

CTIA – The Wireless Association®
Independent Telephone & Telecommunications Alliance
PCIA – The Wireless Infrastructure Association
Rural Cellular Association
Rural Telecommunications Group, Inc.
Wireless Communications Association International, Inc.

June 22, 2009

The Honorable Gary Locke
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Re: Avoiding Unnecessary Delays in Deploying BTOP-Funded Broadband Facilities

Dear Secretary Locke:

CTIA – The Wireless Association®, the Independent Telephone & Telecommunications Alliance, PCIA – The Wireless Infrastructure Association, the Rural Cellular Association, Rural Telecommunications Group, Inc. and the Wireless Communications Association International, Inc. are writing today to express our concern that the substantial public interest benefits promised by the Broadband Technology Opportunities Program (“BTOP”) could be undermined if the National Telecommunications and Information Administration (“NTIA”) adopts unnecessarily burdensome procedures implementing the National Environmental Policy Act and other environmental legislation (collectively “NEPA”).¹ As discussed in further detail below, we urge NTIA to establish a categorical exclusion for all BTOP applications that propose facilities subject to the environmental requirements of the Federal Communications Commission (“FCC”), so long as the application includes a certification by the applicant that it will comply with the FCC’s requirements prior to commencing construction.

As Congress stated in adopting the American Recovery and Reinvestment Act of 2009 (“ARRA”), it is imperative that economic stimulus monies make their way into the marketplace as rapidly as possible.² NTIA’s staff has devoted substantial resources to assure that BTOP accomplishes that objective. Congress also has made clear that the NEPA environmental review process cannot become an unnecessary impediment to ARRA implementation. In establishing ARRA processes pursuant to NEPA, “the shortest existing applicable process under [NEPA] shall be utilized” by Federal

¹ See, e.g., 42 U.S.C. § 4332 (NEPA applies to “major Federal actions”); 40 C.F.R. 1508.18 (defining “major Federal action” to include projects “financed” by federal agencies); 16 U.S.C. § 470f (National Historic Preservation Act applies to “undertakings”); id., 36 C.F.R. § 800.2(o) (defining “undertakings” to include projects “licensed or assisted” by federal agencies, including those assisted through “the expenditure of any Federal funds”).

² American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1602, 123 Stat. 115 (2009).

agencies.³ An April 3, 2009 memorandum by the Council on Environmental Quality (“CEQ”) provided guidance to Federal agencies as to ways they can expedite their NEPA review process, specifically suggesting that other agencies’ processes be reviewed and incorporated where appropriate.⁴

We recommend that NTIA benefit from the four decades of experience the Federal Communications Commission (“FCC”) has in conducting NEPA analyses of communications facilities. The FCC has had the opportunity to consider the environmental implications of virtually every communications facility it authorizes and has created a comprehensive set of rules and policies to protect the environment and create a level of certainty for the environmental review standards and procedures. While the FCC’s implementation of NEPA may come with its own challenges, departure from this tried and true approach poses a substantial risk that BTOP-funded broadband deployments will be substantially delayed by new legal and procedural issues.

This concern is not mere speculation. Earlier this year, for example, NTIA adopted unique and expansive NEPA compliance procedures for the Public Safety Interoperable Communications (“PSIC”) grant program. The difficulty associated with meeting these new requirements is among the factors currently being cited for the relatively small number of PSIC-funded facilities that have been deployed.⁵ In a recent report evaluating the PSIC program and applying the lessons learned to BTOP, the Department of Commerce’s Inspector General has emphasized the importance of promptly developing a programmatic environmental assessment plan for BTOP so as to avoid the sorts of delays experienced with respect to PSIC deployment.⁶ We agree, and are heartened that the CEQ has recently reported to Congress that “NTIA has initiated steps to develop a programmatic [environmental assessment] to cover most [BTOP] grants.”⁷

³ *Id.* §1609(b).

⁴ CEQ, Memorandum for Heads of Departments and Federal Agencies, “Environmental Compliance and Guidance for Reporting NEPA Status and Progress for Recovery Act Activities and Projects,” at 2 (rel. Apr. 3, 2009) (“CEQ Memorandum”) (available at oam.ocs.doc.gov/docs/Recovery%20Act%20and%20NEPA%20Apr%203%202009.pdf).

⁵ These factors, including NEPA compliance guidelines, collectively have justified the need for a Congressional extension of the PSIC program for two additional years. *See* Kirby, “APCO Expresses Support For PSIC Extension,” *TR Daily* (May 5, 2009) (“Federal and state officials say that securing environmental review has slowed agencies’ efforts to spend PSIC grants”).

⁶ *See* Dept. of Commerce Office of Inspector General, OIG Recovery Act Flash Report, “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,” at 3 (dated March 2009) (available at www.recovery.gov/sites/default/files/ARR-19583_for_recovery.gov_.pdf).

⁷ CEQ Report at Attachment 4 (dated May 18, 2009) (available at <http://ceq.hss.doe.gov/nepa/nepanet.htm>).

In this regard, we urge that a categorical exclusion be established for any BTOP application that proposes a wireline or wireless telecommunications facility that is subject to the FCC's environmental requirements, provided that the application includes a certification that the applicant will comply with the FCC's requirements prior to commencing construction of the covered facilities. Since many, if not most, BTOP grantees will be subject to the FCC's existing environmental rules, adoption of this approach will avoid imposing duplicative regulatory burdens on a large number of grantees, while freeing NTIA staff from duplicating efforts that the FCC staff already will be undertaking to assure NEPA compliance. Such an approach is also consistent with CEQ guidance that urges Federal agencies, in crafting their programmatic approaches under NEPA, to use categorical exclusions where possible.⁸ In addition, this approach would permit the BTOP application process to proceed expeditiously as BTOP applicants should be very familiar with the FCC's NEPA requirements.

We appreciate your consideration of this important matter, and look forward to working with NTIA as it implements the ARRA.

Respectfully submitted,

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⁸ CEQ Memorandum at 2.

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