

**Before the
NATIONAL TELECOMMUNICATIONS AND INFORMATION
ADMINISTRATION
and the
RURAL UTILITIES SERVICE
Washington, D.C. 20230**

In the Matter of

Broadband Technology Opportunities Program

Docket No.

090309298-9299-01

COMMENTS OF 3G AMERICAS

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EXECUTIVE SUMMARY

3G Americas urges NTIA and RUS to fund mobile wireless broadband, not merely fixed wireless or fixed wireline broadband. Because mobile networks enjoy scale and technological advantages, they are a highly efficient means of delivering broadband, particularly in rural areas. Mobile communications devices have already and will continue to bridge the digital divide and promote digital inclusion. Pew Research anticipates that mobile devices will be the primary connection tool to the Internet for most people in the world by 2020.

RUS should recognize that funding mobile broadband would help to achieve the ARRA's goal of expediting broadband access to unserved, underserved, and rural Americans. The RUS should put higher importance on expediting the deployment of broadband than on considering whether an applicant is a previous or current RUS grantee.

3G Americas urges NTIA and RUS to categorically exempt, for the public interest, broadband projects from the Buy American provisions of the ARRA. Applying the Buy American provisions to broadband could encourage protectionism by other countries, which could threaten the U.S. recovery. Because the telecommunications industry operates as an interconnected, international industry rather than a group of disparate national industries, applying the Buy American provisions will create a supply bottleneck that will delay the purposes of the ARRA by delaying the provision of broadband to rural, unserved and underserved Americans.

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INTRODUCTION

3G Americas LLC, the leading industry association representing the GSM family of technologies such as HSPA and LTE in the Americas, submits these comments in response to the National Telecommunications and Information Administration’s (“NTIA”) and the U.S. Department of Agriculture Rural Development Rural Utility Service’s (“RUS”) Request for Information (“RFI”)¹ in the above-referenced proceeding concerning the Broadband Initiatives of the American Recovery and Reinvestment Act of 2009 (“ARRA”).² 3G Americas has a broad membership of leading wireless operators and vendors promoting, facilitating and advocating the deployment of the GSM family of technologies including Long Term Evolution (“LTE”) throughout the Americas.³ The ARRA’s purposes are to provide broadband access to unserved areas and to improve

¹ Joint request for information and notice of public meetings, 74 Fed. Reg. 10716 (Mar. 12, 2009) (“RFI”).

² American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (“ARRA”).

³ 3G Americas Board of Governors members include Alcatel-Lucent, AT&T, Cable & Wireless, Ericsson, Gemalto, HP, Huawei, Motorola, Nortel Networks, Nokia, Openwave, Research in Motion (“RIM”), Rogers, T-Mobile USA, Telcel and Telefónica.

broadband access in underserved areas, as well as to provide broadband education, awareness, training, access, equipment and support to educational and community service organizations, organizations helping vulnerable groups such as low income and aged populations, and certain job creating strategic facilities; to improve public safety agencies' access to and use of broadband; and to stimulate the demand for broadband, grow the economy, and create jobs. Including mobile broadband among the funded projects helps to address all of ARRA's purposes. 3G Americas urges NTIA and RUS to fund mobile wireless broadband, not merely fixed wireless or fixed wireline broadband, and to apply a categorical Buy American exemption to broadband projects. The public interest will be served by not applying Buy American to broadband projects, given the interconnected global sourcing environment for communications equipment.

I. Benefits of Mobile Broadband

The ARRA directs NTIA to consider whether an application “[w]ill, if approved, increase the affordability of, and subscribership to, service to the greatest population of users in the area,” and among other criteria will “enhance service for health care delivery, education, or children to the greatest population of users in the area.”⁴ For these reasons, 3G Americas encourages NTIA and RUS to fund mobile wireless broadband. Mobile services are uniquely useful in stimulating the economy, by helping unemployed Americans find work and employed Americans to conduct business more efficiently.⁵ Mobile wireless broadband enables individuals to connect to information in a portable form and at a relatively affordable price point. A device enabled with mobile broadband,

⁴ See § 6001(h); see also RFI 74 Fed. Reg. at 10718 n. 6.

