

Before the
DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
and the
DEPARTMENT OF AGRICULTURE
Rural Utilities Service

Washington, D.C.

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

COMMENTS OF THE RURAL CELLULAR ASSOCIATION

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SUMMARY

Many rural communities throughout America have been watching from the sidelines as broadband transforms communications across the country. Bringing broadband to rural and remote areas has been a slow and uneven process largely because deploying broadband infrastructure in these areas is a costly enterprise with uncertain returns. As broadband construction and deployment have lagged in rural areas, consumers in unserved and underserved communities have found themselves stuck with no means or inadequate means for accessing the Internet.

The Broadband Technology Opportunities Program and the Rural Utilities Service (“RUS”) broadband grant and loan programs funded by the American Recovery and Reinvestment Act of 2009 (“Recovery Act”) provide an opportunity to reverse this tide by expanding and accelerating broadband deployment throughout rural America. In the short term, these funding programs will create and preserve jobs through the deployment of broadband infrastructure. In the longer term, the availability of advanced telecommunications services in rural areas will spur economic development, and will provide many other services and benefits—such as health care and public safety—that are enhanced by the presence of broadband networks.

The challenge for the National Telecommunications and Information Administration (“NTIA”) and RUS is to make all this happen by designing grant and loan programs that work effectively in getting funding into the hands of service providers that can deploy broadband quickly and efficiently. The Rural Cellular Association believes that mobile wireless broadband service providers can play a key role in the rapid deployment of affordable broadband services in rural communities through the utilization of Recovery Act funding.

Priority in awarding grants and loans should be given to projects that will deploy broadband infrastructure in unserved and underserved areas. The economic, educational, and other benefits derived from a national broadband network are decreased to the extent that there are

“dead zones” throughout the country where consumers have no access, or inadequate access, to advanced telecommunications technologies. Directing Recovery Act funding toward a cure for this problem will not only help to achieve parity for consumers in rural communities but will also benefit the nation as a whole by building a ubiquitous broadband network.

This lack of adequate broadband, or the lack of any broadband at all, should be among the first problems addressed by the grant programs. One solution is to define unserved areas, underserved areas, and broadband service in a way that enables carriers using mobile wireless broadband technologies to receive Recovery Act funding. This is consistent with the intent of the statute to enable as many entities as possible to be eligible for grants. In addition, although mobile wireless broadband currently does not deliver speeds comparable to some wireline technologies, it does provide features and capabilities—mobility being chief among them—that make it an attractive service that is increasingly in demand in rural areas. Mobile wireless broadband technologies can be deployed efficiently and quickly, in contrast to wireline broadband infrastructure, making them well positioned to accomplish the statutory goal of deploying broadband service to a large universe of subscribers in unserved and underserved areas.

Another solution to the lack of broadband, or inadequate broadband service, in rural areas is to give a top priority to the deployment of affordable broadband service as quickly as possible in unserved and underserved areas. If NTIA and RUS instead were to give a higher priority to broadband speed, this would be detrimental to consumers because it would slow deployment (because current technologies that provide greater bandwidth also take longer to put in place) and would make broadband services less affordable (because the construction of infrastructure for these higher speed technologies faces many encumbrances that increase their cost).

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Rural Cellular Association (“RCA”), by counsel, hereby provides comments on the Joint Request for Information (“Joint Request” or “JRI”) issued by the National Telecommunications and Information Administration (“NTIA”) and the Rural Utilities Service (“RUS”) ¹ regarding the NTIA Broadband Technology Opportunities Program (“Broadband Program” or “BTOP”) ² and the RUS broadband grant and loan programs. ³

RCA is an association representing the interests of nearly 100 small and rural wireless licensees providing commercial services to subscribers throughout the nation and licensed to serve over 75 percent of the country. Most of RCA’s members serve fewer than 500,000 customers.

¹ NTIA & RUS, Joint Request for Information, American Recovery and Reinvestment Act of 2009 Broadband Initiatives, 74 Fed. Reg. 10716 (Mar. 12, 2009).

² American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (“Recovery Act”), Division B, Title VI.

³ *Id.*, Division A, Title I (Distance Learning, Telemedicine, and Broadband Program).

I. INTRODUCTION.

Job creation and economic development are among the driving forces leading to the passage of the Recovery Act, and RCA is mindful of the fact that decisions that NTIA and RUS will make regarding the administration of their Recovery Act funding programs must keep these objectives clearly in focus.

But we must also be mindful of the fact that “we have not yet met the challenge of bringing broadband service to everyone.”⁴ As RCA explains in these Comments, expanded and accelerated broadband deployment throughout rural America (in which many unserved and underserved areas are located) is critically important, and Recovery Act funding provides an opportunity to ensure that consumers, governments, and businesses, as well as educational, public safety, health care, and other institutions throughout rural America have greater access to broadband services.

The focus of NTIA and RUS on jobs and economic development should not detract from their efforts to utilize funding made available by the Recovery Act in the most efficient and effective manner possible to improve broadband access in rural communities. Further, it is important to note that the goals of job creation and expanded deployment of broadband are not mutually exclusive, since studies have shown a direct correlation between broadband penetration and job creation.⁵

⁴ *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 (rel. Apr. 8, 2009) (“*Broadband Plan NOI*”) at para. 5.

⁵ See Robert Crandall, William Lehr & Robert Litan, *The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data*, THE BROOKINGS INSTITUTION, July 2007, at 2, accessed at http://www.brookings.edu/papers/2007/06labor_crandall.aspx:

We find that nonfarm private employment and employment in several industries is positively associated with broadband use. More specifically, for every one percentage point increase in broadband penetration in a state, employment is projected to increase by 0.2 to 0.3 percent per year. For the entire U.S. private non-farm economy, this suggests an increase of about 300,000 jobs, assuming the economy is not already at “full employ-

For all these reasons, RCA proposes that priority be given by NTIA and RUS, in the allocation of grants and loans, to projects designed to deploy broadband infrastructure in unserved and underserved areas.

NTIA and RUS will face other critical decisions in seeking to ensure the success of their funding programs, including weighing the statutory criteria for grant awards, defining the areas in which funded projects will deploy broadband infrastructure, and determining the levels of transmission speed that will constitute broadband service for purposes of the funding programs.

NTIA and RUS should define unserved areas, underserved areas, and broadband service in a way that moves rural areas toward parity with urban areas in having access to affordable broadband service that enables utilization of advanced applications and functionalities. An effective way to pursue this goal is to define unserved and underserved areas based upon the levels of broadband service speeds currently available. If these levels are selected accurately and reasonably, this definitional approach will facilitate the targeting of funding in a manner most consistent with the goal of universally available broadband.

Broadband service should be defined in a way that distinguishes between wireless and wireline technologies, because this will serve the statutory purpose of ensuring that service providers using different categories of technology platforms all have an opportunity to compete for funding and will enable consumers in unserved and underserved areas to take advantage of the unique capabilities of mobile wireless broadband services.

ment” (the national unemployment rate being as low as it can be with a low, stable rate of inflation). At a more disaggregated level, we find that employment in both manufacturing and services industries (especially finance, education and health care) is positively related to broadband penetration.

Finally, in awarding grants and loans pursuant to BTOP and the RUS broadband grant and loan programs, NTIA and RUS should take into account the fact that mobile wireless broadband service providers are in the best position to deploy broadband infrastructure in rural areas quickly and efficiently, and to provide affordable broadband services to the widest population of subscribers in unserved and underserved areas.

II. DISCUSSION.

In the following sections RCA argues that NTIA and RUS, in disbursing BTOP funds and funds for the RUS broadband grant and loan programs, should place a significant priority on broadband projects for unserved and underserved areas, that NTIA should fashion an appropriate consultative role for the states, and that affordability and increased subscribership levels should be favored over broadband transmission speeds in establishing selection criteria for funding awards.

RCA also argues that NTIA's adherence to technological neutrality must include taking into account the different transmission speeds of different broadband platforms, that the level of granularity regarding broadband coverage collected by the Federal Communications Commission ("FCC" or "Commission") in its FCC Form 477 should be relied upon to produce accurate and comprehensive information about unserved areas for broadband mapping purposes, and that, because reporting and auditing requirements can be particularly burdensome to small entities receiving BTOP grants, these requirements must be clear and unambiguous and NTIA's auditors must receive sufficient training in order to avoid disputes and inconsistent enforcement of the requirements.

Finally, RCA proposes that the definitions of unserved and underserved areas should principally be based upon the speeds of broadband services that currently are available in a given geographic area, that the definition of broadband service should be based upon separate broad-

band speed thresholds for wireless and wireline broadband platforms, that NTIA’s non-discrimination requirements should not extend beyond the FCC’s *Policy Statement*,⁶ and that network interconnection obligations should be based upon the current statutory and regulatory framework.

A. Allocation of Grant Funds.

[JRI, NTIA ¶ 1.a., RUS ¶¶ 1., 1.c., 4.]⁷

Section 6001(b) of the Recovery Act establishes five purposes for the Broadband Program. The first two purposes listed in the statute are to provide broadband access to consumers in unserved areas, and to provide improved broadband access in underserved areas.⁸ NTIA construes each of the purposes delineated in Section 6001(b) to be a separate funding category, and asks whether “a certain percentage of grant funds [should] be apportioned to each category[.]”⁹

The Recovery Act also provides that “priority for awarding funds [under the RUS program] shall be given to projects that provide service to the highest proportion of rural residents that do not have access to broadband service”¹⁰ RUS asks for comment generally regarding the most effective ways it can offer broadband funds to ensure that rural consumers currently

⁶ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket No. 02-33, CC Docket No. 01-337, CC Docket Nos. 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (“*Policy Statement*”).

⁷ Paragraph references are to the NTIA and RUS sections of the Joint Request.

⁸ The other purposes listed in Section 6001(b) are (a) providing broadband “education, awareness, training, access, equipment, and support” to (i) schools, libraries, medical and health care providers, colleges and universities, and similar institutions; (ii) organizations involved in enhancing broadband access for various vulnerable populations; and (iii) job-creating strategic facilities; (b) improving public safety agencies’ access to, and use of, broadband; and (c) stimulating broadband demand, economic growth, and job creation.

