

*Before the*

**DEPARTMENT OF COMMERCE  
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION**

**DEPARTMENT OF AGRICULTURE  
RURAL UTILITIES SERVICE**

**FEDERAL COMMUNICATIONS COMMISSION**

Joint Request for Information:	)	
American Recovery and	)	NTIA/RUS Docket No. 090309298-9299-01
Reinvestment Act of 2009	)	FCC GN Docket No. 09-40
Broadband Initiatives	)	

**COMMENTS OF MEDIA ACCESS PROJECT**

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April 10, 2009

## EXECUTIVE SUMMARY

Media Access Project (“MAP”) submits these comments to emphasize that the core principles of the First Amendment must be considered as the National Telecommunications and Information Administration (“NTIA”), Rural Utilities Service (“RUS”), and Federal Communications Commission (“FCC”) determine the application guidelines for applicants seeking funds pursuant to the American Recovery and Reinvestment Act of 2009, Broadband Initiatives (“Recovery Act”).

Both the Recovery Act and current law require that any program adopted by the NTIA must be consistent with the First Amendment’s values of open expression and civic discourse.

In response to the NTIA’s request for information and FCC’s request for guidance on the definition of certain terms contained in the Recovery Act, MAP urges the NTIA to adopt nondiscrimination and interconnection requirements that go beyond the FCC’s current broadband policy statement. Additional nondiscrimination and interconnection requirements are necessary to not only ensure economic recovery and efficiency, but to ensure also compliance and consistency with existing law that broadband and Internet services must promote First Amendment values. Nondiscrimination and interconnection requirements can easily be defined pursuant to existing statutory language and precedent. Specifically, nondiscrimination can be defined pursuant to 47 U.S.C. §202 and the FCC’s nondiscrimination requirement in the AT&T/Bell South merger. Similarly, interconnection can be defined pursuant to 47 U.S.C. §§ 201 and 251.

Finally, to ensure consistency, these requirements should also extend to the grants and loans awarded by the RUS.

**I. OPEN ACCESS TO BROADBAND AND THE INTERNET FACILITATES AND PROMOTES FIRST AMENDMENT VALUES.**

Essential to the value of the Internet is the ability of citizens to speak to one another, to be publishers and speakers as well as readers and listeners. As the Supreme Court has observed, the content of the Internet is “as diverse as human thought.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997). The Internet is an open and interactive medium, facilitating communication by anyone to and from everyone. *Id.* Most importantly, unlike conventional mass media such as television and cable, the Internet is not simply a medium through which programers make decisions for passive viewers about content. Rather, it is a medium that supports and enhances the free expression of citizens and serves as a vehicle for democratic governance and economic activities.

As the Supreme Court has found, when granting Internet communications the highest protection under the Constitution, the “Internet ... now enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is ‘a unique and wholly new medium of worldwide human communication.’” *Reno v. ACLU*, 521 U.S. at 845. To fully realize the Internet’s potential, all Americans must have the ability to communicate with each other. Thus, access, especially unfettered access, to broadband and the Internet is an essential component for social, economic, and political discourse.

**II. THE RECOVERY ACT REQUIRES THAT ITS FUNDS BE USED TO PROMOTE FIRST AMENDMENT VALUES.**

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 through the Broadband Technology Opportunities Program (“BTOP”). At a minimum, the Recovery Act requires adherence to the FCC’s broadband policy statement.

Section 6001(a) further seeks to ensure that the BTOP program “complements and enhances and does not conflict with other Federal broadband initiatives and programs” while 6001(e)(4) seeks to ensure that all grant applicants will comply with all applicable Federal laws.

Under this backdrop, it is critical that the definitions of nondiscrimination and interconnection are consistent with the diversity goals of the public interest standard of the Communications Act of 1934, as amended. *See, e.g.*, 47 U.S.C. §§ 230, 301, 303, 307, 309. For instance, in Section 230 (b), Congress recognized that the “Internet and other interactive computer services,” accessible through a broadband connection, “offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” Additionally, Congress recognized that “[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.” Similarly, §§ 301, 303, 307, 309 require the Commission to act in the public interest, which, among other things, requires the Commission to ensure a diversity of voices. *See e.g., Further Notice of Proposed Rulemaking*, 21 FCCRcd, 8834, 8837 (2006).