⁵ Peter Dvorak, *On D.C. Streets, the Cellphone as Lifeline*, Washington Post, Mar. 23, 2009, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/22/AR2009032201835.html>.

such as a wireless smartphone, enables consumers to transfer funds, purchase products, browse the Internet, check central databases, watch video content, use mobile maps, conduct electronic messaging and more - wherever they are, whenever the need arises. Mobile broadband allows salespeople to make more sales, service providers to provide more services, and consumers to consume more goods and services, all while on the go, untethered from their desktop.⁶ Mobile broadband clearly facilitates economic development, as sought under ARRA.⁷ Accordingly, 3G Americas urges NTIA and RUS, consistent with the ARRA, to issue rules that will provide for implementation of the Broadband Technology Opportunities Program (“BTOP”) and RUS grants in a technologically neutral manner and allow for the funding of fixed and mobile wireless broadband projects.⁸ Funding both mobile and fixed broadband will provide more consumers the opportunity to experience the benefits of broadband.⁹

Mobile networks are some of the most efficient in the world in providing broadband to the mass public. Mobile broadband networks using High-Speed Packet Access (HSPA) technology have already been deployed in hundreds of markets across the U.S., covering the majority of the nation’s population. And consistent with

⁶ An estimated \$90 billion in annual U.S. productivity gains can be attributed to mobile broadband use. *See* Roger Entner, The Nielsen Company, Comments at the CTIA Spectrum Symposium (Mar. 31, 2009). *See also* Sören Buttkereit et al., Mobile Broadband for the Masses: Regulatory Levers to Make It Happen 6, (McKinsey & Company Feb. 2009), http://www.mckinsey.com/clientservice/telecommunications/Mobile_broadband_for_the_masses.pdf (“*Mobile Broadband for the Masses*”).

⁷ *See* RFI 74 Fed. Reg. at 10717.

⁸ ARRA § 6001(e)(1)(C).

⁹ *Cf.* Meraiah Foley, *Australia Moves to Build High-Speed Network*, N.Y. Times, April 7, 2009 (analysts response to Australian government funding a fixed broadband network: “They also questioned whether consumers would embrace a fixed-line, fiber-to-the-premises network over increasingly popular wireless services.”) *available at* http://www.nytimes.com/2009/04/08/technology/internet/08broadband.html?_r=1&ref=global&pagewanted=print.

government's goals to fund broadband projects that provide competitive choice to users,¹⁰ by the end of this year, a majority of Americans will have access to multiple UMTS/HSPA mobile broadband networks in their markets.

Because of the scale of deployed mobile broadband, providing a HSPA network to a rural, unserved or underserved market would have a lower incremental cost than a network using broadband technology that is not yet deployed or widely available. 3G Americas and its members are actively engaged in the planning for Long Term Evolution ("LTE"), a next generation or so called "4G" technology. However, supply of next generation applications has not reached the critical mass necessary to roll out across the country; if NTIA and RUS require 4G speeds as a condition of funding applications, there will not be enough supply to meet the immediate, stimulative goals of the ARRA.

Additionally, because mobile networks enjoy scale and technological advantages, economics tend to favor mobile over fixed-line networks, particularly in rural areas with lower bandwidth requirements.¹¹ One analysis has even opined that "mobile broadband will be the only affordable solution for many rural areas of emerging markets that need only moderate per-user throughput."¹² Providing grants to HSPA and other 3G applicants comports with the spirit of the ARRA to expedite broadband to rural markets, as well as to fund "shovel ready" projects.¹³

NTIA notes the ARRA requirement to consider the competitiveness of a potentially covered technology, to ensure that both taxpayers and consumers benefit from

¹⁰ See *Joint Notice*, at 4, ¶4, and 10, ¶4.

¹¹ *Mobile Broadband for the Masses* at 8.

¹² *Id.* at 9.

¹³ See *Joint Notice* at 10, ¶4 (funds should be awarded to projects that are "ready to start").

any grant deploying such technology. In addition to consumers having a choice of operators in hundreds of markets, the number of vendors for devices, network equipment, and infrastructure makes the entire eco-system of HSPA and beyond very competitive. Worldwide, there are 1,169 HSPA devices launched from 130 suppliers. HSPA devices are made more affordable through widespread competition and open standards, permitting even those who cannot afford expensive computer laptops or desktops to have the benefits of broadband and carry those benefits with them all the time through smartphones and Mobile Internet Devices. BTOP and RUS grants to entities interested in procuring HSPA services and devices will therefore be a highly cost-efficient use of stimulus funds.