⁹ JRI, 74 Fed. Reg. at 10717.

¹⁰ Recovery Act, Division A, Title I (Distance Learning, Telemedicine, and Broadband Program), fifth proviso.

lacking access will be provided with broadband access,¹¹ asks “[w]hat value should be assigned” to this priority (and others listed in the Recovery Act) in selecting applications,¹² and also seeks comment regarding the best way to ensure that funding “is targeted to unserved areas that stand to benefit the most from this funding opportunity.”¹³

Because a principal objective of NTIA and RUS should be to facilitate as much as possible the deployment of broadband services in areas that currently do not have access to these services, RCA believes it would be a mistake for NTIA to adopt any allocation percentages for the five statutory categories to the extent that doing so would detract from the achievement of this objective. The inclusion of broadband access in unserved areas in Section 6001(b) as an important purpose to be served by the Broadband Program, and the emphasis in the Recovery Act’s RUS broadband programs on service in rural areas,¹⁴ should be construed as reflecting a reasonable judgment by Congress that the complete lack of any broadband service is an immediate and pressing problem to be addressed by NTIA and RUS. Several factors support the view that funding the deployment of broadband in unserved areas should be placed among the highest priorities in the allocation of Recovery Act funding.

First, the funding made available by the Recovery Act presents a unique opportunity to make some headway in solving a problem that has taken on severe dimensions. As one rural advocate has summed up the current situation, “[i]f you’re not connected [to broadband], you’re

¹¹ JRI, 74 Fed. Reg. at 10720.

¹² *Id.*

¹³ *Id.*

¹⁴ See Recovery Act, Division A, Title I (Distance Learning, Telemedicine, and Broadband Program), third and fifth provisos.

sitting out the dance.”¹⁵ The fact is that consumers in many rural communities have been turned into wallflowers because a considerable portion of rural America is not connected. One recent estimate is that as many as one-third of all rural households do not have *any* options for obtaining broadband connections.¹⁶ This contrasts with estimates that 57 percent of urban residents and 60 percent of suburban residents have broadband at home.¹⁷ The implications of this disparity are troublesome:

Ironically, the nation that invented the Internet is falling behind in its ability to make the Internet available to all of its citizens. Thanks to new technology, this rural-urban disparity may now grow worse; in many big cities, today’s broadband services are being replaced by all-fiber networks that give each consumer a ten-fold or more increase in capacity, while many smaller towns wait for their first broadband deployment.¹⁸

The problems presented by the lack of broadband penetration in rural areas are similar to the problems addressed by rural electrification and the deployment of plain old telephone service through federal and state universal service programs. The Broadband Program and the RUS grant and loan programs provide an opportunity for similar initiatives to continue closing the gap between urban areas and unserved areas throughout rural America.

¹⁵ Howard Berkes, *Stimulus Stirs Debate over Rural Broadband Access*, NPR.ORG, Feb. 16, 2009, accessed at <http://www.npr.org/templates/story/story.php?storyId=100739283> (quoting Dee Davis, Director, Center for Rural Strategies) (“Berkes”).

¹⁶ Jon M. Peha, *Bringing Broadband to Unserved Communities*, THE BROOKINGS INSTITUTION, July 2008, at 5, accessed at http://www.brookings.edu/papers/2008/07_broadband_peha.aspx (“Peha”). Dr. Peha currently serves as the Chief Technologist of the FCC. The Pew Internet & American Life Project estimates that 38 percent of rural residents had broadband at home in 2008. John B. Horrigan, *Home Broadband Adoption 2008*, PEW INTERNET & AMERICAN LIFE PROJECT, July 2008, at 3, accessed at www.pewinternet.org/~media/Files/Reports/2008/PIP_Broadband_2008.pdf (“Horrigan”). It also has been noted that “broadband [currently] generally tends to go to two kinds of rural places: counties with large farms, and mountain and beachside enclaves that attract owners of second homes and tourists.” Berkes.

¹⁷ Horrigan at 3. See Communications Workers of America, *A Report on Internet Speeds in All 50 States*, SPEEDMATTERS.ORG, Aug. 2008, at 3, accessed at www.speedmatters.org/document-library/sourcematerials/sm_report.pdf.

¹⁸ Peha at 5.

Second, the Broadband Program and the RUS grant and loan programs have the capability to address directly the main cause of the wide gap between broadband penetration in urban and rural areas, namely, cost. There is wide agreement that the “disparity of access exists because the cost per household of providing broadband is far greater in rural areas.”¹⁹ Recovery Act funding provides an opportunity to plug this gap by helping to underwrite the investment that must be made to deploy broadband into unserved areas.

Third, if the disparity in broadband deployment between urban and rural areas is not sufficiently addressed and consequently continues to persist, the degree of harm imposed upon consumers in rural areas will get worse. Studies have shown that barriers to broadband access “in rural communities are having the most profound effect on the growth and diversification of locally based manufacturing, service and trade sectors.”²⁰ To the extent that lack of broadband continues to impair these activities in rural communities, economic development will be stymied and the communities will face a widening economic divide from the rest of the country.

The health care sector illustrates the expanding problems that can be caused by a lack of access to broadband services in rural communities. The Appalachia Study found, for example,

¹⁹ *Id.* at 10. See U.S. Dept. of Agriculture, Economic Research Service, *Rural Broadband at a Glance 2009 Edition*, ECONOMIC INFORMATION BULLETIN, No. 47, Feb. 2009, at 1, accessed at www.ers.usda.gov/Publications/EIB47/EIB47.pdf (“Broadband Internet access in rural areas is less prevalent than in more densely populated areas of the country. Circumstantial evidence suggests that the difference in access may lie in the higher cost and limited availability of broadband Internet in rural areas. As a result, rural residents depend more on Internet use outside of the home, relying on places like the library, school, and work, where broadband Internet access is available.”).

²⁰ Michael Oden & Sharon Strover, *Links to the Future: The Role of Information and Telecommunications Technology in Appalachian Economic Development*, APPALACHIAN REGIONAL COMMISSION, June 2002 (“Appalachia Study”), at 104, accessed at www.eric.ed.gov/ERICWebPortal/recordDetail?accno=ED467710, quoted in Peha at 13. See also Sharon E. Gillett, William H. Lehr & Carlos A. Osorio, *Measuring the Economic Impact of Broadband Deployment*, ECONOMIC DEVELOPMENT ADMINISTRATION, Feb. 28, 2006, accessed at www.eda.gov/PDF/MITCMUBBImpactReport.pdf (finding that “between 1998 and 2002, communities in which mass-market broadband was available by December 1999 experienced more rapid growth in employment, the number of businesses overall, and businesses in IT-intensive sectors, relative to comparable communities without broadband at that time”).

that, because hospitals and health clinics in rural areas have had difficulties securing access to broadband services, they have also had “a difficult time . . . implementing . . . more advanced data management and transfer applications increasingly being demanded in the sector. Moreover[,] the exciting opportunities offered by more advanced telemedicine applications were not being widely exploited in the rural counties studied.”²¹

Professor Peha has explained how these problems in rural communities, caused by a lack of any access to broadband services, can spin out of control and continue to get worse. This dynamic of worsening problems is largely a product of the relationship between the use of dial-up Internet access service and the use of broadband. Many consumers in rural areas continue to rely upon dial-up service as their only means of accessing the Internet. Moreover, “[r]ural residents using dial-up services to connect to the Internet are seven times more likely to be without access to broadband than dial-up users in the cities.”²²

Given this reliance upon dial-up in rural communities, the ability of consumers in these communities to utilize the Internet will deteriorate as the rest of the country continues to migrate to broadband. Thus, “applications that once worked well over dial-up are now becoming problematic for dial-up users.”²³ Professor Peha explains that, “[i]f broadband is available to 90 percent of Internet users, then much of the Internet will no longer be designed for or particularly useful to dial-up users, and those users see the Internet as less and less valuable.”²⁴

²¹ Appalachia Study at 104.

²² Bill Bishop, *Broadband Missing for Many Rural Dial-Up Users*, DAILY YONDER, Feb. 17, 2009 (“Bishop”), accessed at <http://www.dailyyonder.com/broadband-missing-many-rural-dial-users/2009/02/17/> 1936.

²³ Peha at 15.

²⁴ *Id.*

Fourth, solving the unserved area problem will bring benefits that extend beyond rural America. There is little dispute that “[b]roadband exhibits positive network externalities where the benefits from broadband adoption accrue not just to individual consumers, but to other broadband users and society as a whole.”²⁵ Because of the network effects inherent in broadband expansion, “citizens in the previously unserved region are not the only ones to benefit when broadband infrastructure is expanded. As more people join any communications network, those who already belong to the network gain because they can communicate with more people.”²⁶ As a result of the network effects to be gained by the deployment of broadband in unserved areas, a public policy adopting the view that “[i]f you choose to live in rural America . . . you should have the same [access to broadband] as anyone else”²⁷ not only is equitable, but also serves the broader purpose of benefiting consumers and businesses throughout the country, not just in rural areas.

²⁵ Robert D. Atkinson, *The Case for a National Broadband Policy*, INFORMATION TECHNOLOGY AND INFORMATION FOUNDATION, June 2007, at 4, accessed at <http://www.itif.org/index.php?id=52>. Mr. Atkinson explains these benefits by comparing broadband access to rural electrification:

Imagine this debate [about broadband access] taking place in the 1930s with some analysts arguing that the United States had the right amount of electrical connections and that any efforts to accelerate near universal access to electricity was not only not needed, but downright harmful. At the time although nearly 90 percent of urban dwellers had electricity, only ten percent of rural dwellers did and private electric utilities were wary of making the investments. But the Rural Electric Administration was established to not only establish rural electric cooperatives but also to help private utilities extend service. Just like wiring the nation for electricity 70 years ago underpinned a host of other positive developments (*e.g.*, boosting farm productivity); accelerated widespread adoption of high-speed broadband will do the same today.

Id.

²⁶ Peha at 14. Professor Peha goes on to explain that, “as new users join the network, e-commerce merchants can attract more customers. Online universities can attract more students. Social networks can attract more members. Blogs can gain more readers of content, and more generators of contents. Users of e-mail, VOIP, and videoconferencing can communicate with more friends and business associates.” *Id.*

²⁷ Bishop (quoting Margaret Eilderotter, Frontier Communications) (internal quotation marks omitted).

