

**Before the
National Telecommunications and Information Administration
And
Rural Utilities Service
Washington, DC**

In the Matter of)
)
American Recovery and Reinvestment Act of 2009)
Broadband Initiatives)
_____)

Docket No. 090309298-9299-01

**COMMENTS OF COMPTTEL IN RESPONSE
TO JOINT REQUEST FOR INFORMATION**

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EXECUTIVE SUMMARY

The NTIA and RUS, in developing rules for the BTOP pursuant to the ARRA, should ensure that the taxpayers' money is used in the most efficient and effective manner to promote the expansion of broadband. COMPTTEL proposes rules that make the most effective and efficient use of the funds by (1) ensuring that those entities directly in the business of providing broadband services and deploying broadband infrastructure are eligible for funding; (2) that "broadband" is defined in a manner that promotes the availability of service offerings that are affordable and sustainable by the market; (3) that "unserved area" and "underserved area" are defined in a manner that permits applicants to target the areas most in need of deployment; (4) that the recipients of the funds are subject to obligations – such as providing wholesale access to the BTOP funded networks – designed to foster competition and thereby lead to lower prices and increased subscribership to broadband services, at no additional cost to taxpayers; and (5) an application review process that is informative and transparent so that both the applicants and the Administration can use their resources in the most effective and efficient manner.

Specifically, COMPTTEL proposes the following rules regarding the eligibility of applicants, definitions for broadband, unserved and underserved areas, proper nondiscrimination and network interconnection obligations, and rules for the grant process:

Proposed Rule for Eligibility of Applicants [NTIA Question 3]:

Eligible applicants shall include the following: (a) those entities listed in Section 6001(e)(1)(A) and (B) of the ARRA; or (b) any broadband service or network infrastructure provider, including any entity that is, or would be, pursuant to its grant application, required to file an FCC Form 499 or 477 with the Federal Communications Commission; or (c) any entity that is certificated as a local exchange carrier by a State.

Proposed Rule Defining Broadband [NTIA Question 13.B]:

Broadband refers to a signaling method in which multiple signals share the same terrestrial bandwidth simultaneously for the transmission of voice, data and video.

Proposed Rule Defining “Unserved” [NTIA Question 13.A]:

An “Unserved” area is an applicant-defined area in which, at the time of filing the application, 90% or more of the customer locations within that area do not have access to broadband service; provided, however, that if the applicant defined service area falls completely within a state that defines “unserved” using a different percentage, the state definition will govern.

Proposed Rule Defining “Underserved”[NTIA Question 13.A]:

An “Underserved” area is an applicant-defined area in which, at the time of filing the application, there is only one facilities-based provider of broadband service to 90% of the customer locations within that area; provided, however, that if the applicant defined service area falls completely within a state that defines “underserved” using a different percentage, the state definition will govern.

Proposed Rule For Network Interconnection And Nondiscrimination Obligations [NTIA Question 13.C]:

Any entity that receives funding, directly or indirectly (i.e., through partnership or subcontract arrangement), to deploy a broadband network shall agree to the following obligations as a condition of receiving funds:

- (1) Interconnection. – (a) The obligation to, at a minimum, interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers, including on an IP-to-IP basis; and (b) the obligation to provide access to the BTOP funded broadband network on a wholesale, resale or discrete basis on just, reasonable and nondiscriminatory terms and conditions and at rates no higher than the funding recipient’s cost plus a reasonable profit. The foregoing obligation includes the duty to provide access in a manner that allows requesting providers to combine discrete elements of the network with their own facilities in order to provision broadband service to their customers. In determining cost for purposes of setting network access rates, only the private funds invested to build, operate and maintain the network shall be treated as recoverable costs; the rates may not include nor provide any recovery whatsoever for the portion of the cost of the network deployment that was supported by BTOP grant funds. (c) The foregoing obligations will be contractual conditions of any award and do not replace or eliminate existing obligations under current law.**
- (2) Nondiscrimination. – Any entity that receives funding, directly or indirectly, shall agree to comply with the FCC’s Broadband Policy Statement.**