The availability of mobile broadband in rural markets can have impacts beyond mobile commerce and entertainment. Mobile broadband can deliver healthcare applications that have a multiplier effect on the economy, as more Americans spend less days sick and away from work. Current “mHealth” applications available today on 3G networks are making healthcare more affordable for the consumer and more cost-efficient for the provider. For instance, The Pill Phone and other applications that remind patients when to take their medications, and alert caregivers if dosages are missed, are currently downloadable on many smartphones.¹⁴ Another application currently available for certain smartphones allows cardiograms to be streamed across 3G networks to monitor heart rate, as well as fluid levels and blood pressure. Deployment of HSPA networks in rural, unserved and underserved markets can allow hospitals and clinics to replace the spaghetti of wires in most intensive care units today with a much more welcoming, less

¹⁴ See Brian Dolan, *Pillbox vs. Pillboxer v. the Pill Phone*, Mobihealthnews, Feb. 24, 2009, <http://mobihealthnews.com/tag/the-pill-phone/>.

stressful environment in which monitoring is performed wirelessly, through wireless sensors of vital signs.¹⁵ Another set of applications allows consumers to conduct self-examinations and then e-mail results to their doctors for diagnosis. Such mHealth applications enhance the productivity of both patient and doctor, freeing up commuting and office-visit time for other activities.

To be cost-efficient, stimulus funds must address both the supply side and the demand side. There is an increasing demand for health IT applications like the ones described above, as Baby Boomers, who have embraced mobile technology, age and face additional health concerns. Baby Boomers will demand more mHealth applications, to make health care more convenient, accurate and results more immediate. But in addition to the demand side, NTIA and RUS should make awards that comport with current supply. Many mHealth and health IT applications are currently available in the 3GPP family of technologies. To fully implement the goals of ARRA, supply and demand should be aligned. By funding mobile wireless broadband, the grant programs will align current demand with deployed, low-cost supply.

Health applications are not the only ones that can stimulate the economy when delivered to rural and underserved areas. In such markets, mobile banking can have significant productivity effects, since consumers can transfer funds without having to drive long-stretches of road, or locate banks in underserved urban markets. Motorola and many other GSM device manufacturers are building mobile banking functionality into

¹⁵ See John Leland, *Sensors Help Keep the Elderly Safe, and at Home*, N.Y. Times, Feb. 12, 2009, available at http://www.nytimes.com/2009/02/13/us/13senior.html?_r=1; for discussion of “smart band-aid” wireless sensors of vital signs see also *Sensium Wireless Monitoring Band-Aid*, <http://www.technovelgy.com/ct/Science-Fiction-News.asp?NewsNum=1448> and <http://www.archrock.com/product/?gclid=CPXKkejv35kCFQrAGgodpyCKW>.

their handsets today. For instance, AT&T Mobility is currently offering mobile banking in the U.S.

II. Growth in Mobile Broadband

Mobile broadband is growing rapidly in urban markets. “[I]n North America mobile broadband accounted for close to 25% of total mobile subscribers in 2008 but this will jump to near 75% by 2013.”¹⁶ And the United States “had 61.9 million mobile broadband subscribers in 2008, up 70% from 36.3 million in 2007, and this is set to increase 308% to 252.4 million in 2013.”¹⁷ One goal of the BTOP and RUS programs is to encourage the sustainable adoption of broadband service.¹⁸ Mobile broadband’s rapid and continuously growing adoption rate attests to its sustainability.

While broadband is growing overall, mobile broadband growth is particularly high. Fixed broadband is expected “to grow at a CAGR of 9 percent from 2008 to 2014, whereas mobile broadband computing will grow about three times as fast, totaling \$69 billion by 2014 – 30 percent the size of fixed broadband.”¹⁹ Mobile broadband is growing at over a 100% compound annual rate.²⁰ There is already more data traffic than voice on mobile networks. Sales of smartphones are growing by 30% a year, and recently outsold laptops. By next year, one in three mobile phones sold in the U.S. will

¹⁶ Press release, Informa Telecoms & Media, LTE and WiMAX to take center stage at CTIA Wireless 2009 (Mar. 26, 2009), <http://www.informatm.com/itmgcontent/icoms/s/press-releases/20017633078.html%3Bjsessionid=A3B10BE7925425D6372AA8E5E36FE58D> (“Informa Press Release”).

¹⁷ *Id.*

¹⁸ *See, e.g.*, RFI 74 Fed. Reg. at 107198 ¶ 4(f).