For all the reasons discussed above, RCA urges NTIA and RUS to establish a priority that will result in making available a substantial portion of the Recovery Act funding to achieve the goal of “[p]rovid[ing] access to broadband service to consumers residing in unserved areas of the United States”²⁸ Establishing such a priority would be entirely consistent with the objectives that are set out in the Recovery Act and would also reflect the fact that the complete absence of any options for broadband service in many rural areas of the country is an urgent and worsening problem.²⁹

In emphasizing the importance of targeting Recovery Act funds for the deployment of broadband services in unserved areas, RCA does not intend to suggest that underserved areas do not also warrant special emphasis in establishing grant disbursement priorities.³⁰ Many of the reasons RCA has presented in arguing for a funding priority for unserved areas apply with similar force in the case of underserved areas. Although some rural communities currently have access to some level of broadband, these broadband services generally are not comparable to the levels of service available in urban and suburban communities. If underserved areas are underfunded in the Recovery Act programs, then the gap between these communities and their urban and suburban counterparts will increase. This will result in less job creation, depressed economic development, and other adverse effects.

²⁸ Recovery Act, § 6001(b)(1). *See id.*, Division A, Title I, (Distance Learning, Telemedicine, and Broadband Program), fifth proviso.

²⁹ *See* Peha at 6 (noting that “[f]or communities without broadband infrastructure, access is the immediate concern”).

³⁰ *See, e.g., Oversight of the American Recovery and Reinvestment Act: Broadband: Hearings Before the Subcomm. on Communications, Technology, and the Internet of the H. Comm. on Energy and Commerce, 111th Cong. (Apr. 2, 2009), Statement of Rep. Boucher, Chairman, H. Comm. on Communications, Technology, and the Internet (“Boucher Statement”) at 1-2 (stating that “[b]oth [unserved and underserved] areas are important, and the statute requires accommodating both. We want to ensure that everyone has access to broadband, and we also want to ensure that everyone has access to broadband at meaningful speeds and affordable prices and can benefit from competition among service providers.”).*

If priorities for unserved and underserved areas are established by NTIA and RUS, then these agencies should either establish specific percentages of grant and loan funds that reflect these priorities, or they should refrain from adopting any distribution percentages for any of the categories, but should make grant disbursement decisions designed and intended to award a substantial portion of overall funding to projects that will deploy broadband in unserved areas and underserved areas.³¹

B. The Role of the States.
[JRI, NTIA ¶ 2.b.]

Section 6001(c) of the Recovery Act gives NTIA the discretion to consult with the states regarding the identification of unserved and underserved areas in the various states, and with regard to the allocation of grant funds in a state for projects in that state. NTIA asks about the appropriate role for states “in selecting projects for funding.”³²

Numerous members of RCA have established their eligibility to serve as eligible telecommunications carriers (“ETCs”) pursuant to Section 214(e) of the Communications Act of 1934 (“Act”),³³ pursuant to which these carriers have utilized universal service funds to deploy wireless infrastructure and to provide telecommunications services to consumers in rural communities across the country. In establishing their eligibility to serve as ETCs, these carriers have worked closely with public utility commissions in many states to ensure that the states’ universal service goals and objectives will be promoted by the operations of these RCA members. This cooperative relationship has continued, after ETC eligibility has been granted, as these carriers

³¹ In this regard, the Recovery Act specifically requires that at least 75 percent of any area served by an RUS grant or loan program must be in “a rural area without sufficient access to high speed broadband service to facilitate rural economic development” Recovery Act, Division A, Title I, (Distance Learning, Telemedicine, and Broadband Program), third proviso.

³² JRI, 74 Fed. Reg. at 10717.

³³ 47 U.S.C. § 214(e).

have striven to implement infrastructure build-out, service quality, and other objectives agreed upon with the state commissions as part of the ETC eligibility process.

These experiences and ongoing relationships have given RCA members an understanding of the universal service policy objectives of the state commissions, as well as an appreciation of the expertise of these commissions in approaching issues and problems associated with universal service. Because of this, RCA believes that, as a general matter, NTIA should seek to draw upon this expertise in connection with any examination it may undertake of any inter-relationships between implementation of the Broadband Program and the pursuit of universal service goals by the various states.

Turning to the specific question raised in the Joint Request regarding the selection of projects, RCA believes that the states can play a useful advisory role at a strategic level with respect to the Broadband Program, and therefore encourages NTIA to exercise its discretion pursuant to Section 6001(c) of the Recovery Act to consult with the relevant state agencies for the general purpose of evaluating the appropriate and most effective array of projects that will carry out the purposes stated in Section 6001(b) in the respective states.

RCA recognizes that states may be in a position to play a positive role in the grant evaluation process by identifying projects proposed by carriers or other entities that could be particularly effective in advancing broadband deployment, job creation, economic development, and related goals and objectives in the state involved.³⁴ To the extent evaluations or recommendations are received by NTIA from state agencies, NTIA should give them due consideration, but should not treat them as having any dispositive effect upon NTIA's review of a particular project

³⁴ For example, if a state agency has identified a need for broadband services in a specific unserved or underserved area, for purposes of promoting a state-sponsored economic development initiative, then NTIA should give additional consideration to any BTOP grant application that includes this area in its proposal.

proposal, nor should NTIA specifically solicit from the states any evaluations or recommendations regarding particular project proposals.³⁵

NTIA should avoid establishing any procedures that would carve out a special evaluative role for the states because this would risk delaying the review and approval of project proposals, and any procedural mechanisms that could cause such delay must be avoided in light of the fact that NTIA is required to ensure that all grant awards are made not later than September 30, 2010.³⁶ In addition, because of the fact that states (as well as local governments) are themselves eligible to receive BTOP funding,³⁷ to the extent that a state or local government has filed a competing application for BTOP funding, NTIA should not assign any additional weight or preference to the views or recommendations of a competing state, state agency, or municipality.

C. Establishing Selection Criteria for Grant Awards.
[JRI, NTIA ¶ 4.b., RUS ¶ 4.]

1. Weighing the Criteria for Awards.
[JRI, NTIA ¶ 4.b., RUS ¶ 4.]

Sections 6001(h)(2) and 6001(h)(3) of the Recovery Act establish several criteria that NTIA must consider (to the extent practical) in evaluating grant proposals, as follows: (1) whether the proposal will, for the greatest population of users in the area served (a) increase broadband affordability and subscribership;³⁸ (b) provide the greatest speed possible; and (c) enhance service for health care delivery, education, or children; (2) whether the proposal will avoid

³⁵ In deciding upon the weight to be given to such evaluations or recommendations, NTIA should take a variety of factors into account, including whether the state agency submitting the evaluation or recommendation has (1) evidenced an active involvement in broadband issues; (2) established programs to facilitate broadband deployment in its jurisdiction; and (3) adopted and implemented means for gathering information about the status of broadband deployment in the state.

³⁶ Recovery Act, § 6001(d)(2).

³⁷ *Id.*, § 6001(e)(1)(A).

³⁸ The Recovery Act also requires the FCC to develop “a detailed strategy for achieving affordability of [broadband access] service and maximum utilization of broadband infrastructure and service by the public.” Recovery Act, § 6001(k)(2)(B), *cited in Broadband Plan NOI* at para. 52.

unjust enrichment resulting from funding from other federal programs; and (3) whether the applicant is a socially and economically disadvantaged small business concern. NTIA asks what weighting should be given to these various factors.³⁹

The Recovery Act also assigns priorities that RUS must take into consideration in its evaluation of projects, as follows: (1) projects that provide customers with a choice of broadband service providers; (2) projects that provide broadband service to the highest proportion of rural residents that lack access to broadband; (3) projects proposed by current or former RUS borrowers; and (4) projects that will be fully funded and ready to start when they receive Recovery Act funding.⁴⁰ RUS also asks what additional priorities it should consider.⁴¹

NTIA has recognized that “by far our greatest challenge will be determining a fair, equitable, and appropriate manner for selecting grant recipients.”⁴² In undertaking this task, and in evaluating the weighting of the factors described above, RCA believes that NTIA should rank affordability and subscribership over speed.⁴³ This view is driven principally by RCA’s belief, as explained above,⁴⁴ that the chief priorities of the Broadband Program should be funding the

³⁹ JRI, 74 Fed. Reg. at 10718.

⁴⁰ See Recovery Act, Division A, Title I (Distance Learning, Telemedicine, and Broadband Program), fourth, fifth, sixth, seventh, and ninth provisos.

⁴¹ JRI, 74 Fed. Reg. at 10720.

⁴² *Oversight of the American Recovery and Reinvestment Act: Broadband: Hearings Before the Subcomm. on Communications, Technology, and the Internet of the H. Comm. on Energy and Commerce*, 111th Cong. (Apr. 2, 2009), Testimony of Mark G. Seifert, Senior Advisor to the Assistant Secretary, NTIA (“Seifert Testimony”) at 11.

⁴³ The importance of affordability is illustrated, for example, by the fact that, while 76 percent of households earning at least \$50,000 annually subscribe to broadband Internet access, only 35 percent of households with annual incomes less than \$50,000 subscribe to broadband. See *Oversight of the American Recovery and Reinvestment Act: Broadband: Hearings Before the Subcomm. on Communications, Technology, and the Internet of the H. Comm. on Energy and Commerce*, 111th Cong. (Apr. 2, 2009), Testimony of Dr. Nicol Turner-Lee, Senior Vice President, One Economy Corporation, at 2. Funding projects that will improve the affordability of broadband will help address this problem.

⁴⁴ See Section II.A., *supra*.

deployment of broadband in unserved areas and underserved areas. The best way to achieve this goal, and to maximize the results from the disbursement of grant funds, is to award grants to those applicants who demonstrate that they are in the best position to deploy broadband infrastructure quickly and efficiently. For the same reasons, RCA proposes that RUS should establish the affordability of broadband services as an additional priority in its evaluation of proposed projects.

