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American Recovery and Reinvestment Act of 2009 Broadband Initiatives

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The undersigned organizations, representing a broad coalition of public interest advocacy groups, foundations, community broadcasters and others, strongly support the goals of the American Recovery and Reinvestment Act (ARRA) that aim to expand broadband access and adoption.

We urge NTIA and RUS to consider these comments as the agencies design the grant and loan application and selection processes.

Definitions of Unserved and Underserved

Sec 6001 (a) requires the NTIA to create the Broadband Technology Opportunities Program (BTOP) in consultation with the Federal Communications Commission (FCC), and the FCC has launched a parallel proceeding to determine the definitions of "unserved area" and "underserved area.[1]" Division A, Title I of the Recovery Act directs the Department of Agriculture to provide broadband infrastructure loans and loan guarantees and grants provided that "at least 75 percent of the area to be served by a project receiving funds from such grants, loans or loan guarantees shall be in a rural area without sufficient access to high speed broadband service to

[1] GN Docket No. 09-40. *See also* Conf. Rep. 111-16, at 776 ("The [Recovery Act] does not define such terms as 'unserved area' 'underserved areas' and 'broadband.' The Conferees instruct the NTIA to coordinate its understanding of these terms with the FCC, so that the NTIA may benefit from the FCC's considerable expertise in these matters."

facilitate rural economic development, as determined by the Secretary of Agriculture."

We urge the NTIA, in consultation with the FCC, to adopt definitions of "unserved" and "underserved" that are consistent with other provisions of the Recovery Act and give the agency the flexibility to consider proposed projects on their own merit, and without the constraint of artificial geographic boundaries.

We also wish to stress that section (b)(3)(A) of the Recovery Act makes eligible entities such as schools, hospitals, libraries, institutes of higher education, who wish to provide service to themselves, without regard to whether they are in an area that is deemed un- or underserved. Similarly, the statute directs NTIA to consider projects that address *any* of the five purposes when selecting grants, not just whether an area is un- or under-served. Other purposes include access to community support institutions,[2] public safety use and stimulation of demand.

Clearly, it is important for NTIA to place some priority on projects that bring high speed broadband to areas of the country that have absolutely no services now, at any price. We support a definition of "unserved" where no wireline Internet services are offered, or only dial-up service is available.

We also urge that NTIA not define "unserved" or "underserved" by relying on firm geographic boundaries such as zip codes or census tracts. There is a scarcity of reliable data available to NTIA at that level of detail on where broadband is available, the prices offered and speeds available. The agency could not possibly determine which firm geographic areas are un- or under-served until highly granular data is collected and aggregated, a job the FCC is responsible for.

Firm geographic boundaries could also result in leaving out important vulnerable populations. For example, a zip code or any particular census tract in an urban center may be served by multiple broadband providers, but at prices beyond reach of residents of public housing in that city. In that case, the housing projects should be considered underserved. Similarly, important targeted populations mentioned by the Recovery Act – such as the aged or unemployed – do not always live in clustered geographic areas. A tele-health project that connects seniors from diverse geographic areas to an on-line wellness program should be considered just as worthy as one that serves seniors at a fixed geographic location.

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[2] Schools, libraries, medical and healthcare providers, community colleges and other institutions of higher education, and other community support organizations and entities to facilitate greater use of broadband service by or through these organizations; organizations and agencies that provide outreach, access, equipment, and support services to facilitate greater use of broadband service by low-income, unemployed, aged, and otherwise vulnerable populations; job-creating strategic facilities located within a State-designated economic zone, Economic Development District designated by the Department of Commerce, Renewal Community or Empowerment Zone designated by the Department of Housing and Urban Development, or Enterprise Community designated by the Department of Agriculture; and public safety agencies.

We urge that the NTIA, in consultation with the FCC, define an "underserved area" as an area without sufficient access to high-speed broadband service to facilitate economic development or to advance other social benefits. We suggest that NTIA establish broad criteria for identifying underserved areas, and allow potential applicants to demonstrate whether their project serves such an area. Those criteria could include:

- Whether the cost of broadband services is out of reach for populations identified in Act, such as low-income, unemployed, aged, and otherwise vulnerable populations;
- Whether the speeds currently available fail to meet the needs for economic development and other social benefits;
- Whether the only available broadband networks fail to offer consumers services that are non discriminatory; or
- Whether the targeted populations (such as elderly, disabled, etc) have significantly lower rates of broadband adoption than the population at large.

Applicants should be required to demonstrate the area served meets these criteria by submitting data as part of their grant application that is verifiable, transparent, and uses sound research methodology.