- (3) Enforcement.** – (a) Failure to comply with the interconnection, including the network access, obligations shall constitute an unjust and unreasonable practice under 47 U.S.C. §§ 201 and 202. Parties that are denied interconnection, including network access, to a funding recipient’s network in accordance with the foregoing provisions may file a complaint at the FCC pursuant to 47 U.S.C. § 208 or file a complaint in federal court pursuant to 47 U.S.C. § 207. (b) Failure to comply with the nondiscrimination obligation shall constitute an unjust and unreasonable practice under 47 U.S.C. §§ 201 and 202. Parties alleging discrimination contrary to the foregoing requirements may bring a complaint at the FCC or seek any other relief available at law or in equity. (c) These remedies are not exclusive and do not preclude a party from pursuing any other remedy at law or in equity to enforce these provisions.

Proposed Rule For the Grant Process [NTIA Questions 5, 10 and RUS Questions 2, 4]:

NTIA and RUS shall provide the following information with respect to the applications that have been submitted under their respective programs:

- (1) Publish notice of all applications, giving reasonable descriptions thereof, including but not limited to: (a) the name(s) of applicants; (b) the state(s) and general area(s) to which the application applies; (c) a general description of the type of project; and (d) the amount of funding sought.**
- (2) Publish the application “score” and all non-proprietary information for each application that results in a funding award.**
- (3) Make available to each applicant that does not receive an award the “score” assigned to that project application and an explanation of the reason(s) funding was denied.**

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**COMMENTS OF COMPTTEL IN RESPONSE
TO JOINT REQUEST FOR INFORMATION**

COMPTTEL¹ hereby submits these comments² in response to the Joint Request for Information (“RFI”) issued by the National Telecommunications and Information Administration (“NTIA”) and the Rural Utilities Service (“RUS”) with respect to the American Recovery and Reinvestment Act of 2009 (the “Recovery Act”) Broadband Initiatives.³ COMPTTEL proposes rules regarding the eligibility of applicants, definitions for broadband, unserved and underserved areas, nondiscrimination and network interconnection obligations as well as rules for the grant process. COMPTTEL urges NTIA and RUS to adopt its proposals, which are designed to encourage the best and most efficient use of the taxpayer monies allocated to fund broadband expansion.

¹ COMPTTEL is the leading industry association representing competitive communications service providers and their supplier partners. COMPTTEL members are entrepreneurial companies driving technological innovation and creating economic growth through competitive voice, video, and data offerings and the development and deployment of next-generation, IP-based networks and services.

² These Comments reflect the position of a majority of COMPTTEL members. Individual members may be filing separate comments where they advocate positions on some issues that are different from those stated herein.

³ See Federal Register, Vol. 74, No. 47, p. 10716 (Mar. 12, 2009).

I. ELIGIBILITY OF APPLICANTS [NTIA QUESTION 3]

Proposed Rule: Eligible applicants shall include the following: (a) those entities listed in Section 6001(e)(1)(A) and (B) of the ARRA; or (b) any broadband service or network infrastructure provider, including any entity that is, or would be, pursuant to its grant application, required to file an FCC Form 499 or 477 with the Federal Communications Commission; or (c) any entity that is certificated as a local exchange carrier by a State.

NTIA asks what standard it should apply to determine whether it is in the public interest that entities other than those listed in Section 6001(e)(1)(A) and (B) should be eligible for grant awards.⁴ Because the purpose of the grant/loan programs is to provide access to and stimulate demand for broadband service,⁵ the public interest will be served by defining eligible applicants to include entities that actually provide broadband service and deploy network infrastructure. At a minimum, such entities would include any entity that files Federal Communications Commission (“FCC”) Form 477 and/or 499 or that is certificated by a State to provide local exchange service.