In recommending that NTIA and RUS should give priority to the affordability of broadband services in their evaluation of project proposals, RCA wishes to stress that it is *not* suggesting that NTIA or RUS should attempt to exert any ratemaking or oversight authority with respect to the retail prices at which broadband services are made available by Recovery Act grant recipients. There is no statutory basis for the exercise of any such authority. The Recovery Act instructs NTIA, to the extent practical, to consider whether an application to deploy infrastructure in an area would increase the affordability of services to the greatest population of users in the area,⁴⁵ but the statute gives NTIA no license to regulate retail rates. The Recovery Act does not address the issue of affordability directly with regard to RUS grant and loan programs, but the statute does assign a priority to project applications that will deliver to end users a choice of more than one service provider,⁴⁶ suggesting a legislative intent to let market forces affect the level of retail rates.

Further, from a public policy perspective, it would make no sense for NTIA or RUS to attempt to construct a ratemaking or pricing oversight regime, since such a regulatory superstructure would be cumbersome, burdensome, and costly to administer, and would dampen the incen-

⁴⁵ Recovery Act, § 6001(h)(2)(A).

⁴⁶ See Recovery Act, Division A, Title I (Distance Learning, Telemedicine, and Broadband Program), fourth proviso.

tives for service providers to participate in the broadband funding programs established by the Recovery Act. The best way for NTIA and RUS to ensure that their funding programs will positively affect the affordability of broadband services is for the agencies to give priority to those broadband technology platforms that can construct facilities and deliver services efficiently to customers in rural and remote areas.

If a grant or loan applicant demonstrates the capability to construct and deploy, in a relatively short period of time, broadband facilities that are able to cover large areas that currently are unserved or underserved, and the applicant also shows that the nature of the technology involved will enable the efficient construction and deployment of the broadband network, then the applicant's project will likely be successful in maximizing the affordability of broadband service by flowing through to consumers the benefits of the efficiencies associated with the construction and deployment of the applicant's infrastructure. A project that achieves the rapid and widespread deployment of broadband infrastructure, and that results in relatively low-priced broadband services, will also promote the goal of maximizing the level of subscribership in unserved and underserved areas, since it will introduce or expand access to broadband over the widest area at affordable rates.⁴⁷

⁴⁷ As RCA has noted, the Recovery Act has charged the FCC with the task of developing a strategy for achieving affordable rates as part of its national broadband plan, which must be submitted to Congress not later than February 17, 2010. In connection with this, the FCC has sought comment on how it should define affordability with respect to broadband access. *See Broadband Plan NOI* at para. 54. NTIA in the meantime will need to address the issue of affordability in connection with its application of the statutory criteria to be used in evaluating grant proposals. For this purpose, RCA suggests that one approach that could be utilized would be to examine the average of rates that are charged in fully competitive markets for various broadband speeds that fall within NTIA's definition of broadband service for BTOP purposes. These average rates, produced by competitive markets, could serve as a useful benchmark in gauging whether a proposed broadband deployment project would likely provide service at affordable rates.

Further, RCA is concerned about another aspect of determining affordable rates for grant award purposes. To the extent that municipal governments or other governmental entities compete against private sector service providers for BTOP funding to be used in deploying and providing broadband service, these governmental entities could have an unfair advantage because they may offer services for no charge at all, or

RCA understands that establishing levels of broadband speeds that a grant applicant must propose to deploy is an important issue, because an ultimate objective should be to ensure that broadband facilities deployed as a result of support from the Recovery Act enable utilization of web-based services and applications that demand increasingly higher bandwidth speeds.⁴⁸ Determining what weight should be given to this grant award criterion of providing the greatest speed possible is, of course, pertinent to achieving the objective of providing a carrier's customers with the ability to utilize capacity-intensive services and applications on the Internet and otherwise.

There is a significant risk, however, that ranking speed over affordability and subscriber-ship will disserve consumers in unserved and underserved areas, both in the short term and in the longer term. The reason for this is that carriers utilizing technologies that currently may be capable of providing greater broadband speeds than technologies utilized by competing carriers, are also likely to face encumbrances resulting in inefficiencies in the construction and deployment of their broadband networks, and to require much greater periods of time to deploy broadband in unserved and underserved areas.

In this regard, NTIA and RUS will need to weigh the comparative advantages and disadvantages of wireline and wireless technologies with respect to meeting Recovery Act objectives in unserved and underserved areas. RCA is encouraged by the fact that NTIA approaches this task with an understanding of the accomplishments and the potential of wireless carriers in the mobile broadband sector. The agency has recognized that “[t]he wireless industry is the fastest

at very low rates, due to the fact that their service offerings would likely be subsidized from general or state or local taxpayer revenues or from other state or local revenue sources. RCA therefore encourages NTIA not to give undue weight to grant proposals made by governmental entities, so as to avoid imposing an unfair disadvantage on grant proposals made by private sector service providers.

⁴⁸ RCA discusses the issue of establishing required levels of broadband speeds in greater detail below. See Section II.F, *infra*.

growing sector of America’s broadband economy”⁴⁹ and that “the number of broadband lines provided by mobile wireless operators increased from less than 380,000 in June of 2005 to almost 22 million at the end of 2006—a growth rate that dwarfs that of other broadband platforms.”⁵⁰ In addition, “[a]s of December 2007, mobile wireless providers served more than 15 million customers with advanced service lines—nearly 20 percent of all advanced services.”⁵¹

With respect to deploying broadband services in rural areas, Congress has recognized that “mobile broadband technologies are applicable to farmers, ranchers, and small rural business owners” and that, although “[f]ixed broadband service will continue to be important in rural homes and offices, . . . mobile technologies also may have a role to play in expanding broadband access to rural residents.”⁵²

In addition, the FCC has agreed with the proposition that “wireless service may represent a cost-effective alternative to wireline service in sparsely populated, remote locations where the

⁴⁹ NTIA, *Networked Nation: Broadband in America 2007* (Jan. 2008) (“*Networked Nation*”) at 17, accessed at www.ntia.doc.gov/reports/2008/NetworkedNationBroadbandinAmerica2007.pdf. The FCC has noted that “there are more wireless subscribers than wireline switched access lines[,]” citing figures that show approximately 129.7 million wireline end user switched access lines and 249.2 million mobile wireless subscribers as of the end of 2007. *High-Cost Universal Service, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Inquiry, FCC 09-28 (rel. Apr. 8, 2009) at para. 19 & n.69 (footnote omitted) (citing Local Telephone Competition: Status as of December 31, 2007, Industry Analysis and Technology Division, Wireline Competition Bureau, at Tables 7, 14 (Sept. 2008)).

⁵⁰ *Networked Nation* at 18 (footnote omitted). As of May 2008, approximately 95 million mobile wireless subscribers in the United States paid for access to the mobile Internet, either as part of a subscription or on a transaction basis. Nielson Mobile, *Critical Mass: The Worldwide State of the Mobile Web* (July 2008) at 3, access at <http://www.nielsenmobile.com/documents/CriticalMass.pdf>.

⁵¹ CTIA—The Wireless Association[®] (“CTIA”) Comments, FCC GN Docket No. 09-29, filed Mar. 25, 2009, at 3 (“CTIA Comments”) (footnote omitted). CTIA noted that advanced service lines provide over 200 kbps for both downlinks and uplinks. *Id.*

⁵² *Food, Conservation, and Energy Act of 2008*, Conference Report To Accompany H.R. 2419, H. R. RPT. NO. 110-627, at 834 (2008) (Conf. Rep.), *quoted in* CTIA Comments at 3.

cost of line extensions is prohibitively expensive.”⁵³ The Government Accountability Office, in studying ways to improve telecommunications services on tribal lands, has observed that “[g]eographic isolation has increased the cost of providing service on Navajo lands and limited the number of companies interested in providing telecommunications services. The distances needed to connect communities and homes with copper wires or fiber optic cable make wireline telecommunications systems expensive.”⁵⁴

Decisions regarding the ranking of speed, affordability, and subscribership, for purposes of evaluating grant applications, also have potential long-term implications for the deployment of broadband in unserved and underserved areas. If greater affordability and subscribership are traded for greater speed, and this turns out to be a bet on the wrong horse, then this would risk inadvertently entrenching in previously unserved and underserved areas incumbent carriers that have deployed costly broadband infrastructure (and taken considerable periods of time to do so) but that have been handed a competitive advantage in these markets because their incumbent status, and because of their receipt of grant awards even though unsuccessful grant applicants would have been more likely to achieve greater affordability and subscribership levels.

As carriers with competing technologies develop the capability to provide broadband at faster and faster speeds—making their services attractive in rural markets because of their ser-

⁵³ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12237 (para. 56) (2000) (subsequent history omitted). See Peha at 5 (indicating that “wireless technology tends to be more cost effective when bringing Internet services to more sparsely populated areas”).

⁵⁴ GAO, Report to Congressional Requesters, “Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands,” GAO-06-189, rel. Jan. 2006, at 78. See S. Derek Turner, Down Payment on Our Digital Future: Stimulus Policies for the 21st-Century Economy, Free Press Action Fund (Dec. 2008) (“Turner”) at 13, accessed at www.freepress.net/files/DownPayment_Digital_Future.pdf (noting that, “[b]eing a wireline technology, FTTH is likely to have initial deployment costs that exceed fixed wireless or 4G [fourth generation] mobile wireless (or any other wireless) technologies”).

vices' features and price—they will face difficulties in entering markets where their competitors enjoy the fruits of incumbency. This scenario, which is a risk associated with placing too high a premium on the speed at which broadband can currently be provided in unserved and underserved areas, would not serve the interests of rural consumers.