Speed

In order to regain our position as a global broadband leader, the goal of U.S. broadband policy should be to ensure that every residence, business and institution has access to Internet at speeds of 100 symmetrical megabits or more at an affordable rate. Achieving that goal will take a far more significant investment than provided in the Recovery Act, and requires years of planning and implementation far beyond the Congressionally mandated deadline for project completion of September 30, 2012.

That is why we urge NTIA to refrain from requiring minimum speeds more aggressive than the FCC's current definition of broadband as anything above 768 kb per second, and instead to consider each project based on whether it meets the criteria required by the Recovery Act.

This would give NTIA the flexibility it needs to meet two important, but sometimes conflicting, goals: increased affordability of and subscribership to the greatest population of users; and provide the greatest broadband speed possible to the greatest population of users.

For example, a project that offers very low cost or free service to consumers over a wireless network could increase subscribership greatly among low-income users, at speeds appropriate for economic development and other social benefits, and for a

relatively modest investment of taxpayer dollars. That project should be considered on its merits, just as one that brings high speed fiber optics to a health institution, critical for today's health IT needs, but much more costly. The success of both of those projects could create significant economic opportunities and social benefits, proving the value of access and creating momentum towards federal policy that could truly bring high-speed access to all.

Role of the States

ARRA and the conference report recognize both the importance of the states and the need to ensure that control of the program remains centralized in NTIA. While the statute requires that NTIA distribute at least one grant per state, it does not require that NTIA distribute money ***to*** the states (although nothing prevents states from applying for grants). The directive to award at least one grant per state should not be misconstrued as requiring awards to states or otherwise elevating the role of the states in the process. Also, Sec 6001(g) states that NTIA may make "competitive grants," but equal or proportionate grants to states are not competitive.

Similarly, the statute provides that the NTIA "***may*** consult" with state governments with regard to certain definitional issues. As noted in the conference report, this reflects the recognition that states possess significant knowledge and expertise about the local broadband environment. At the same time, Congress made clear its intent that NTIA must retain authority over decision-making and must maintain strict oversight of grant recipients. The fact that even this consultation is discretionary underscores that Congress intended for this to remain a federal program, under federal supervision, using standardized criteria and definitions. Indeed, Congress rejected earlier versions, which would have given the states a greater role in the process.

Accordingly, while NTIA may consider creating a formal process of consultation for the states, it should not delegate authority to the states, nor give states the authority to "rank" potential applicants, nor allow the states to craft their own definitions to apply locally. Such an approach would make it impossible to establish any sort of uniform policy. It would frustrate the effort to develop national metrics and a national broadband plan. It could create tension between states with significant urban populations and predominantly rural states, and between states and Native American tribes. It would create a conflict of interest between states that apply for funds, and competitive applications from other entities within the state.

Furthermore, at least 15 states have severely restricted or outright banned the ability of their municipal or county governments in creating or managing communications networks. If a state has, by legislative action, eliminated its municipalities' ability to use federal funds to build communications networks, in direct contrast to the Recovery Act statute that explicitly allows local governments to be grantees, NTIA should look upon that state's application for public funds with less favor.

Indeed, given the diversity of state entities potentially involved in a delegation of any substantive authority to the states raises serious administration concerns. Should this be through state governors? State PUCs? Some states have specific broadband programs, others do not. What criteria would NTIA apply to determine the proper state entity to exercise any delegated authority or to set any definitions? Rather than simplifying the process, as some have suggested, delegation to the states raises numerous questions that could delay expeditious administration of the programs.

An alternative structure for soliciting and considering input from third parties, such as states, would be to create one or more advisory councils at NTIA, balanced with representation from states, counties, municipalities, Tribal governments, community organizations and public interest groups. This would allow the agency to benefit from the valuable experiences of these entities, while providing balance and a diversity of points of view. States could also be requested to submit their own statewide broadband plans for the NTIA to consider when reviewing applications from entities within that state.

Furthermore, problems regarding broadband deployment and adoption often cross state lines and require interstate solutions. In addition, broadband adoption solutions that address barriers occurring in non-geographic cohorts (e.g. mono-lingual Spanish speakers) cannot be addressed by programs that are only geographic in scope. The BTOP program should encourage solutions that may require collaborations in communities across state lines, or have the ability to scale beyond a single state.

Empower Local Governments

As noted above, more than a dozen states have either banned or severely restricted the ability of local governments to operate communications networks. This has often been done at the urging of incumbent network owners that wish to thwart competition that a municipally run network could provide. State level preemption is directly at odds with the eligibility criteria of the BTOP program as outlined in ARRA, which includes local governments as eligible entities.