Congress enacted the Recovery Act to create jobs and stimulate economic growth.⁶ Private industry, especially small businesses, including telecommunications carriers and information service providers, drive job growth and economic development. To the extent that the Administration and Congress have determined that expanding access to broadband services will contribute to job growth and economic stimulation, it is critical that grant funding be made available to those entities that will construct the broadband networks and provide the broadband services to citizens and businesses in unserved and underserved areas. Significantly, none of the entities listed in Sections 6001(e)(1)(A) and (B) is in the business of providing broadband services or deploying broadband infrastructure. What this is likely to mean is that any of the

⁴ *Id.*

⁵ Pub. L. No. 111-5, Section 6001(b).

⁶ Pub. L. No. 111-5, Section 6001(b)(5), (k)(2)(D) and Section 1602.

entities listed in those Sections that receives funds would have to hire third parties to construct and operate the publicly funded broadband networks and taxpayer money, that could otherwise be spent on expanding the availability of broadband service, will be spent on administrative, overhead costs and markups.

The seven billion dollars that NTIA and RUS are required to distribute by the close of fiscal year 2010, while substantial, is not enough to bring broadband to all unserved and underserved communities. In an effort to make the best and most productive use of the limited funds, the public interest demands that NTIA include broadband service and network infrastructure providers in the definition of those eligible to apply for and receive grant/loan monies.⁷ Such providers have proven histories of deploying the type of networks and providing the type of services that the grant/loan monies are intended to finance, expand and stimulate demand for. Specifying by rule that such entities are eligible to apply for and receive funding will go a long way toward ensuring that the funds are used for their intended purposes and that broadband service is delivered to unserved and underserved communities in the most efficient and economical manner.

II. DEFINITION OF BROADBAND [NTIA QUESTION 13.B]

Proposed Rule: Broadband refers to a signaling method in which multiple signals share the same terrestrial bandwidth simultaneously for the transmission of voice, data and video.

NTIA should afford grant applicants maximum flexibility in designing their networks and product offerings in ways that will be attractive to and affordable for customers. Therefore,

⁷ See Joint Explanatory Statement of the Committee on Conference, Division B - Tax, Unemployment, Health, State Fiscal Relief, and Other Provisions, p. 275 at http://www.house.gov/billtext/hr1_cr_jesb.pdf (indicating NTIA may select grant recipient that will best meet the broadband access needs of an area whether by wireless provider, wireline provider, or any provider offering to construct last mile, middle mile, or long-haul facilities).

regardless of how “broadband” is otherwise defined, it should *not* be defined by reference to a minimum speed. Certainly, the Administration can and should consider speed as a factor (among others) when evaluating project applications, but speed should not be a limitation on eligibility to apply for and receive funding in the first instance. If NTIA, nonetheless, decides to define broadband by a minimum speed, that speed should be no higher than 1.4 mbps downstream and 768 kbps upstream.

Giving service providers flexibility in designing and proposing product offerings for funding will generate a broader pool of applications for NTIA and RUS to consider. Allowing network operators such flexibility is likely to promote more immediate delivery of broadband services to unserved and underserved areas, as well as subscribership to those services, by ensuring that applications can be tailored to the type of service that the market can sustain and support. Moreover, the Administration should be technology neutral in implementing the BTOP, thereby encouraging potential applicants to explore the use of promising, new technologies.

Higher broadband speeds may be more costly to provision and even difficult to achieve in certain areas due to geographic, market demand or other limitations. Even with the BTOP funding, providers may be unable to support higher broadband speeds immediately in unserved or underserved areas. Where providers propose the delivery of higher speeds because of the availability of Broadband Technology Opportunities Program (“BTOP”) funding, customers may be unwilling or unable to pay the prices that providers will need to charge for the ongoing costs associated with operating higher-capacity networks. If customers are unwilling to purchase a service, broadband providers will be less successful post-deployment, leading possibly to a market failure that will again result in the area being unserved or underserved and BTOP funds wasted.