RCA believes that a better approach—one that is more in keeping with the objectives and purposes of the Recovery Act—is to deal with the immediate problem of the lack of any broadband access in unserved areas, and the lack of adequate broadband capacity in underserved areas, by getting broadband in place as quickly as possible and as efficiently as possible. Even though the technologies that can accomplish these goals of rapid deployment and affordability may not currently match the broadband speeds that could be deployed by other technologies, RCA submits that, in the short term, deploying broadband quickly and efficiently addresses the critical need faced by rural consumers, and, in the longer term, these consumers will continue to benefit not only from affordable broadband but also from greater speeds achieved by the availability of more advanced broadband platforms.⁵⁵

RCA is aware that Congress expressed a preference for NTIA, to the extent practicable, to seek to fund “projects that provide the highest possible, next-generation broadband speeds to consumers.”⁵⁶ This preference, of course, does not force NTIA to rank the “greatest speed” con-

⁵⁵ Fourth generation mobile broadband platforms such as LTE (Long-Term Evolution) will be capable of providing downlink speeds ranging up to 100 megabits per second (Mbps). Patrick Bernard, *LTE Mobile Broadband Market to Generate More Than \$70 Billion During Next Five Years*, TMCNET (Mar. 31, 2009), accessed at www.cn-c114.net/583/a400636.html. Verizon is expected to begin rolling out LTE with peak speeds of 60 Mbps late this year. John Cox, *Verizon Confirms Details of U.S. LTE Deployment*, NETWORK WORLD (Feb. 18, 2009) accessed at www.networkworld.com/news/2009/021809-mwc-verizon.html.

⁵⁶ *Making Supplemental Appropriations for Job Preservation and Creation, Infrastructure Investment, Energy Efficiency and Science, Assistance to the Unemployed, and State and Local Fiscal Stabilization, for the Fiscal Year Ending September 30, 2009, and for Other Purposes*, Conference Report To Accompany H.R. 1, H. R. RPT. NO. 111-16, at 775 (2009) (Conf. Rep.). Congress expressed this preference because it is “mindful that the construction of broadband facilities capable of delivering next-generation

sideration over the objectives of increased affordability of service to users and increased subscribership, since the statute itself places all of these factors on an equal footing.⁵⁷

RCA is also aware that one of the principal general purposes of the Recovery Act is “[t]o preserve and create jobs and promote economic recovery[.]”⁵⁸ but RCA believes that NTIA and RUS should reject the suggestion that this general purpose must be given preeminent weight in awarding Recovery Act funds for broadband projects. The Fiber-to-the-Home Council (“FTTH Council”) has claimed that, under the Recovery Act, “broadband deployment is first and foremost a means to an end of economic recovery and reinvestment, and only secondarily an end in its own right[.]”⁵⁹ and has gone on to argue that FTTH projects should be given priority because “FTTH deployments are enormous construction projects, involving far more outside plant work than other technologies.”⁶⁰

If broadband deployment were simply a means to an end, as FTTH Council claims, then Congress would have made this point abundantly clear in establishing the purposes of BTOP and the RUS grant and loan programs. Instead, in the case of BTOP, Congress listed job creation— together with the stimulation of demand for broadband and economic growth—as one of five purposes of the Broadband Program, the first of which (as listed in the statute)⁶¹ is to provide

broadband speeds is likely to result in greater job creation and job preservation than projects centered on current-generation broadband speeds.” *Id.*

⁵⁷ Recovery Act, § 6001(h)(2).

⁵⁸ *Id.*, § 3(a)(1). *See* Seifert Testimony at 2-3 (listing job creation as the first among five goals set by NTIA for broadband funding under the Recovery Act).

⁵⁹ FTTH Council Comments, Docket No. 090309298-9299-01, filed Mar. 26, 2009 (“FTTH Council Comments”), at 6. FTTH Council argues that RUS should give priority to projects that create the most jobs, can be initiated promptly by an experienced entity, and can deploy infrastructure that spurs rural economic development. *Id.*

⁶⁰ *Id.* (footnote omitted).

⁶¹ RCA does not mean to suggest that placing service to unserved and underserved areas at the top of the statutory list reflects a congressional intent to require NTIA to give these goals top priority, but neither

broadband access to consumers in unserved areas, and the second of which is to expand broadband infrastructure in underserved areas.⁶² In the case of the RUS grant and loan programs, the Recovery Act does not reference job creation specifically, and lists rural economic development among numerous priorities that RUS must take into account in evaluating project proposals.⁶³

As RCA has discussed, there are strong reasons to conclude that the rapid deployment of affordable broadband services in unserved and underserved areas warrants a very high priority in the disbursement of Recovery Act funding. There is no support for FTTH Council's suggestion that the Recovery Act should be read as intending to cancel out this priority to serve consumers in unserved and underserved areas in favor of awarding grants to projects that can demonstrate the highest construction costs.

In addition, even if there was any credence to FTTH Council's claim that the statute demands priority for projects with enormous construction costs, it is not clear that applying this criterion for purposes of favoring FTTH projects would in fact create more jobs, as compared to the number of jobs that would be created by funding projects involving mobile wireless technologies. FTTH Council cites a study that it commissioned for the proposition that, because of the heavy reliance on construction for FTTH, \$1 million of investment in FTTH deployment would result in almost 20 jobs, while \$1 million of investment in wireless broadband would result in fewer than 15 jobs.⁶⁴

But the study also indicates that “[c]onstruction is given larger weight for FTTH than for . . . wireless because much of the infrastructure [for] . . . wireless (i.e., towers) already exists and

can it be said that job creation has been given preeminent status among the goals listed in Section 6001(b) of the Recovery Act.

⁶² Recovery Act, § 6001(b).

⁶³ *See id.*, Division A, Title I (Distance Learning, Telemedicine, and Broadband Program), third proviso.

⁶⁴ FTTH Council Comments at 7.

does not require new construction.”⁶⁵ The fact is, however, that infrastructure usable for mobile wireless broadband services in unserved areas does not currently exist in all cases, and, in cases where mobile wireless networks do exist, costs would be incurred to retrofit these networks for use by mobile broadband technologies such as EVDO.⁶⁶ The point of Recovery Act grants and loans would be to enable mobile wireless service providers to construct broadband infrastructure where necessary, and to undertake the retrofitting of existing networks.⁶⁷

In discounting wireless-related construction costs because of the purported existence of wireless towers throughout unserved and underserved areas, the study also fails to examine the extent to which adequate middle-mile backhaul facilities exist for the transport of data from wireless last-mile facilities to Internet backbone facilities. The availability of sufficient, competitively-priced middle-mile backhaul facilities plays a critical role in carriers’ decisions to construct broadband facilities in unserved or underserved areas, and the absence of robust middle-mile facilities interferes with the optimum utilization of last-mile plant and negatively impacts the affordability of broadband services. The fact is that adequate, competitive-priced middle-

⁶⁵ Jeffrey A. Eisenach, Hal J. Singer & Jeffrey D. West, *Economic Effects of Tax Incentives for Broadband Infrastructure Deployment*, EMPIRIS, LLC (Jan. 5, 2009) (“Empiris Study”) at 8.

⁶⁶ EVDO (Evolution Data Only / Evolution Data Optimized) is a third generation mobile broadband technology used in conjunction with CMDA (code division multiple access) mobile voice networks.

⁶⁷ The Empiris Study further supported the weighting factor it assigned to wireless industry construction (a 7 percent factor, as compared to the 50 percent factor the study assigned to FTTH industry construction) by indicating that a business case model prepared by the WiMax Forum five years ago had indicated that 7 percent of five-year capital expenditures for WiMax deployment in rural areas would be for “site acquisition and civil works,” which the study viewed as being “focused more on the construction industry” *Id.* at 9 n.11. But the WiMax business case stated that “[r]ural areas for the purpose of the business case analysis are defined as small cities or towns that are located far from metropolitan areas. Customer densities can be fairly high in these areas but they tend to be underserved due to their remote location.” WiMax Forum, *Business Case Models for Fixed Broadband Wireless Access based on WiMax Technology and the 802.16 Standard*, Oct. 10, 2004, at 5, accessed at www.observatory.gr/files/meletes/Broadband_Deliverable_2_AppendixV.pdf. This definition is not likely to be an accurate description of the population densities that typically will be confronted by mobile wireless providers constructing or retrofitting infrastructure, especially in unserved rural areas. Therefore, reliance upon the WiMax business case as a basis for estimating the number of jobs that would be created by funding mobile wireless projects is misplaced.

mile backhaul facilities are not available in many unserved and underserved areas.⁶⁸ Another purpose of Recovery Act grants and loans would be to fund the construction of these facilities, for use by mobile wireless broadband providers.

Finally, if NTIA and RUS agree with RCA that the deployment of broadband services in unserved and underserved areas should be among the top priorities of the Recovery Act grant and loan programs, then accomplishing this priority as quickly as possible, with services that are as affordable and widely available as possible, should be given a preference over the funding of projects focusing on the highest possible, next-generation broadband speeds. It simply may not be practical or realistic to bring these next-generation speeds to unserved or underserved areas in the immediate future, but this fact should not mean that funding priorities should turn away from consumers in these areas.

To the contrary, with respect to unserved areas, a national broadband policy should start with the proposition that *every* American should have access to broadband service, just as every American should have electricity and plain old telephone service in his or her home. In keeping with such an ideal, NTIA and RUS should establish funding criteria that do not handicap broadband deployment in unserved areas.

2. Technological Neutrality.
[JRI, NTIA ¶ 4.g.]

The Recovery Act requires NTIA, to the extent practicable, to promote the purposes of Section 6001 in a technologically neutral manner.⁶⁹ In light of this requirement, NTIA asks

⁶⁸ See Sprint Nextel Corporation (“Sprint”), *Ex Parte* Letter, FCC GN Docket No. 09-40, filed Apr. 1, 2009 (“Sprint *Ex Parte* Letter”), Attachment at 1.

⁶⁹ *Id.*, § 6001(e)(1).

whether it should consider “the fact that different technologies can provide different service characteristics, such as speed and use of dedicated or shared links”⁷⁰

In adopting the technological neutrality requirement, Congress made clear its intent that BTOP funds should be made available to as many different categories of service providers as possible, emphasizing that, “consistent with the public interest and purposes of [Section 6001], as many entities as possible [should] be eligible to apply for a competitive grant, including wireless carriers, wireline carriers, backhaul providers, satellite carriers, public-private partnerships, and tower companies.”⁷¹ Congress indicated its intent that “NTIA select grant recipients that it judges will best meet the broadband access needs of the area to be served, whether by a wireless provider, a wireline provider, or any provider offering to construct last-mile, middle-mile, or long haul facilities.”⁷²

The import of the Section 6001(e)(1) requirement regarding technological neutrality, and the intent expressed by Congress regarding this requirement, is that NTIA should avoid establishing any criteria or requirements with respect to the BTOP grant programs that would favor any particular technology. The criteria and requirements established by NTIA must instead ensure the broadest participation in these grant programs by various categories of broadband carriers and related service and infrastructure providers.