In order to fully carry out the purposes of ARRA, we urge NTIA to engage in a rulemaking process to make explicit that local governments that receive ARRA broadband funds are permitted, under federal law, to own, operate or manage communications networks. Congress expressly provided NTIA with rulemaking authority to carry out the purposes of ARRA, and we strongly believe this would be an appropriate use of that authority.

Support Small Projects

We recognize the challenges NTIA faces in administering a grant program of this size, in a short period of time, and with limited staff capacity. We are concerned that in its effort to meet those challenges, NTIA will be hard pressed to seriously consider proposals that are modest in scale. Failing to seriously consider projects of a small scale would be an enormous missed opportunity. Some of the most effective and cost-efficient access and adoption programs are run by small, community based and local organizations, many of which are not equipped to manage a multi-million dollar project.

NTIA can address that challenge by placing a priority on projects that aggregate multiple, smaller stakeholders into one proposal. For example, a multi-million dollar project that sub-contracts or sub-grants services to community groups for thousands or tens of thousands of dollars, is one way to ensure these local groups are part of the U.S. broadband solution. Municipalities, counties, regional and community foundations are logical aggregators of such projects since they are existing intermediaries who already fund community-based organizations and on-the-ground projects.

Re-granted or sub-contracted projects should be held to the same level of transparency and accountability as directly funded projects. A successful applicant should need to very clearly specify the steps it would take to ensure the re-granting and subsequent monitoring and compliance process is successful. Applicants should state in advance what services are going to be provided, and to the extent practical, who will perform those services. If the sub-contractor or re-grantee cannot be identified in advance, NTIA should still hold the direct grantees accountable for the work. Intermediaries should be expected to collect ongoing metrics and grant results, but can and should streamline the application and ongoing grant reporting process.

NTIA should also both encourage and seriously consider projects of a small scale. Without compromising the accountability and transparency requirements of the Recovery Act, the agency could create a streamlined application process for small projects. The agency could also consider setting aside some amount of funding just for smaller projects, along the lines of what Congress set aside for public computer center capacity and projects for sustainable adoption. This is another instance where NTIA can rely on the expertise of state and local governments as well as community groups in creating an advisory board to help the agency select worthy projects.

Network Non Discrimination and Interconnection

Section 6001(j) of the Recovery Act requires that the NTIA, in consultation with the FCC, adopt nondiscrimination and network interconnection standards that grant seekers will have to adhere to as a condition of a grant award. Division A, Title I

instructs RUS to give "priority … to project applications for broadband systems that will deliver end users a choice of more than one service provider."

At a minimum, the Recovery Act requires adherence to the FCC's broadband policy statement, and consistency dictates that NTIA funded networks also give consumers a choice of service providers. We strongly support the intent of this policy, and encourage both NTIA and RUS to go further to ensure federal funds are used to spur the development of a truly open, neutral communications network. We also encourage the agency be mindful of current restrictions on many educational networks that may cause difficulty in meeting open access requirements.

To ensure consistency, we also feel that interconnection and nondiscrimination requirements should be applied to the grants and loans awarded by the RUS and NTIA pursuant to the Recovery Act. This follows since RUS funds, conceivably, could go to building the networks that BTOP's targeted populations and institutions use to increase demand, adoption, and sustained use as well as promoting economic development and other social benefits.

Pursuant to Section 201 of the Communications Act, the principle of interconnection has been the foundation of communications law and policy. These principles of are what allowed the Internet to grow, flourish, and succeed. It was only in 2005 that the FCC no longer mandated these principles for today's high-speed broadband networks. We recommend that the NTIA use the policy laid out in Section 201 and require all grantees to charge reasonable rates to establish physical connections with other carriers.

However, NTIA and RUS must recognize a distinction between commercial networks intended for consumer use, and private networks intended to serve specific community-support institutions. Commercial networks should be held to the strongest interconnection standards. However, non-commercial entities such as housing projects, libraries or similar entities that seek to build a network solely for use within its facilities and not for broader consumer use, should be encouraged but not mandated to meet interconnection rules. Multi-use networks, whereby many nonprofit and educational institutions interconnect to share a network, should be considered consistent with the agencies' interconnection rules.

Applicants should also be required to make extremely clear as to whether or not residential users would be prohibited from sharing their connections with those outside their domiciles and/or prohibited from operating a web, email or other type of server.

In order to ensure compliance with nondiscrimination rules, we recommend that NTIA and RUS require that grant awardees that own or manage infrastructure submit to the agencies their network management practices. This will allow the agencies and the public to determine whether those practices discriminate among users, content, services, or applications.