Business customers and residential customers are also likely to demand different speeds. If the Administration defines broadband service by a minimum speed that may be acceptable to business customers, it may be too expensive for residential customers. The purpose of the BTOP funding will be thwarted if it finances proposals that particular areas cannot sustain, or even if sustainable by a segment of the population in those areas, are not affordable for a significant segment of the population.

A more flexible approach to the speed that network providers can propose will also help ensure that the application process is technology neutral. Different technologies are able to support varying speeds, and requiring a “one-size fits all” approach for speed may prevent broadband providers using certain technologies from participating in the program and delivering the benefits of broadband to unserved and underserved areas. Declining to set a minimum speed will also allow network providers to take advantage of technologies that can improve both in scale and scope -- technologies that, while unable to provide a “very high” speed presently, allow for adequate speeds and may ultimately be able to produce speeds that may surpass more mature technologies. Moreover, technology improvements are not limited to increases in speed and such improvements can yield significant benefits in productivity gains. The competitive sector of the communications industry has a proven history of penetrating new markets by deploying initial capability based on market demands, and then increasing network capacity and capabilities as needed through augments and technology improvements.

III. DEFINITIONS OF UNSERVED AND UNDERSERVED [NTIA QUESTION 13.A]

An “unserved” area should be defined in terms of the proportion of customer locations without access to broadband service, and an “underserved” area should be defined in terms of the number of competitive providers of broadband service available to customers in a particular applicant defined area. If funding recipients are required to provide access to their networks to

other providers, as COMPTTEL urges below, the deployment of a new taxpayer funded network in unserved and underserved areas should stimulate additional competition and market entry (e.g., providers 2, 3, 4, 5, etc.). The promotion of competition is critical to increasing broadband subscription rates at the lowest cost to taxpayers. In any particular area, broadband subscribership rates may be low due to a number of factors, including the quality and price of existing service offerings. The entry of additional providers increases the potential for more and different service offerings, which is likely to afford customers both a choice of service offerings and choice of rates.

In evaluating whether or not an application meets the criteria for serving an “unserved” or “underserved” area, the Administration should consider the target market, i.e., residential versus business market, that the applicant is proposing to serve. For example, if an applicant proposes to provide broadband services to business subscribers and the only broadband provider in the applicant-defined area is a cable company that serves only the residential market, the area should be considered “unserved” for business subscribers. Similarly, if there are two facilities-based providers in the applicant-defined area, and one is a cable company that serves only the residential market, the area should be considered “underserved” for business subscribers.

A. Unserved Area

Proposed Rule: An “Unserved” area is an applicant-defined area in which, at the time of filing the application, 90% or more of the customer locations within that area do not have access to broadband service; provided that if the applicant defined service area falls completely within a state that defines “unserved” using a different percentage, the state definition will govern.

NTIA should consider an area to be “unserved” if 90% or more of the customer locations⁸ in that area do not have access to a broadband⁹ service provider unless the state for

⁸ As discussed above, customer location should be defined by relevant market (*i.e.*, residential or business customers).

which application is made defines “unserved” using a different percentage, in which case the state definition shall apply.

In order to ensure that all areas without access to broadband have an opportunity to benefit from the BTOP, COMPTTEL proposes that applicants be permitted to define the area they propose to serve. If the Administration determines to use standardized areas (e.g., MSAs, counties or, states) for evaluating whether an area is unserved, the larger the area, the more variation there is likely to be in terms of availability of broadband service. Allowing applicants to define their own proposed service areas will permit them to target the unserved segments of larger and/or varied geographic regions. The 90% customer location threshold will provide balance, ensuring that BTOP funds can be directed to significant pockets of customers who cannot access broadband services, even if there happens to be a single customer or a select few customers (such as businesses or government buildings) within that same area who enjoy broadband access.