Thus, funds allocated through the Recovery Act must not only attain the goals of creating and preserving jobs and promoting economic recovery. Rather, the funds must also be used to ensure that the Internet maintains its First Amendments values by remaining a “forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” 47 U.S.C. §230. This can only be accomplished by the adoption of nondiscrimination and interconnection requirements.

### **III. NONDISCRIMINATION AND INTERCONNECTION REQUIREMENTS ARE NECESSARY TO PROMOTE FIRST AMENDMENT VALUES.**

The mandate of the Recovery Act is to spur economic recovery and, consistent with current law, to preserve the First Amendment speech aspects of broadband use. Thus, in addition to economic considerations, there are important considerations supporting nondiscrimination and interconnection requirements which flow from the First Amendment and its underlying purpose of promoting an environment for open and vibrant civic discourse.<sup>1</sup> Without such requirements, broadband users will face real and potential constraints which can have a dramatic effect on the exercise of First Amendment rights to speak and to be heard in the marketplace of ideas. Prohibition of access to particular content or content providers or on the ability of devices to network with each other can all interfere with vibrant civic discourse. The same is true of practices which degrade the functionality of devices or degrade the accessibility of certain applications, content, or services.

First Amendment considerations clearly and separately support nondiscrimination and interconnection requirements. The Communications Act does not limit the application of these objectives to particular services or technologies. *See U.S. v. AT&T*, 551 F.Supp. 131, 184 (D.D.C. 1982). In *U.S. v. AT&T*, the Court, in approving the AT&T consent decree and imposing restrictions on “electronic publishing” and relying on §§ 301, 303, 307, 309 of the Communications Act held that First Amendment considerations separately supported the action. The Court stated that it did “not here sit to decide on the allocation of broadcast licenses. Yet, like the FCC, it is called upon to make

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<sup>1</sup>As a member of the Public Interest Spectrum Coalition, MAP has also documented the necessity for nondiscrimination and interconnection requirements to ensure that the investments made with the funds allocated by the Recovery Act will not only create and preserve jobs and promote economic recovery, but also continue to increase economic efficiency by spurring broadband services and technological advances and to continue to provide long-term economic benefits.

a judgment with respect to the public interest and, like the FCC, it must make that decision with respect to a regulated industry and a regulated company.” *Id.*

In fact, the Supreme Court has recognized the importance of First Amendment principles in the context of the Communications Act. In *Red Lion*, the Court unanimously embraced a robust view of the affirmative duty of government to facilitate speech, pointing to the public’s “collective right to have the medium function consistently with the ends and purposes of the First Amendment.” *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). The Court emphasized that it “is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.” *Id.* The Court went on to further say that it “is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.” *Id.*

This role of the First Amendment in application of the Communications Act was dramatically restated in the Supreme Court’s *Turner* cases, which held that considerations of both competition and diversity justified enactment of cable must carry rules. In *Turner I*, the majority held that “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.” *Turner Broadcasting System v. FCC*, 512 U.S. 622, 663 (1994), *aff’d*. *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997).

There is a long and unbroken line of authority that the NTIA and FCC can and must take into account regarding the effect of its policies on diversity and the marketplace of ideas. Thus, it is necessary for the FCC and NTIA to take into account the Recovery Act’s “effect on other public policies, such as the First Amendment principle of diversity in dissemination of information to the

American public.” *Id.*

#### **IV. “INTERCONNECTION” AND “NONDISCRIMINATION” ARE EASILY DEFINED.**

To date, the deployment of broadband and the development of the Internet have had not only a powerful impact on our economy, but also on discourse. Interconnection among private and public networks promotes the utility of the overall network. Further, as broadband connectivity has proliferated, individuals, institutions, and communities with access to broadband and new media tools enjoy unprecedented access to global news and information, cultural production, and distribution opportunities. In addition to accessing information, such broadband connectivity also allows users to offer their own ideas and innovations.