¹⁹ *Mobile Broadband Computing Services – Complement or Substitute for Fixed Broadband* (Pyramid Research Mar. 2009).

²⁰ *See Mobile Broadband Spectrum Demand* (Rysavy Research Dec. 2008).

be a smartphone, capable of reaching the Internet and performing other broadband applications.

Unfortunately, not every American is benefitting from this growth today, particularly in rural markets or in underserved or unserved communities. The BTOP and RUS funds can help to remedy that. It is “mobile communications devices—most of them not yet Internet-connected—[that] have made an amazing impact already and will continue to bridge the digital divide and promote digital inclusion.”²¹ “In mature markets, mobile broadband networks can complement the fixed networks to ensure the best, ubiquitous connectivity, but more importantly, they can be the solution to the digital divide[.]”²² And beyond mature markets, mobile broadband represents the future of connectivity for the general public. According to a 2008 Pew Research Report surveying Internet experts and specialists in 2020 “the mobile phone . . . is the primary Internet connection and the only one for a majority of the people across the world.”²³ There are four billion people around the world that use a cell phone. In contrast, less than a billion people have a personal computer.²⁴ Clearly, most people in underserved markets will first access the Internet and experience broadband over a mobile device.

Given the income characteristics, many Latin American markets can serve as an analog for some underserved or rural markets in the U.S. In Latin America, where the average telecom bill is U.S. \$12-15 dollars a month, the majority of Internet access is

²¹ Janna Quitney Anderson and Lee Rainie, The Future of the Internet III 30 (Pew Internet and American Life Project Dec. 14, 2008) (“Pew Report”).

²² Informa Press Release.

²³ Pew Report at 5.

²⁴ Tomi T. Ahonen, Communities Dominate Brands: So Nokia is the World’s Biggest Computer Maker in 2008 (Dec. 26, 2008 , con’t Jan. 6, 2009) available at <http://communities-dominate.blogs.com/brands/2008/12/so-nokia-is-wor.html>.

through mobile devices. Latin and Caribbean markets have 45 commercial HSDPA networks in 22 countries, and almost 6 million subscribers.²⁵ There has been a 300% increase in deployments of HSPA networks in Latin America and the Caribbean in the last 14 months – clearly demonstrating the affordability and value-proposition of this type of mobile broadband technology for emerging markets. If mobile broadband experienced sustainable adoption in lower GDP markets in the Americas, there is a high probability that its adoption would be sustainable in rural, unserved and underserved markets in the United States.

To maximize economic growth, all Americans need access to mobile wireless broadband. In a recent report, McKinsey & Company noted that “Mobile broadband is uniquely positioned to stimulate economic growth and welfare in areas that lack adequate fixed-line broadband infrastructure.”²⁶ McKinsey estimated that “a 10 percent increase in broadband’s household penetration delivers a boost to a country’s GDP that ranges from 0.1 percent to 1.4 percent.”²⁷ 3G Americas respectfully urges NTIA and RUS to carefully craft the rules governing the award of stimulus funds so as to not favor fixed broadband solutions. Such technology discrimination would undermine the pace of broadband deployment to the unserved, underserved, and rural consumers that could most benefit.

The ARRA requires that BTOP funds be distributed, to the extent possible, in a technologically neutral manner. With respect to RUS funds, to expedite the distribution

²⁵ See Press Release, 3G Americas, 25 Million Total UMTS-HSPA Mobile Broadband Connections in Americas (Mar. 5, 2009), <http://www.3gamericas.org/index.cfm?fuseaction=pressreleasedisplay&pressreleaseid=2159>.

²⁶ *Mobile Broadband for the Masses* at 3.

²⁷ *Id* at 4.

of funds, Congress directed RUS to assign priority to projects of current and former RUS borrowers.²⁸ Because of the importance of inter-agency coordination in this area, and because Congress has stated that the BTOP is to be technologically neutral, in order to best serve rural Americans, RUS should distribute its funds in a technologically neutral fashion. RUS has funded wireless projects in the past, and should do so with stimulus funds.²⁹ However, the potential exists that as RUS complies with Congress's directive, preference will be given to particular technologies that represent a greater proportion of previous and current RUS grantees.