B. Underserved Area

Proposed Rule: An “Underserved” area is an applicant-defined area in which, at the time of filing the application, there is only one facilities-based provider of broadband service to 90% of the customer locations within that area.; provided, however, that if the applicant defined service area falls completely within a state that defines “underserved” using a different percentage, the state definition will govern.

NTIA should consider the area to be served by an applicant’s proposal as “underserved” if there is only one facilities-based provider of broadband¹⁰ services to 90% of the customer

² See Proposed Rule for defining “broadband” in Section II of these comments. [“Broadband refers to a signaling method in which multiple signals share the same terrestrial bandwidth simultaneously for the transmission of voice, data and video.”]

locations in that area unless the state for which application is made defines “underserved” using a different percentage, in which case the state definition shall apply.¹¹ The entry of a new provider can reasonably be expected to stimulate demand and promote pricing competition that will lower prices. Indeed, competition in the telecommunications industry has stimulated innovation and resulted in lower prices and new service offerings. Absent competition, Americans might still be renting rotary telephones and have only one option for local and long distance telecommunications service. Competition provides the incentives to invest and innovate in new technologies for both competitors and incumbents.¹²

IV. NETWORK INTERCONNECTION AND NONDISCRIMINATION OBLIGATIONS [NTIA QUESTION 13.C]

Proposed Rule: Any entity that receives funding, directly or indirectly (i.e., through partnership or subcontract arrangement), to deploy a broadband network shall agree to the following obligations as a condition of receiving funds:

- (1) Interconnection. – (a) The obligation to, at a minimum, interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers, including on an IP-to- IP basis; and (b) the obligation to provide access to the BTOP funded broadband network on a wholesale, resale or discrete basis on just, reasonable and nondiscriminatory terms and conditions and at rates no higher than the funding recipient’s cost plus a reasonable profit. The foregoing obligation includes the duty to provide access in a manner that allows requesting providers to combine discrete elements of the network with their own facilities in order to provision broadband service to their customers. In determining cost for purposes of setting network access rates, only the private funds invested to build, operate and maintain the network shall be treated as recoverable costs; the rates may not include nor provide any recovery**

¹⁰ See Proposed Rule for defining “broadband” in Section II of these comments. [“Broadband refers to a signaling method in which multiple signals share the same terrestrial bandwidth simultaneously for the transmission of voice, data and video.”]

¹¹ As discussed above, customer location should be defined by relevant market (*i.e.*, residential or business customers).

¹² See, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 7 (1999) (“*UNE Remand Order*”).

whatsoever for the portion of the cost of the network deployment that was supported by BTOP grant funds. (c) The foregoing obligations will be contractual conditions of any award and do not replace or eliminate existing obligations under current law.

(2) Nondiscrimination. – Any entity that receives funding, directly or indirectly, shall agree to comply with the FCC’s Broadband Policy Statement.

(3) Enforcement. – (a) Failure to comply with the interconnection, including the network access, obligations shall constitute an unjust and unreasonable practice under 47 U.S.C. §§ 201 and 202. Parties that are denied interconnection, including network access, to a funding recipient’s network in accordance with the foregoing provisions may file a complaint at the FCC pursuant to 47 U.S.C. § 208 or file a complaint in federal court pursuant to 47 U.S.C. § 207. (b) Failure to comply with the nondiscrimination obligation shall constitute an unjust and unreasonable practice under 47 U.S.C. §§ 201 and 202. Parties alleging discrimination contrary to the foregoing requirements may bring a complaint at the FCC or seek any other relief available at law or in equity. (c) These remedies are not exclusive and do not preclude a party from pursuing any other remedy at law or in equity to enforce these provisions.