This interactivity and corresponding First Amendment expression did not happen by chance. It occurred because at the dawn of the Internet, the FCC imposed open access conditions on the incumbent telephone networks. *See United States v. Western Electric Co., Inc.*, 673 F. Supp. 525, 585-86 (D.D.C. 1987). *See generally*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (Basic Books 1999). In fact, it was these mandated principles of interconnection and nondiscrimination that allowed the Internet to grow, flourish, and succeed. It was only in 2005 that the FCC no longer mandated these principles.

Thus, this level of participation and growth has occurred, and has been encouraged, due to the ability of networks to interconnect with each other to maximize the efficiency and utility of the networks. This level of participation and growth has occurred also because of the open nature of accessing the Internet. A requirement of interconnection and nondiscrimination would merely restore the environment in which the Internet as we know it was able to exist.

**A. “Interconnection” Can Be Defined Pursuant to Sections 201 and 251 of the Communications Act.**

The Recovery Act assumes that grantees will have to abide by interconnection obligations. A principle of interconnection between facilities based providers is necessary to ensure a vibrant and competitive marketplace for both residential and business class broadband services. Until recently, pursuant to Sections 201 and 251 of the Communications Act, the principle of interconnection has been the foundation of communications law and policy. MAP suggests that the NTIA should continue the policy laid out in Sections 201 and 251 and require all grantees to charge reasonable rates to establish physical connections with other carriers.

**B. “Nondiscrimination” Can Be Defined Pursuant to FCC Precedent.**

The Recovery Act already states that, at a minimum, grants awarded pursuant to the Recovery Act must adhere to the FCC’s broadband policy statement. MAP recommends that in addition to the broadband policy statement, the NTIA must adopt a nondiscrimination requirement. Thus, to ensure that the Internet remains an open, innovative environment that encourages speech, competition, innovation, and sustainability, all funds acquired through the Recovery Act for broadband deployment must be used to deploy a network that will not discriminate among users, content, services, or applications.

Until recently, pursuant to Section 202 of the Communications Act, the principle of nondiscrimination has been the foundation of communications law and policy. The NTIA should continue the policy laid out in Section 202 and require all grantees to maintain a neutral network and neutral routing in stimulus funds used toward broadband Internet access service. Thus, like the provision the FCC adopted in the AT&T/Bell South merger, *Memorandum Opinion and Order*, In the Matter of AT&T

Inc. and BellSouth Corporation Application for Transfer of Control, 22 FCCRcd 5662 (2007), MAP suggests that grantees should not be allowed to make agreements to provide or to sell to Internet content, application, or service providers any service that privileges, degrades or prioritizes any packet transmitted over a grantee's broadband Internet access service based on its source, ownership or destination.

**C. Awardees of RUS Funds must Also Abide by Nondiscrimination and Interconnection Requirements.**

In addition to the NITA, the RUS has also been allocated funds for broadband loans and grants. To ensure consistency among the two programs, MAP recommends that RUS adopt these same definitions of nondiscrimination and interconnection.

**IV. CONCLUSION**

Based on the provisions in the Recovery Act and current law, it is evident that grant decisions cannot be based solely on economic and cost efficiencies, but must also consider First Amendment principles. Fortunately, adopting interconnection and nondiscrimination requirements for funds received pursuant to the Recovery Act can accomplish simultaneously a number of goals. These goals include creating and preserving jobs and promoting economic recovery; increasing economic efficiency by spurring broadband services and technological advances; and providing long-term social, political, and economic benefits by ensuring that all Americans have the ability to engage in two-way discourse. Thus, the greatest return on the Recovery Act's investment will not necessarily come from what the Recovery Act pays for directly, but from the opportunities that are opened up for Americans to explore.

Respectfully submitted,

/s/

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