In order for NTIA to accomplish this statutory goal of broad participation in the grant programs, it must consider the fact that different technologies currently have different capabilities regarding broadband capacity, and this consideration should result in grant selection criteria that do not preclude any category of service providers from receiving grants if the broadband ca-

⁷⁰ JRI, 74 Fed. Reg. at 10718.

⁷¹ H. R. RPT. NO. 111-16, at 775.

⁷² *Id.* at 774.

capacity they can provide is consistent with meeting the overall purposes and objectives of the Broadband Program.

An overarching objective of BTOP is to bring broadband service to unserved areas. This objective is the first purpose listed in Section 6001(b) and, as RCA has discussed, warrants a high priority in the award of BTOP funds.⁷³ In order to pursue this goal successfully, it is critically important that NTIA take account of the fact that, although mobile wireless technology currently provides less broadband capacity than some other technologies, other characteristics of mobile wireless make it a highly attractive technology for broadband deployment in unserved areas, as well as in underserved areas.

Chief among these characteristics, of course, is mobility, since having mobile access to the Internet and to services and applications accessible via broadband connections is highly desirable in rural, remote, and sparsely populated areas. The fact that wireless infrastructure can be extensively deployed more quickly than many other technologies is another characteristic supporting the conclusion that mobile wireless technology is an effective means of bringing broadband to unserved and underserved areas.

Because mobile wireless is well positioned to deliver broadband services in unserved and underserved areas, and because the Recovery Act is intended to include as many categories of service providers as possible in the BTOP grant program, NTIA must be cautious in establishing minimum speed requirements as part of the selection criteria for BTOP grants. If the speed threshold is set too high, this could preclude the ability of mobile wireless carriers from establishing their eligibility for grants. Such an outcome would not be technologically neutral, nor

⁷³ See Section II.A., *supra*.

would it serve the objective of the Recovery Act to expedite the deployment of affordable broadband services to the greatest number of customers in unserved areas.

D. Broadband Mapping.
[JRI, NTIA ¶¶ 8.a., 8.b., 8.c.]

The Recovery Act requires NTIA, not later than two years after the date of the enactment of the legislation, to “develop and maintain a comprehensive nationwide inventory map of existing broadband service capability and availability in the United States that depicts the geographic extent to which broadband service capability is deployed and available from a commercial provider or public provider throughout each State.”⁷⁴

NTIA poses several questions about the broadband mapping requirement, including what uses the broadband map should be capable of serving, what specific information the broadband map should contain, and what level of geographic or other granularity should be used for information on broadband service provided by the broadband map.⁷⁵

RCA believes that three considerations should guide NTIA’s efforts to develop a nationwide inventory map for broadband service. First, “no one knows how many Americans actually lack access to broadband”⁷⁶ This lack of knowledge, of course, is a serious barrier to expanding access. The most important use of the broadband inventory map, therefore, must be to capture accurate and comprehensive information about geographic areas in which there currently is no access to broadband services.⁷⁷

⁷⁴ Recovery Act, § 6001(l).

⁷⁵ JRI, 74 Fed. Reg. at 10718.

⁷⁶ Peha at 11. NTIA has expressed a similar concern, noting that “[t]he lack of a single authoritative data set makes it difficult to establish with certainty whether broadband penetration has become ubiquitous” *Networked Nation* at 12.

⁷⁷ Congress has sought to advance this goal by enacting the Broadband Data Improvement Act, Pub. L. 110-385 (47 U.S.C. § 1301 note) (2008) (“Broadband Data Improvement Act”).

If NTIA seeks to develop a broadband map that would serve other uses in addition to this principal use of identifying areas lacking any broadband access, then NTIA must be careful to ensure that gathering data for these other uses does not interfere with accomplishing the principal use that the map must be capable of serving. One additional use could involve the collection of data, for inclusion in the inventory map, relating to competitive issues. For example, in areas where broadband service is available, data could be collected regarding the price of service, the quality of service, the number of service providers, the types of service features and packages being offered by broadband providers, and similar information.

Most of this information could be collected from carriers, in connection with their supplying information about areas where they are providing broadband service and the level of capacity they are providing. RCA believes, however, that any attempt to collect such information would have several disadvantages. Such a data collection would impose additional data collection and reporting obligations on carriers providing broadband service, and these obligations would be particularly burdensome to small, rural carriers. In addition, it would be extremely difficult to keep the data current and accurate, and this difficulty would seriously undermine the usefulness of the data. Further, the data would have no relevance to the award of BTOP funding or the administration of BTOP grants. For these reasons, RCA opposes the inclusion of this category of data as part of the broadband inventory map.

A second additional use of the broadband map could be to develop an inventory of “social data” for unserved areas, underserved areas, and areas with sufficient broadband service. These data could include statistics regarding poverty, unemployment, race, language, and similar factors.⁷⁸ Although the inclusion of such data in the inventory map could be useful in pursuing

⁷⁸ See Howard Buskirk, Adam Bender & Mike Dolan, *Disagreement Likely on Open-Access Rules for Stimulus Grants*, COMM. DAILY, Mar. 24, 2009 (“Buskirk”), at 1, 3.

the statutory goal of increasing levels of broadband subscribership as much as possible,⁷⁹ RCA is concerned that these data would not be pertinent to the principal, immediate goal of deploying broadband in unserved areas and increasing broadband capacity in underserved areas. Moreover, attempting to gather and include such information in a nationwide inventory map would be an arduous and costly undertaking. For these reasons, RCA believes that NTIA should not attempt at this time to include this category of data in the broadband inventory map.

A second consideration involves the level of granularity that the broadband map should use for information on broadband service. The FCC recently overhauled its data collection requirements for broadband service providers in a manner that should serve as a template for the design of the broadband inventory map mandated by the Recovery Act.⁸⁰ The Commission modified its FCC Form 477 to require all broadband providers to file semiannual reports to supply information about their broadband connections in each individual Census Tract in which they provide service.⁸¹

FCC Form 477 enables the collection of information regarding uplink and downlink speeds in various speed tiers established by the FCC, as well as the broadband technologies used, and the category of end users subscribing to broadband service (*i.e.*, business or residential). The FCC explained that the purpose of the expanded data collection is to “provide us with a highly

⁷⁹ See Recovery Act, § 6001(h)(2)(A).

⁸⁰ *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Report and Order, 23 FCC Rcd 9691, *recon.*, 23 FCC Rcd 9800 (2008) (“*Broadband Reporting Order*”). FCC Form 477 is used in part to collect information about broadband connections to end user locations for purposes of tracking the deployment of broadband infrastructure. Data required by the modified Form 477 was first collected by the FCC on March 16, 2009.

⁸¹ “Census Tracts are geographic entities within counties (or the statistical equivalent of counties). The entire area and population of a county are covered by Census Tracts.” FCC, *Instructions for Local Telephone Competition and Broadband Reporting Form (FCC Form 477)*, at 15.

detailed and reliable account of broadband subscription and deployment nationwide, enabling us to make more informed policy determinations and to support more effectively the efforts of states and others seeking to promote broadband services.”⁸²

RCA agrees with Verizon that Form 477 data “should be a cornerstone of any rural broadband strategy or other national broadband plan to ensure that attention and resources are appropriately targeted.”⁸³ RCA therefore suggests that NTIA, in developing the broadband inventory map, should give considerable weight to the level of geographic granularity used by the FCC in its revised Form 477. In addition, states should consider relying upon the FCC’s Form 477 data for statewide broadband mapping purposes, instead of developing and funding their own programs for broadband mapping.⁸⁴

The third consideration relates to timing. The Recovery Act requires NTIA to make its broadband inventory map accessible to the public on the NTIA web site, in an interactive, searchable format, not later than February 17, 2011.⁸⁵ But the Recovery Act also requires NTIA to ensure that all grant awards are made not later than September 30, 2010.⁸⁶ Clearly, Congress did not contemplate that the development and implementation of the broadband mapping plan would be a basis for slowing down or otherwise altering the timetable for action on BTOP grant applications. For purposes of awarding the broadband stimulus funding, NTIA should use the

⁸² *Broadband Reporting Order*, 23 FCC Rcd at 9698 (para. 14).

⁸³ Verizon Comments, FCC GN Docket No. 09-29, filed Mar. 25, 2009, at 6.

⁸⁴ RCA recognizes that Congress has established a grant program for state broadband mapping initiatives. *See* Broadband Data Improvement Act, § 106. For many states, however, it may be more efficient and less costly (the Broadband Data Improvement Act requires at least 20 percent matching contributions from the states) to rely on FCC Form 477 data rather than participating in the federal grant program.

⁸⁵ Recovery Act, § 6001(l).

⁸⁶ *Id.*, § 6001(d)(2).

best information available (including certifications from grant applicants) regarding the extent and parameters of broadband services in areas proposed to be served by the applicants.

E. Reporting and Auditing Requirements.
[JRI, NTIA ¶ 11.]

The Recovery Act gives NTIA the authority to require grant applicants to provide assurances that grant funds are used and accounted for in an appropriate manner,⁸⁷ and also requires NTIA to establish mechanisms to ensure appropriate use of funds.⁸⁸ The statute also instructs NTIA to require grant recipients to file quarterly reports regarding their use of funds and their progress in meeting the objectives for which the funds were provided,⁸⁹ and NTIA is given the authority to establish additional reporting and information requirements applicable to grant recipients.⁹⁰

The U.S. Department of Commerce has indicated that NTIA's administration of the Broadband Program will involve strict oversight and intensive auditing, and will include a risk-based assessment that concentrates on those recipients that the agency's Inspector General considers to pose the highest degree of risk.⁹¹ Public interest advocates have suggested that oversight requirements must be rigorous and that all grant recipients—both large and small—must be subject to the same oversight requirements and meet the same oversight goals.⁹²

RCA has three concerns regarding the audit, reporting, and oversight requirements that NTIA may establish. First, in undertaking a rigorous and extensive auditing program regarding

⁸⁷ Recovery Act, § 6001(e)(7).

⁸⁸ *Id.*, § 6001(i)(3).

⁸⁹ *Id.*, § 6001(i)(1).