In many instances today, broadband providers are insulated from competition because (1) it is uneconomical to build a competing network and (2) existing providers decline to provide access to their fiber and packet switched networks to competing providers.¹³ Since Recovery

¹³ In a number of different decisions, the FCC has determined that certain statutory network access obligations and other regulatory requirements should not apply to incumbent local exchange carrier broadband facilities. *See e.g., Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004), *aff’d sub nom. EarthLink, Inc. v. FCC* 462 F.3d 1 (D.C. Cir. 2006); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*; *Universal Service Obligations of Broadband Providers*; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*; *1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises*; *Petition of the Verizon Telephone Companies for Declaratory Ruling or*

Act funding creates a means for deploying more extensive broadband facilities and expanding the broadband options available to customers in unserved or underserved areas, as a condition of funding, recipients must agree to offer requesting broadband service and information service providers access to these publicly-funded networks. Because taxpayer dollars will be used to fund up to 80% or more of the cost of deploying broadband infrastructure,¹⁴ network providers and operators who take advantage of those taxpayer dollars must be contractually obligated to make their BTOP funded networks and the services offered thereon available on a wholesale basis, a resale basis and a discrete basis to competing providers. Imposing such an obligation will deliver maximum benefits to all taxpayers by facilitating the entry of multiple broadband service providers into unserved and underserved areas, thereby increasing customer choice and promoting competitive rates. In addition, NTIA grant recipients as well as RUS loan recipients must contractually agree to comply with the FCC's Broadband Policy Statement.¹⁵

A. Interconnection Must Be A Contractual Condition of Any Award

The FCC's Broadband Policy Statement and the interconnection provisions of the Communications Act apply to broadband networks as a matter of existing law and policy, regardless of whether the networks are funded by RUS, NTIA or a private source. The Recovery Act explicitly directs NTIA to impose and publish network interconnection obligations that shall

Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005).

¹⁴ Pub. L. 111-5, Section 6001(f).

¹⁵ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement, 20 FCC Rcd 14986 (2005) ("Broadband Policy Statement").*

be contractual conditions of any funding award.¹⁶ The NTIA should require funding recipients to adhere to strict and well-defined duties to interconnect facilities constructed with taxpayer dollars with the networks of requesting telecommunications carriers. While the Recovery Act's discussion of the *RUS* program does not expressly require network interconnection conditions, adopting similar conditions is within the discretion of RUS and would serve the public interest.

As an initial matter, each award recipient must allow competitive telecommunications carriers to interconnect their facilities and equipment and exchange traffic, including on an IP-to-IP basis, with the broadband network built with Recovery Act funds. Next Generation access and transport facilities are routinely replacing circuit-switched facilities in the public switched telephone network ("PSTN"). The network construction funded by BTOP will be a fundamental part of this modernization of the PSTN. The circuit-emulation capabilities of Next Generation technology already are transforming the PSTN to an all packet network, just as the PSTN previously evolved from analog to digital transmission as digital technology developed. Substantial segments of the PSTN have already been replaced with NextGen technology.¹⁷ For instance, Verizon has been replacing circuit-switches with soft-switches for years, even as it has demanded that competing carriers continue to interconnect in legacy form.¹⁸ It has recently been

¹⁶ Pub. L. No. 111-5, Section 6001 (requiring, at a minimum, compliance with the FCC Broadband Policy Statement).

¹⁷ It is important to appreciate that large portions of the PSTN have converted to Next Generation transport facilities, even if end-users continue to subscribe to circuit-switched services. Over time, as the number of subscribers served by soft-switches and other IP-devices increases, the level of end-to-end packet services will become increasingly more important. That trend (*i.e.*, the growth of end-user services), however, should not be confused with the ongoing (if piecemeal) substitution of Next Generation access and transport facilities within the network overall.

