

**Before the
National Telecommunications and Information Administration
and the U.S. Department of Agriculture
Washington, D.C.**

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

COMMENTS OF NEVESEM, INC.

Nevesem, Inc. (“Nevesem”), through its undersigned counsel, hereby respectfully submits its comments to the Department of Commerce – National Telecommunications and Information Administration’s (“NTIA”) in response to the March 12, 2009 Federal Register notice for comments (“Notice”) to implement the Broadband Initiatives in the American Recovery and Reinvestment Act of 2009 (“Recovery Act”).¹

Founded in 1993, Nevesem is a pioneer in the use of technology to improve education and transform Puerto Rico’s schools and libraries into 21st Century learning institutions by helping students and educators take advantage of the vast resources of the Internet and the power of distance learning. Nevesem has partnered with well-established and reputable companies such as Texas Instruments, Cisco, Microsoft, Edicinco (Spain) and Grupo Editorial Iberoamérica (Mexico). In addition to designing and creating patented educational software in subjects such as math, science and languages, Nevesem is an Internet service provider to schools and libraries in Puerto Rico

¹ American Recovery and Reinvestment Act of 2009 Broadband Initiatives, Joint Request for Information and Notice of Public Meetings, 74 FED. REG. 10,716 (rel. March 12, 2009).

that participate in the Schools and Libraries Program of the Universal Service Fund, commonly known as the “E-Rate” program.

The E-Rate program, which is administered by the Universal Service Administrative Company (“USAC”) under the direction of the Federal Communications Commission (“FCC”), provides discounts to assist most schools and libraries to obtain affordable telecommunications and Internet access. Discount levels for support depend on the level of poverty and the urban/rural status of the population served and range from 20 to 90 percent of the costs of “eligible services.” A significant number of schools and libraries in Puerto Rico apply and qualify for E-Rate funds due to the poverty level in and rural nature of the island. Eligibility of these schools and libraries for Broadband Technology Opportunities Program (“BTOP”) grants is critical to any serious national broadband service deployment and expansion program.

I. Recipients of E-rate Funds Should Not Be Precluded From Obtaining Grants Under the Broadband Technology Opportunities Program.

Section 6001(b) of the Recovery Act provides that one of the main purposes of the Broadband Initiative is to “provide broadband education, awareness, training, access, equipment and support” to, among others, schools, libraries, medical and healthcare providers, community colleges and higher education institutions.”² Therefore, schools and libraries are among the educational institutions that Congress specifically intended would benefit from the Recovery Act.

By the same token, the Recovery Act provides that NTIA must consider whether an application will result in unjust enrichment to the applicant because the applicant has applied (or intends to apply) for other federal money to support the broadband

² Recovery Act § 6001(b).

infrastructure deployment.³ There is no legal or policy justification for construing this provision to render schools and libraries ineligible for BTOP grants simply by virtue of their receipt of E-Rate funds. For the reasons set forth below, NTIA should make an affirmative finding that recipients of E-Rate funds are eligible for BTOP funding.

Under the E-Rate program, schools and libraries may not use E-Rate funds to purchase end-user equipment (*e.g.*, computers, telephones), software, training, professional development, and other services.⁴ By contrast, the Recovery Act allows schools and libraries to use BTOP grants for these services and products. Therefore, schools and libraries that receive E-Rate funds would not be “unjustly enriched” if they use BTOP grants for end-user equipment, software, training, and professional development.

Under the E-Rate program, requests for telecommunications services and Internet access (“Priority 1 Services”) are funded first, and any remaining funds are then applied to requests for internal connections and basic maintenance of internal connections (“Priority 2 Services”). Because of this prioritization and the ever increasing demand for E-Rate funds, the vast majority of schools and libraries do not receive support for Priority

³ *See id.* § 6001(h)(2)(d) (“NTIA, in awarding grants, shall, to the extent practical ... consider whether an application to deploy infrastructure in an area ... 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.”).

⁴ *See* 47 C.F.R. § 54.504(b)(2)(vi) (requiring applicants to certify under oath that that they have secured access to all of the resources, including computers, training, software, maintenance, internal connections, and electrical connections necessary to make use of the connectivity supported by E-Rate); *see also* USAC, *Eligible Services List, Schools and Libraries Support Mechanism for Funding year 2009*, available at: <http://www.usac.org/sl/tools/eligible-services-list.aspx> (last visited April 10, 2009), identifying computer workstations, laptops, telephones, fax machines, printers, all end-user software, application software other than e-mail, technical support, Internet content, training on the use of the Internet, dark fiber service, as ineligible services and products, among others.

2 Services. If a school or library receives E-Rate funds for Priority 1 or Priority 2 Services, it makes sense that such institution should not be able to obtain a BTOP grant for those same services. However, schools and libraries that have been unable to obtain E-Rate funds for either Priority 1 or Priority 2 Services due to the lack of available funds should be able to obtain a BTOP grant to fund such services and would not be “unjustly enriched” by doing so.