⁹⁰ *Id.*, § 6001(i)(2).

⁹¹ See Tim Warren & Howard Buskirk, *Commerce Warns of Strict Broadband Audits*, COMM. DAILY, Mar. 25, 2009, at 1.

⁹² *Id.*

the BTOP funding, NTIA has an obligation to ensure that, if it establishes specific auditing terms, conditions, and requirements in its grant awards,⁹³ these terms, conditions, and requirements are clear, unambiguous, explicit, and simple to follow. The more opaque and cumbersome these terms, conditions, and requirements are, the more difficult it will be for grant recipients to account for their use of funding in a manner that comports with NTIA's view of how the rules and requirements were intended to apply.

The problems that will ensue in the wake of NTIA's utilization of poorly crafted terms, conditions, and requirements will be especially burdensome to smaller grant recipients that will not be in a position to dedicate large staffs and extensive resources in their efforts to figure out what they are supposed to do to comply with the requirements. The best way to avoid these problems is for NTIA to successfully carry out its task of prescribing at the outset a clear and simple accounting and auditing roadmap.

Second, especially in light of the fact that "grant programs of the size of the \$4.7 billion broadband initiative . . . are enormous undertakings for NTIA[,]"⁹⁴ the agency has a related obligation to ensure that auditors deployed by NTIA to audit the records of grant recipients receive a level of training and instruction, regarding the accounting and auditing terms, conditions, and requirements that NTIA chooses to utilize, that is sufficient to ensure that the auditing process does not turn into a quagmire that saps the resources of both grant recipients and NTIA by gen-

⁹³ In the Public Safety Interoperable Communications Grant Program (Program No. 11-555), for example, NTIA provided that audits may be conducted in accordance with the terms and conditions of a grant award and with *Department of Commerce Financial Assistance Standard Terms and Conditions* (Oct. 2001).

⁹⁴ U.S. Department of Commerce, Office of Inspector General, *NTIA Should Apply Lessons Learned from Public Safety Interoperable Communications Program to Ensure Sound Management and Timely Execution of \$4.7 Billion Broadband Technology Opportunities Program*, ARR-19583 (Mar. 2009) at 2. See Tim Warren, *NTIA Should Use PSIC Lessons to Distribute Stimulus Funds*, *Inspector General Says*, COMM. DAILY, Apr. 8, 2009, at 2.

erating myriad questions and disputes that could have been avoided if NTIA's auditors had received better guidance and had a better understanding of how accounting and auditing requirements were intended to work. RCA is concerned that these training functions may become even more critical because "the Recovery Act does not authorize funding for managing the program beyond September 30, 2010. Without sufficient funding for a BTOP program office, funded projects that are still under way at September 30, 2010, will no longer be actively managed, monitored, and closed out."⁹⁵ In such circumstances, the auditing process could become particularly haphazard and randomly burdensome to grant recipients in the absence of sufficient auditor training.

Third, while RCA understands the importance of accountability regarding the manner in which grant recipients utilize public funds, RCA requests NTIA to be cognizant of the fact that there is a point at which overly detailed and extensive accounting and auditing requirements could become counter-productive by discouraging smaller carriers and other service providers from seeking to participate in the Broadband Program and by draining resources of smaller grant recipients that could be better utilized in meeting the goals for which funds were awarded.

**F. Definition of Unserved Area, Underserved Area, and Broadband Service.
[JRI, NTIA ¶ 13, 13.a., 13.6, RUS ¶ 3(b)]**

The Recovery Act does not contain any definition of "unserved area," "underserved area," or "broadband," but the Conference Report instructs NTIA to coordinate with the FCC in developing a definition of each of these terms.⁹⁶ NTIA seeks comment regarding developing

⁹⁵ *Id.* RCA notes that the Recovery Act sets aside \$10 million for use by the NTIA Inspector General to carry out vigorous oversight of the use of BTOP funds. *See* Seifert Testimony at 5. NTIA should ensure that a sufficient portion of this \$10 million is used for the training of auditors.

⁹⁶ H. R. RPT. NO. 111-16, at 776.

definitions of “unserved area” and “underserved area,”⁹⁷ and both NTIA and RUS seek comment on how the term “broadband service” should be defined.⁹⁸ NTIA also asks whether BTOP should “establish threshold transmission speeds for purposes of analyzing whether an area is ‘unserved’ or ‘underserved’”⁹⁹

As a general matter, RCA’s view is that the question of whether a given geographic area should be treated as unserved or underserved, for purposes of allocating Recovery Act grants and loans, should be driven by an assessment of the level of broadband speeds currently available in the area.¹⁰⁰ In addition, “broadband service” should be defined in a manner that sets the minimum levels of service that a Recovery Act grant or loan applicant must commit to provide in order to be eligible for receipt of a grant.

In determining the levels of transmission capacity that should be used for purposes of treating an area as unserved or underserved, RCA believes that the requirements and intent of the Recovery Act argue against any attempt to develop a “one size fits all” definition of these terms. There hardly can be disagreement that separate transmission speed thresholds should be used for unserved and underserved areas.¹⁰¹ In addition, RCA believes that separate thresholds for wireline and wireless technology platforms also would best serve the purposes of the Recovery Act.

⁹⁷ JRI, 74 Fed. Reg. at 10719.

⁹⁸ *Id.* (definition of “broadband service”); *id.* at 10720 (definition of “high-speed broadband service”). With respect to the RUS broadband grant and loan programs, the Recovery Act establishes funding priorities for rural areas without sufficient access to broadband, and for rural areas with no access to broadband. *See* Recovery Act, Division A, Title I (Distance Learning, Telemedicine, and Broadband Program), third and fifth provisos.

⁹⁹ *Id.* at 10719.

¹⁰⁰ As RCA discusses further in this section, it is proposing that such assessments of broadband speeds be undertaken separately for wireline and wireless services.

¹⁰¹ The statute, for example, establishes separate purposes geared to promote access to broadband service in unserved areas and underserved areas. *See* Recovery Act, §§ 6001(b)(1), 6001(b)(2).

The Conference Report expresses the explicit congressional intent that “NTIA take into consideration the technical differences between wireless and wireline networks[,]”¹⁰² and the Recovery Act specifies that NTIA must promote the objectives of the Broadband Program in a technologically neutral manner.¹⁰³ The congressional intent that the technical differences between wireless and wireline networks be taken into account supports the view that the definitions of “unserved area,” “underserved area,” and “broadband service” should accommodate current differences in broadband capacity between mobile wireless technologies and wireline technologies.

Further, as RCA has discussed,¹⁰⁴ adherence to the statutory objective of technological neutrality requires that the terms “unserved area,” “underserved area,” and “broadband service” be defined in a manner that does not preclude mobile wireless carriers from receiving BTOP funding. Establishing different criteria for defining unserved areas and underserved areas, with lower transmission speed thresholds used for wireless technology platforms, will facilitate taking into account technical differences between wireless and wireline technologies, consistent with the purposes of the Recovery Act.

Developing definitions of unserved area, underserved area, and broadband service that preserve the opportunity of mobile wireless service providers to compete for funding helps to optimize the accomplishment of several purposes and objectives of the Recovery Act.¹⁰⁵ First, such definitions will maximize the options for delivering broadband services to unserved and

¹⁰² H. R. RPT. NO. 111-16, at 776.

¹⁰³ Recovery Act, § 6001(e)(1).

¹⁰⁴ See Section II.C.2., *supra*.

¹⁰⁵ See Sprint *Ex Parte* Letter, Attachment at 1 (arguing that broadband should be defined in a manner “that accounts for the unique value of mobile broadband relative to fixed alternatives. Only mobile broadband services are capable of providing access everywhere, all the time and often at lower cost, which is essential to achieving universal broadband connectivity.”).

underserved areas, and RCA believes that deploying broadband to these areas should be one of the most important priorities of the Broadband Program.

Second, such definitions will also increase the prospect that broadband services will reach unserved and underserved areas quickly (because wireless infrastructure deployment faces fewer obstacles than the deployment of wireline infrastructure), that the services will be affordable (because wireless infrastructure deployment can be done more efficiently than wireline infrastructure deployment, and because wireless carriers have demonstrated their ability to price their broadband services competitively), and that the services will be made accessible to the largest possible population in areas served (because wireless infrastructure deployment can achieve greater coverage footprints more rapidly than wireline infrastructure deployment).

Third, definitions of unserved area, underserved area, and broadband that accommodate participation by mobile wireless carriers in the Recovery Act's funding and loan programs serve the congressional intent of ensuring that "as many entities as possible [are] eligible to apply for a competitive grant, including wireless carriers"¹⁰⁶ This objective, which promotes grant awards and loans to carriers that can deploy affordable broadband services quickly and widely, will maximize benefits to consumers.

With these considerations in mind, RCA suggests that the terms "unserved area," "underserved area," and "broadband service" be defined in the following manner.¹⁰⁷ First, "unserved area" should be defined, in the case of wireless services, to mean any area in which no wireless service with a transmission capacity of at least 200 kbps (in at least one direction) is available.

¹⁰⁶ H. R. RPT. NO. 111-16, at 775.

¹⁰⁷ RCA notes that, for purposes of the following discussion, it proposes that threshold speeds used in defining unserved areas, underserved areas, and broadband service should be measured and evaluated as speeds that are capable of being provided by a given broadband technology. *See* JRI, 74 Fed. Reg. at 10719 (NTIA ¶ 13.b.(3)).

RCA believes that establishing separate speed thresholds for wireless and wireline technologies will promote competition (which would serve the statutory objectives of affordability and the maximization of subscribership),¹⁰⁸ and it will give consumers a greater range of options for broadband access (*e.g.*, the utilization of mobile broadband services).

Although RCA recognizes that the FCC recently revised upward the 200 kbps threshold in its definition of broadband services,¹⁰⁹ it is also the case that downlink services ranging from 200 kbps to 768 kbps continue to be offered by carriers in rural broadband services markets.¹¹⁰ It therefore would be reasonable to treat an area as unserved, with regard to wireless services, if services with transmission capacity of at least 200 kbps are not available in the area because wireless infrastructure has not yet been deployed in the area.