In the RFI, RUS queried what weight should be given to the criteria of whether an applicant is a previous or current RUS grantee.³⁰ While RUS should follow Congress directive to *consider* whether an applicant is a previous or current RUS grantee, it should recognize that funding mobile broadband would help to achieve ARRA's goal of expediting broadband access to unserved, underserved, and rural Americans. The RUS should put higher importance on expediting the deployment of broadband. To maximize the benefit of the funded projects, RUS should set rules that are technologically neutral. Particularly since RUS must weigh the other criteria of serving the highest proportion of rural residents that lack access to broadband service and giving end-users a choice of internet service project providers, funding mobile broadband makes an ideal candidate technology.

²⁸ ARRA div. A, tit. I.

²⁹ See Rural Utilities Service, Approved and Pending Community Loans, <http://broadbandsearch.sc.egov.usda.gov/SearchResults.aspx?CompanyId=> (listing companies that have received or pending grants, some of which offer wireless products).

³⁰ RFI at 74 Fed. Reg. at 10719.

III. Buy American

NTIA and RUS should not impose the requirements of the Buy American provisions of the ARRA on stimulus-funded broadband projects. Communications equipment is sourced from a global industry. For instance, many components of the iPhone, reportedly including the touchscreen, are manufactured by Taiwanese companies.³¹ Application of the Buy American restrictions to broadband stimulus projects would disrupt efficient equipment markets to the detriment of the quality of consumers' experience and cost.

The Office of Management and Budget ("OMB") has issued interim final guidance about the "Federal government-wide award terms for financial assistance awards . . . to implement the cross-cutting requirements" of the ARRA.³²

A. NTIA and RUS Should Not Impose the Buy American Requirements on Broadband Projects by Private Companies.

The Buy American provisions of the ARRA require 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

³¹ See David Gonzales, Unnamed Source Confirms Apple Has Ordered 10-Inch Touchscreens From WinTek, Electronic Pulp, Mar. 11, 2009, <http://www.electronicpulp.net/2009/03/11/unnamed-source-confirms-apple-has-ordered-10-inch-touchscreens-from-wintek/>; see also ; see also Ken Belson, *Silent Hands Behind the iPhone*, The New York Times, July 18, 2007, available at <http://www.nytimes.com/2007/07/18/technology/18taiwan.html?pagewanted=1&r=1&sq=taiwan%20iphone&st=cse&scp=3> (discussing other iPhone components manufactured in Taiwan).

³² Memorandum from the Office of Management and Budget to the Heads of Departments and Agencies, Appendix 9, Interim Final Guidance to Agencies 121 (Apr. 3, 2009), available at <http://www.recovery.gov/sites/default/files/m09-15.pdf> ("OMB Guidance Memo").

United States.”³³ OMB’s interim final guidance provides definitions to key terms, most pertinently for “public building” and “public work.”

OMB defined “public building” and “public work” to mean:

a public building of, and a public work of, a governmental entity (the United 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). 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.³⁴

Importantly, covered buildings and works are those “of” a government entity.

This language parallels the language of the Buy American Act of 1933,³⁵ which defines “[t]he terms ‘public use,’ ‘public building,’ and ‘public work’ [to] mean use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico [, the Philippine Islands], American Samoa, the Canal Zone, and the Virgin Islands.”³⁶

The Comptroller General of the United States has explained that the Buy American Act applies only to federal government procurement, and not to procurement contracts entered into by grantees of federal funds.³⁷ While the ARRA’s Buy American provision is broader than the Buy American Act, in that OMB has interpreted the ARRA’s provisions to apply to state and local governments, both apply to works “of” the

³³ ARRA § 1605(a).

³⁴ OMB Guidance Memo at 144.

³⁵ 41 U.S.C. §§ 10a-10d.

³⁶ 41 U.S.C. § 10c(b).

³⁷ See, e.g., *General Electric Company*, 54 Comp. Gen. 791 (1975) (finding the Buy American Act inapplicable because rural electric cooperatives were not instrumentalities of the United States for purposes of procurements conducted by them with funds borrowed from or guaranteed by federal agency); *Babcock & Wilcox Company*, 57 Comp. Gen. 85 (1977) (The Buy American Act “only applies to the Federal Government, not grantees” and so a state agency that received federal mass transit funds need not have preferred American-made products in its procurements.).

government, not to works that a private entity undertakes funded in part by the government.