In addition, access to BTOP funds is essential to schools seeking to implement emergency notification services, for which schools and libraries cannot use E-Rate funds. BTOP allows applicants to apply for grants to “construct and deploy broadband facilities that improve public safety broadband communications.”⁵

A reading of the “unjust enrichment” provision in the Recovery Act that precludes all recipients of E-Rate funds from also applying for BTOP grants is at odds with the provision of the Recovery Act that NTIA make competitive grants available to “ensure access to broadband service by community anchor institutions.”⁶ Although the Recovery Act does not define “community anchor institutions,” Nevesem respectfully submits that NTIA should include schools and libraries in such definition. Schools provide communities with a focal point for educational services for children. Libraries provide support for job searches, resume-building, skills-training, financial literacy, small-business development, e-government services, and many other resources that are dependent on a broadband connection to the Internet. These institutions serve as

⁵ Recovery Act § 6001(g)(5).

⁶ *Id.* § 6001(g)(3).

information hubs and, as such, play a critical role in the economic, social and political development of their respective communities.

Puerto Rico is the “poster child” for BTOP grants. When it comes to access to broadband, Puerto Rico residents are among the most “unserved” and “underserved” in the United States. In Puerto Rico, the deployment of fiber and other wire infrastructure is severely limited by the topographical characteristics of the island, as approximately 75 percent of Puerto Rico consists of hills or mountains. According to the U.S. Census Bureau, the median household income in Puerto Rico in 2007 was \$17,741, which is less than half that of Mississippi (\$36,338), the state with the lowest median household income.⁷ The unemployment rate in Puerto Rico is consistently higher than anywhere else within the continental United States.⁸ NTIA should consider these challenging factors as it considers applications from schools and libraries in Puerto Rico.

II. States Should Not Have Absolute Discretion as to Which Projects Get Funded Within Their Jurisdictions.

The Recovery Act provides that NTIA may consult with the states, the District of Columbia, and the territories with respect to: (a) the definition of “unserved” and “underserved” areas, and (b) the allocation of grant funds within a state.⁹ While states

⁷ See U.S. Census Bureau, 2007 American Community Survey, *available at* http://factfinder.census.gov/servlet/GRTTable?_bm=y&_box_head_nbr=R1901&-ds_name=ACS_2007_1YR_G00_&-_lang=en&-format=US-30&-CONTEXT=grt.

⁸ As of February 2009, Puerto Rico had an unemployment rate of 14.3 percent. The U.S. state with the highest unemployment as of February 2009 was Michigan with 12 percent. The national average for that same period was 8.1 percent. See *News, Regional and State Employment and Unemployment: February 2009*, USDL 09-0305, Bureau of Labor Statistics, U.S. Department of Labor (rel. March 27, 2009), *available at* http://www.bls.gov/news.release/archives/laus_03272009.pdf (last visited April 13, 2009).

⁹ Recovery Act § 6001(c).

and territories can play a constructive role in the BTOP grant process, NTIA should not and cannot abdicate its responsibility in the grant selection process to the states and territories.¹⁰

Moreover, states and territories may have a conflict of interest. They are eligible to apply for grants for their own projects and, thus, they will have every incentive to request priority for their own projects. Because of this conflict of interest, NTIA should not give the states absolute discretion as to which projects get funded within their jurisdictions.

III. The Application Process for Schools and Libraries Seeking Grants for Equipment, Broadband Education, Software and Training Should Not Be Cumbersome or Overly Complex.

Many of the schools and libraries in Puerto Rico are located in low-income and/or rural areas and often lack dedicated technical support staff. They also have little or no personnel with expertise in grant writing, nor do they have the financial ability to hire experts to assist with grant applications. A grant application process that is cumbersome and overly complex will result in the *de facto* exclusion of these educational institutions from the BTOP program, which would be contrary to the Recovery Act's goal of providing assistance to "organizations that provide outreach, access, equipment, and support services to facilitate greater use of broadband service by low-income, unemployed, aged, and otherwise vulnerable populations."¹¹

¹⁰ See H. Rep. No. 111-15, at 775 ("The Conferees further intend that the NTIA, at its discretion, will seek advice and assistance from the States in reviewing grant applications, *as long as the NTIA retains the sole authority to approve the awards*") (emphasis added).

¹¹ Recovery Act § 6001(b)(3)(B).

The complex nature of the E-Rate application process has led some small schools and libraries not to participate in the E-rate program, a problem that, in Puerto Rico, has been exacerbated by the fact that Spanish is the first language for most schools' and libraries' personnel.¹² The amount of documentation requested by USAC has been staggering, forcing applicants to provide responses to duplicative requests for information at the risk of having their applications denied. The result of the complex process and language issues has resulted in E-Rate applications being denied for what essentially amounts to clerical or ministerial errors. Nevesem encourages NTIA to establish a simple application process that takes into consideration language barriers so that the problems these institutions have previously encountered in the E-Rate program can be avoided.¹³

¹² The FCC is concerned about the complexity of the E-Rate application process and its potential impact on participation by schools and libraries. *See Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11308, ¶ 37 (2005) (“We seek comment on whether the complexity of the application process leads some small schools and libraries to choose not to participate in the E-rate program.”).

¹³ As the American Library Association has stated in connection with the BTOP grant program, “We learned a great deal from the E-rate applications of the FCC and we know, especially if we want to move this program quickly, we must make the politics easy for regular Americans to use.” *See Statement by Emily Sheketoff, Associate Executive Director, American Library Association*, NTIA Public Meeting, March 16, 2009.

Respectfully submitted,

NEVESEM, INC.

By: /s/ Edgar Class

Edgar Class
Wiley Rein, LLP
1776 K Street NW
Washington, DC 20006
Tel: (202) 719-7504

Its Attorneys

Dated: April 13, 2009