economic development needs of each particular community; and (3) gives great weight

to proposals offering increased broadband competition and offering broadband service to the greatest number of rural residents lacking Internet access, with little weight given to current or former RUS borrowers.

Respectfully submitted, 

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