¹⁸ For instance, over four years ago, Verizon announced the replacement of a number of DMS 100 switches in California with Nortel's Succession Packet Switches (*see* Notice of

estimated that 90% of the interLATA PSTN and 60% of the intraLATA PSTN has been replaced by IP technology.¹⁹

It is extremely unlikely that any new broadband networks funded by NTIA or RUS will deploy circuit-switched rather than packet switched technology. The interconnection and traffic exchange obligations set forth in the Communications Act are technology neutral and continue to apply as technologies change and evolve. In order to ensure that the networks that taxpayers fund interconnect and exchange traffic in the most efficient and economical manner, NTIA and RUS should make clear in their contract awards that fund recipients shall interconnect and exchange traffic on an IP-to-IP basis, if requested, and may not require interconnecting carriers to convert their packet switched traffic to TDM before passing it to the taxpayer funded packet switched network. This interconnection condition should remain in force for the life of the publicly-funded network, and should survive any sale, assignment, or other transfer of that network. Grant funds should be de-obligated if the network operator fails to comply with the condition.

B. The Obligation To Provide Interconnection Must Include the Obligation To Provide Network Access, As A Contractual Condition Of Any Award

It is clear that Congress intended NTIA to impose conditions on taxpayer funded networks beyond what otherwise may be required under current law.²⁰ Consequently, NTIA

Network Change, Verizon, June 15, 2004). Similar changes have been announced in other states.

¹⁹ Presentation of Carl Ford, Vice President, Crossfire Media, to National Association of Regulatory Utility Commissioners, Staff Telecommunications Subcommittee, February 14, 2009. It is a mistake to judge the importance of NextGen networks to the PSTN solely by the much smaller count of *end-users* that subscribe to NextGen voice services offered by incumbents, when the most relevant measure is the amount of overall capacity that is now operating in IP form.

²⁰ The Administration, including the FCC, should also be revisiting its current regulation of certain services, such as special access services, to promote broadband adoption.

and RUS should also condition each funding award on the recipient's agreement to provide competing telecommunications service and information service providers access to its BTOP funded network on a wholesale, resale and discrete basis on just, reasonable and nondiscriminatory terms and conditions and at rates no higher than the award recipient's cost plus a reasonable profit. This obligation includes a requirement to provide access to the network in a manner that allows competing providers to combine discrete elements of the network with their own network facilities to provision broadband service to their own customers. The condition will ensure that (1) competing information service providers are able to purchase network capacity to serve their customers; (2) competing facilities based telecommunications carriers are able to purchase discrete elements of the network that can be combined with their own facilities to deliver service to their customers; and (3) and other competing providers are able to resell the broadband provider's services to serve their customers. Imposing such a condition will promote competition in unserved and underserved areas and will create the opportunity for customers to have a choice of both services and service providers.²¹ The broadband networks funded with taxpayer dollars should be shared with all service providers to maximize consumer benefits.

In determining the funding recipient's cost for purposes of setting rates, only the *private funds* invested to build, operate and maintain the broadband network should be treated as recoverable costs. Rates should not include or provide any recovery for the portion of the cost to deploy the network funded by grant monies. The network access condition should remain in force for the life of the taxpayer-funded network and should survive any sale, transfer or

²¹ The RUS is required to give priority to "project applications for broadband systems that will deliver end users a choice of more than one service provider." See Pub. L. 111-5, Title I, Appropriations Provisions, Distance Learning, Telemedicine and Broadband Program.

assignment of the network. Grant and loan funds should be de-obligated if the network operator fails to comply with the condition.

C. Funding Recipients Must Agree to FCC Enforcement of Interconnection, Including Network Access, Contractual Conditions.

Although NTIA and RUS must ensure that fund recipients comply with the contractual provisions and conditions of their awards, the FCC is uniquely positioned to resolve disputes and oversee enforcement of the conditions relating to interconnection, including access, to the taxpayer funded broadband networks. For years, the FCC has been responsible for adopting rules and policies to implement the Communications Act and for resolving disputes relating to interconnection,²² access to the networks of other providers,²³ and broadband deployment.²⁴ As a condition of funding, each NTIA and RUS award recipient should be expressly required to agree that (1) failure to comply with the interconnection obligations, including the network access obligations, shall constitute an unjust and unreasonable practice under 47 U.S.C. §§ 201 and 202; and (2) failure to comply with the nondiscrimination obligation and the FCC's Broadband Policy Statement shall constitute a violation of 47 U.S.C. §§ 201 and 202.