Second, “underserved area” should be defined, in the case of wireless services, to mean any area in which no wireless service with a transmission capacity capable of providing speeds of 1 Mbps (downlink) and 200 kbps (uplink) is available.¹¹¹ This definition would accommodate defining an area as underserved even if competitors are already providing services in the area. This is consistent with Chairman Boucher’s view, for example, that “[u]nderserved can . . . refer to communities with inadequate broadband speeds. A community should not be disqualified

¹⁰⁸ See Recovery Act, Division A, Title I, Rural Utilities Service, Distance Learning, Telemedicine and Broadband Program (priority for awarding funds “shall be given to project applications for broadband systems that will deliver end users a choice of more than one service provider”); Boucher Statement at 2 (noting that communities should get “the benefit of market competition”).

¹⁰⁹ *Broadband Reporting Order*, 23 FCC Rcd at 9700-01 (para. 20 & n.66).

¹¹⁰ See Gary Kim, *100 Percent Rural Broadband Access, Study Finds*, TMCNET (Nov. 4, 2008), accessed at jobs.tmcnet.com/topics/broadband-comm/articles/44483-100-percent-rural-broadband-access-study-finds.htm (reporting that, according to a survey conducted by the National Telecommunications Cooperative Association, about 19 percent of rural customers subscribe to broadband service at 200 kbps to 768 kbps).

¹¹¹ See Letter from Eric C. Peterson, Executive Director, RCA, to Hon. Harry Reid, Majority Leader, U.S. Senate, Hon. Nancy Pelosi, Speaker, U.S. House of Representatives, Hon. Mitch McConnell, Republican Leader, U.S. Senate, Hon. John Boehner, Republican Leader, U.S. House of Representatives (Feb. 4, 2009), at 2.

from the program because there are multiple providers offering broadband with a download speed of just 256 or 512 kbps.”¹¹²

In addition, the downlink and uplink thresholds proposed for wireless services are consistent with the transmission capabilities of many wireless carriers currently providing mobile services in rural areas and, therefore, setting these thresholds to define underserved areas would promote the Recovery Act’s objective of technological neutrality and participation of the widest array of service providers in the Recovery Act’s programs, because the thresholds would facilitate the eligibility of most rural carriers to compete for funding to deploy infrastructure and provide services in underserved areas.

Third, RCA proposes that “broadband service” be defined, in the case of wireless services, as a service that is capable of providing speeds of 1 Mbps (downlink) and 200 kbps (uplink). An important aspect of RCA’s proposal is that a grant or loan applicant would be required to commit to the provision of services capable of performing at these speeds in *both* unserved and underserved areas. Thus, even though an unserved area, for wireless services, would be defined as an area with no access to 200 kbps wireless broadband services, a wireless carrier would not be eligible for any funding unless the carrier committed to the provision of broadband services with transmission capacity capable of providing downlink speeds of 1 Mbps in the unserved area. The purpose of this proposed requirement is to accelerate as much as possible the deployment in rural areas of current generation broadband services that are widely available to consumers in urban areas.¹¹³

¹¹² Boucher Statement at 2.

¹¹³ *Cf.* Section 254(b)(3) of the Act, 47 U.S.C. § 254(b)(3) (“Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas

RCA believes that its proposed speed thresholds for defining broadband service are a practical and effective means of providing “the greatest broadband speed possible”¹¹⁴ because, as NCTA has observed, setting the thresholds at higher speeds would risk “misallocating funds that should be devoted to higher priority geographic areas and populations, and could deter any . . . wireless investments in areas that do not currently support broadband, depriving those areas of jobs in building out broadband and perpetuating the lack of broadband service.”¹¹⁵ RCA believes that the provision of broadband service that is capable of providing downlink speeds of 1 Mbps is currently achievable by many mobile wireless service providers and therefore would avoid the risks described by NCTA.

RCA also suggests that NTIA and RUS, in prescribing their rules for deciding whether a grant applicant has established eligibility to receive funding, should consider inclusion of a waiver process pursuant to which an applicant could still be found eligible for funding even if the applicant could not warrant that it would deploy services with the minimum transmission speeds required by the definition of broadband service.

There may be cases in which a grant proposal makes a convincing showing that, for example, the proposed deployment of infrastructure would significantly increase affordability and subscribership to the greatest population of potential users in the service area. It might be found that allowing such an application to compete for and receive funding would bring substantial benefits to consumers in unserved or underserved areas, even though the grant applicant’s service would provide less than the required speed thresholds. RCA believes that granting a waiver

and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”).

¹¹⁴ Recovery Act, § 6001(h)(2)(B).

¹¹⁵ NCTA Comments at 19.

in such circumstances would serve the interests of consumers and would also address the congressional concern “that a specific speed threshold could have the unintended result of thwarting broadband deployment in certain areas.”¹¹⁶

In evaluating the advisability of awarding Recovery Act grants or loans for the deployment of mobile wireless services that would provide the minimum speeds RCA is proposing, some parties may make the argument that it would be better to forego the funding of such deployment at the present time and instead wait for the deployment of 4G wireless technologies in rural areas. RCA strongly believes that such an approach would not be consistent with the purposes and intent of the Recovery Act, and would disserve consumers in rural areas, risking the perpetuation of policies that have had the effect of relegating consumers in unserved and underserved areas to a back seat regarding the availability of broadband services.

While it is true that 4G technologies such as LTE will offer enormous transmission capacity and will likely revolutionize mobile wireless broadband, deployment of these technologies in rural America may not occur in the near-term future.¹¹⁷ There is no public policy justification for steering Recovery Act funding away from current generation mobile broadband services because of the hope that technologies with faster speeds are just around the corner for rural communities.

Finally, defining “unserved area” and “underserved area” also involves a geographic component, in addition to the transmission capacity component RCA has discussed. RCA suggests that NTIA and RUS should use Census Tracts as the “building blocks” for designating ar-

¹¹⁶ H. R. RPT. NO. 111-16, at 775.

¹¹⁷ Widespread deployment of LTE is expected to begin to occur during 2012, but extending LTE to rural communities will likely take years. See Stacey Higginbotham, *Ericsson Expects Mass LTE Deployment in 2012*, GIGAOM (Feb. 19, 2009) accessed at gigaom.com/2008/02/19/ericsson-expects-mass-lte-deployment-in-2012/; Marguerite Reardon, *Verizon Promises 4G Wireless for Rural Areas*, CNET.COM (Apr. 1, 2009), accessed at reviews.cnet.com/8301-12261_7-10209933-51.html.

areas in which grant or loan recipients would deploy broadband services. A grant applicant could propose any group or groups of contiguous Census Tracts as the area to be covered by the proposed project. The applicant would be required to demonstrate or certify that the area qualifies as an unserved area or underserved area, as the case may be, because the defined level of broadband service is not available from any existing service provider in any of the Census Tracts comprising the area.¹¹⁸

Using Census Tracts as a component of the definition of “unserved area” and “underserved area” would be technologically neutral because it would not be based upon any pre-existing service areas used either by wireline or wireless carriers. The use of Census Tracts would also help to target the deployment of broadband service at a very granular level. If larger areas were used, this would risk precluding an area from qualifying as an unserved area, for example, even though only a small percentage of end users in the area were receiving the defined level of broadband service from existing service providers. Finally, the use of Census Tracts would be relatively easy to implement because the FCC has begun to collect broadband service data at the Census Tract level.

G. Non-Discrimination and Network Interconnection Obligations.
[JRI, NTIA ¶ 13.c.]

The Recovery Act requires NTIA, in coordination with the FCC, to publish non-discrimination and network interconnection obligations applicable to BTOP award recipients, and indicates that these obligations must include compliance with the FCC’s broadband *Policy*

¹¹⁸ RCA also suggests that NTIA and RUS should develop rules or criteria that would prevent the disqualification of a grant application because of the *de minimis* presence of broadband services (at the levels established by NTIA and RUS in their definitions of unserved and underserved areas) in Census Tracts included in the grant application.

Statement.¹¹⁹ NTIA asks how BTOP should define the non-discrimination and network interconnection obligations.¹²⁰

RCA's view is that the non-discrimination provisions should follow the FCC's *Policy Statement* but should not attempt to extend beyond it.¹²¹ Any effort to develop more extensive or detailed requirements would be very controversial and would likely extend the period of time necessary for NTIA to prescribe the overall set of rules and requirements that will govern its administration of the Broadband Program. Given the fact that the *Policy Statement* has been a durable mechanism for preserving and promoting the interest of consumers in an open, interconnected public Internet, there is no persuasive reason to risk any such delay in the initiation of the grant program.¹²² For the same reason, RCA believes that it would be sufficient and effective to base network interconnection obligations on the existing statutory and regulatory framework.

III. CONCLUSION.

The Broadband Technology Opportunities Program and the RUS broadband grant and loan programs provide an important opportunity for the expanded and accelerated deployment of broadband service, especially in rural America. NTIA and RUS should seize this opportunity by crafting grant and loan programs that effectively promote job creation and economic development, and that also advance the objective of bringing broadband networks to areas of the country that currently do not have a path to the digital future. Mobile wireless broadband providers look

¹¹⁹ Recovery Act, § 6001(j).

¹²⁰ JRI, 74 Fed. Reg. at 10719.

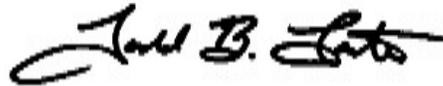
¹²¹ RCA agrees with Sprint that the *Policy Statement* should be applied in a manner that ensures that mobile carriers will be able "to continue to require that devices connected to their services do not harm the network or degrade the performance of the network for other users." Sprint *Ex Parte* Letter, Attachment at 2.

¹²² See Buskirk at 3 (quoting Chris Guttman-McCabe, Vice President for Regulatory Affairs, CTIA) ("[t]he goal must be to get the stimulus money into the economy, 'not to spend the next several months debating these [non-discrimination] issues . . . in tortured detail'").

forward to participating in these funding programs and helping to achieve the goals and purposes of the Recovery Act in bringing broadband to rural America.

Respectfully submitted,

RURAL CELLULAR ASSOCIATION

A handwritten signature in black ink, appearing to read "Todd B. Lantor". The signature is fluid and cursive, with a large initial "T" and a long, sweeping underline.

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