B. The Public Interest Exception to the ARRA Buy American Provision should Apply to Broadband Projects.

The ARRA's goals of expediting broadband to underserved areas and stimulating the economy would be undermined by application of Buy American to projects undertaken by both private entities and public entities, such a local government's wireless network or a statewide broadband network. Therefore, NTIA and RUS should categorically determine that the "public interest" exception to the ARRA Buy American provision should be applied to broadband projects.³⁸ Applying the Buy American provisions to broadband projects is against the public interest because it would raise the cost of broadband projects and undermine the quality of consumer experience. Moreover, applying the Buy American provisions to broadband could damage the overall economy by encouraging protectionism by other countries.

1. Reciprocal Protectionism

The Buy American provision could encourage protectionist measures by U.S. trading partners. Ambassador John Bruton, Head of the Delegation of the European Commission to the United States, stated in a letter to Congress that including protectionist measures in the U.S. stimulus package "risks entering into a spiral of protectionist measures around the globe that can only hurt our economies further."³⁹ EU Trade Commissioner Catherine Ashton has noted that "introducing local content

³⁸ ARRA § 1605(b)(1).

³⁹ Delegation of the European Union to the United States, *Ambassador Bruton Urges Congress to Refrain from Buy American Protectionist Measures*, Feb. 2, 2009, available at http://www.eurunion.org/eu/index.php?option=com_content&task=view&id=3015&Itemid=58.

requirements in stimulus packages . . . carr[ies] a real risk of a widespread protectionist backlash [which would result in] an even larger decline in world trade.”⁴⁰ Likewise, Canadian International Trade Minister Stockwell Day has said regarding the ARRA that U.S. protectionist activity, “can only trigger retaliatory action and we don't want to go there[.]”⁴¹ Michael Wilson, Canada's ambassador to the United States wrote a letter to the Senate Majority and Minority Leaders that “[a] rush of protectionist actions could create a downward spiral like the world experienced in the 1930s.”⁴²

Protectionist measures by other countries would harm the U.S., which operates in a global economy also struggling under a recession. Open markets are integral to U.S. recovery. Open markets both create employment opportunities for American workers and provide a place for U.S. businesses, small and large, to sell their products. For example, foreign-owned firms operating in the U.S. employ over 5 million U.S. employees, spending \$335 billion on American payroll, and account for 20% of U.S. exports. For these reasons, as well as consumer welfare, the public interest would be served by not applying the Buy American restrictions to broadband projects.

2. Undermining the Goals of the ARRA

The ARRA states an intent to create jobs in the near-term,⁴³ to allocate the funds to projects by the end of FY 2010,⁴⁴ and to increase broadband access in unserved and

⁴⁰ Catherine Ashton, European Union Trade Commissioner, *The Transatlantic Challenge: Promoting Open Trade*, speech at the Carnegie Endowment for International Peace (Mar. 18, 2009), http://ec.europa.eu/commission_barroso/ashton/speeches_articles/spca008_en.htm.

⁴¹ Sheldon Alberts, *Ottawa Warns U.S. on Trade*, Financial Post, Feb 3, 2009, available at <http://www.financialpost.com/related/links/story.html?id=1246012&p=1>.

⁴² *Id.*

⁴³ ARRA § 6001(b)(5).

⁴⁴ *Id.* § 6001(d)(2).

underserved areas.⁴⁵ However, these goals will not be met if the Buy American provisions are applied to broadband projects.

As noted above, OMB's definition of "public work" is broader than the Buy American Act of 1933 and includes "state and local governments." However, state and local government are intended to be key applicants for stimulus funds for broadband projects⁴⁶ and it is not in the public interest that these entities be denied access to the widest possible range of manufactured goods – which have benefitted from the global economies of scale achieved in the multi-national telecommunications industry. Application of the Buy American provisions will not allow state and local governments to improve their broadband offerings. The OMB interim final guidance proposed a definition of manufactured good to mean "a good brought to the construction site for incorporation into the building or work that has been -- (1) Processed into a specific form and shape; or (2) combined with other raw material to create a material that has different properties than the properties of the individual raw materials."⁴⁷ While the interim final guidance also clarified that there is no requirement with regard to the origin of components or subcomponents in manufactured goods, as long as the manufacturing occurs in the United States,⁴⁸ this is incompatible with operations in the telecommunications industry, which is an interconnected, international industry rather than a group of disparate national industries. It would be inconsistent with the public interest to apply the Buy American restriction to broadband projects because many or most broadband vendors are multinational companies and manufacture the equipment needed for consumer broadband access

⁴⁵ *Id.* § 6001(b)(1)-(2).