Non-Public Entities

The Recovery Act clearly favors proposals from public and non-profit entities, and explicitly states that broadband service or infrastructure providers can be considered only if the Assistant Secretary rules that the entity is in the public interest.

During public hearings held by NTIA, it was suggested that any entity that holds a state or local franchise, other licenses to provide service, or was already in a public-private partnership automatically be ruled as a "public interest entity." We strongly urge NTIA to reject that proposal. There exists no common, consistent or clearly defined demonstration of public interest value of commercial providers through those processes.

Alternatively, when determining if an entity is "in the public interest," the agency could consider whether the proposal submitted by commercial applicant contains a demonstrated and verifiable partnership with an eligible government or non-profit entity as defined in section (b)(3)(A)(B)(C) of the Recovery Act.

The agencies should also hold any commercial providers ruled to be "in the public interest" to the strongest open access, non-discrimination and interconnection rules, and should consider whether the entity guarantees the affordability of any services subsidized with public funds, both during and after the grant term.

We also point to a separate filing from the Benton Foundation, submitted to NTIA on March 20 2009, which lays out a detailed proposal for NTIA to consider in this area.

Matching Fund Requirements

The Recovery Act limits the federal share of any project to 80%, unless the Assistant Secretary is petitioned for a waiver and determines the petition demonstrates financial need. The statute also requires that applicants demonstrate that a project would not have been implemented without Federal grant assistance. While these two requirements are not inconsistent, it is important that the NTIA recognize that worthy projects and organizations that require federal assistance to materialize may be challenged to raise 20% of the funds from other sources. This is particularly true during these trying economic times, when access to capital and credit present a significant challenge to economic development.

One way to ensure that worthy projects meet this test is to allow nonprofit organizations and government entities to count in-kind resources of staffing, equipment and software, volunteer hours, and similar towards their 20% match.

NTIA may want to consider some reasonable leniency in applying this rule to non-profits whose projects are designed solely to run adoption programs, and are not applying to build or manage networks.

Mapping

The Recovery Act allocates up to $350 million to implement the Broadband Data Improvement Act, which aims to map deployment. Mapping of broadband is one way for policymakers to determine whether more government action is needed to make certain that everyone is able to participate in online democracy, commerce, education and entertainment. Done correctly, mapping can help determine which population segments are unserved, or underserved. Even the best maps won't disclose why certain areas are unserved or underserved, merely that they are.

However, it's not clear that all, or even most, mapping is being done correctly. In many jurisdictions, available maps are based on information supplied by telephone, cable and wireless companies and the underlying information is not subject to independent review and analysis. In order for mapping truly to be a useful tool, all information on current deployment of broadband (frequently updated) must be transparent so that the public and policymakers can determine what types and speeds of service are available where, and at what price. Until that happens, mapping will be a limited tool at best.

Any federal entity, be it NTIA, RUS or FCC, must treat funds spent for broadband mapping under the Recovery Act with the same mandates for transparency and accountability as it does for other funds. It should outright reject proposals that would award any public dollars to a mapping initiative that fails to disclose the source of the data, the methodology used, and data points critical for assessing U.S. broadband access, speed and availability.

In support of the FCC's developing a National Broadband Strategy one year from the passage of the ARRA, a portion of the $350 million allocated for the mapping of broadband should be set aside to map the actual and potential uses of the spectrum for the public interest. This would include spectrum set aside for governmental uses, for public safety, the "white spaces" in the radio spectrum, etc. Since the demand for spectrum will only accelerate, mapping the uses of spectrum by broadband technologies becomes increasingly critical to the national interest.

Use Qualitative Metrics for Digital Inclusion

The Recovery Act requires that NTIA and RUS collect information to measure the success of the broadband programs. In addition, the statute requires that NTIA fund broadband mapping and the formulation of a broadband national plan.

Traditionally, these efforts have focused on a limited number of quantitative metrics, e.g., the number of DSL lines, number of subscribers, speeds offered, and so forth. Going forward these measures need to include more technical information about traffic routing, network architecture and geo-spatial data to identify the quality of service and functionality of connections at any given location.

But federal policy values broadband for its ***qualitative*** impact, such as how it improves people's lives, and as the Recovery Act explicitly states, advances consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes. The information collected by NTIA and RUS to assess the impact of the program, and used to formulate the broadband map and national broadband plan, should therefore include these qualitative metrics.

In order to effectively target vulnerable populations, NTIA funded projects should collect information about adoption rates by area and by demographics (such as age, income, ethnicity, and gender) as part of their reporting, as well as to inform national broadband mapping. Furthermore, the Department of Commerce should add questions about broadband adoption and home computer usage to the 2010 Census.

Signed,

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