⁴⁶ *Id.* § 6001(e)(1)(A).

⁴⁷ OMB Guidance Memo at 150.

⁴⁸ *Id.*

around the globe. Indeed, many available products may include components made in America, or use U.S. licensed technology, but be assembled elsewhere. Applying the restriction would limit the pool of eligible suppliers to state and local governments, and to private entities if NTIA and RUS apply the Buy America provisions to projects they undertake. Applying the restriction would also decrease competition and create a bottleneck that would substantially hinder the delivery of broadband to rural, unserved, and underserved areas.

U.S. consumers, including mobile wireless users, have benefitted from economies of scale of global markets through lower-cost networks, handsets, and innovative technologies. Globally, the mobile industry had 2.2 billion subscribers in 2005 compared with 4 billion today, and the cost for a typical handset in the U.S. has dropped more than 75% over that time.⁴⁹ So it is understandable that telecommunications equipment has been recognized as deserving of special protection from discriminatory provisions in the regulations implementing the Buy American Act of 1933 and in certain treaties. The Federal Acquisition Regulations implementing the Buy American Act create an exemption to those requirements for purchasing foreign end products, providing that the restriction does not apply to “the acquisition of information technology that is a commercial item.”⁵⁰ And, as OMB noted in its interim final regulations, RUS is required to waive the Buy American restriction on financing for telecommunications for iron, steel, and manufactured goods from countries covered by NAFTA and the U.S.-Israel FTA.⁵¹

⁴⁹ See *Mobile Broadband for the Masses* at 8.

⁵⁰ 48 C.F.R. § 25.103(e).

⁵¹ OMB Guidance Memo at 135-36.

Moreover, the BTOP instructs that broadband projects are to be “substantially complete” within two years following the grant of an award.⁵² Applying the Buy American restrictions to broadband projects undertaken by state and local governments or by private entities would undermine this direction because of the bottleneck in supplies that would be created because of the limited supply of exclusively domestically produced communications equipment. In addition, applying the Buy American restrictions would bypass the efficiencies of global economies of scale that have developed in the telecommunications market. Mobile carriers directly employ 268,000 people in the United States⁵³ and utilize efficient procurement processes taking advantage of tremendous global economies of scale in technology for cost effective deployment of broadband technology. It is not in the public interest for NTIA and RUS to constrain these processes by applying a Buy American bureaucracy that will significantly hamper the stimulus effect.

Finally, NTIA and RUS should make the public interest exemption categorical for all broadband projects, rather than review exemption requests on an application-by-application basis. A case-by-case review of eligible goods and systems to determine if a waiver of the Buy American provisions is in the public interest will create a time-consuming bottleneck in allocating funds. Likewise, this same bottleneck will be created if NTIA and RUS require applicants to apply for the Buy American non-availability exception on a good-by-good or application-by-application basis.⁵⁴ Such delay will

⁵² ARRA § 6001(d)(3).

⁵³ CTIA – The Wireless Association®, Background on CTIA’s Semi-Annual Wireless Industry Survey at 9, http://files.ctia.org/pdf/CTIA_Survey_Year-End_2008_Graphics.pdf.

⁵⁴ See OMB Guidance Memo at 136-37.

frustrate the ARRA's intent to create jobs in the near-term,⁵⁵ to allocate the funds to projects by the end of FY 2010,⁵⁶ and to increase broadband access in rural, unserved, and underserved areas.⁵⁷ The public interest requires that NTIA and RUS issue a categorical exemption of the ARRA Buy American provisions for broadband projects.

CONCLUSION

There are clear economies of scale and scope in funding mobile wireless broadband in rural, unserved, and underserved markets. The existing deployment of HSPA networks, to half of the U.S. population, makes this technology a cost-efficient option, and one that will stimulate the economy and increase productivity when extended into areas targeted by the ARRA. Funding mobile broadband will help more Americans access broadband sooner, anywhere, anytime over smartphones and mobile internet devices. In order to safeguard these economic and social benefits, NTIA and RUS should not apply the Buy American restriction to any broadband project.

Respectfully submitted,

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⁵⁵ ARRA § 6001(b)(5).

⁵⁶ *Id.* § 6001(d)(2).

⁵⁷ *Id.* § 6001(b)(1)-(2).