²² See e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499(1996).

²³ See e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293 (2004).

²⁴ See e.g., *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management*, Memorandum Opinion and Order, File No. EB-08-IH-1518 & WC Docket No. 07-52, (rel. Aug. 20, 2008) ("Comcast Order").

Grant and loan recipients must also agree that the FCC has jurisdiction to resolve any disputes over the interconnection, including network access, conditions for the network facilities deployed using taxpayer funding. Requesting carriers and information service providers should be treated as third party beneficiaries of the contracts with NTIA and RUS and be given the right to enforce these conditions through the filing of a complaint at the FCC pursuant to 47 U.S.C. § 208, a complaint in district court pursuant to 47 U.S.C. § 207 or through other legal or equitable means.

The FCC has broad ancillary authority to regulate interstate and foreign communications “‘even where the Act does *not* apply’”²⁵ and such authority includes enforcement of the FCC Broadband Policy Statement.²⁶ Specifically, the FCC has authority over a complaint alleging failure to comply with the FCC Broadband Policy Statement because noncompliance may affect common carriers and is reasonably ancillary to 47 U.S.C. § 201.²⁷ For the same reasons, the FCC may and should handle disputes and enforcement for award recipients’ compliance with contractual conditions related to interconnection, including the network access obligation, with publicly-funded networks.

V. GRANT PROCESS [NTIA QUESTIONS 5, 10 AND RUS QUESTIONS 2, 4]

Proposed Rule: NTIA and RUS shall provide the following information with respect to the applications that have been submitted under their respective programs:

(1) Publish notice of all applications, giving reasonable descriptions thereof, including but not limited to: (a) the name(s) of applicants; (b) the state(s) and general area(s) to which the application applies; (c) a general description of the type of project; and (d) the amount of funding sought.

²⁵ *Comcast Order* at ¶ 15 (citing *AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366, 380 (1999)).

²⁶ *Id.* at ¶¶ 13-16.

²⁷ *Id.* at ¶ 17.

(2) Publish the application “score” and all non-proprietary information for each application that results in a funding award.

(3) Make available to each applicant that does not receive an award the “score” assigned to that project application and an explanation of the reason(s) funding was denied.

A. Application Review Must Be Transparent.

NTIA is required to establish and maintain a database listing each applicant, an application description, the application status, each award recipient, the purpose for which an award recipient receives funds, each quarterly report, and “such other information sufficient to allow the public to understand and monitor grants awarded under the program.”²⁸ In fulfilling its statutory obligation, NTIA should publish notice of all applications, giving reasonable descriptions thereof, including but not limited to: (a) the name(s) of applicants; (b) state(s) and general area(s) to which the application applies; (c) a general description of the type of project; and (d) the amount of funding sought. This should foster more efficient use of the applicants’ and the Administration’s resources, by providing potential applicants with the ability to deduce the locations and the type of services lacking in the current applications and possibly preventing multiple similar applications.

B. Application Awards Must Be Transparent.

NTIA and RUS are required to report on their funding awards under the Recovery Act.²⁹ To help ensure that the public is fully informed with respect to the use of BTOP funds, NTIA and RUS should publish the “score” and all non-proprietary information contained within each “winning” application. Providing this information will increase the public understanding of project awards, and allow for more informed preparation of applications in later funding rounds.

²⁸ Pub. L. No. 111-5, Section 6001(i)(5).

²⁹ Pub. L. No. 111-5.

The agencies should also deliver to individual applicants the “score” of their own applications and an explanation of the reason(s) that their projects were not funded. Such information will assist individual applicants in considering whether and how to revise their applications for future funding requests, which, in turn, will improve the potential projects available for award consideration.

CONCLUSION

To ensure that the goals of the Recovery Act are met, NTIA and RUS should adopt the rules that COMPTTEL proposes in these comments. These proposed rules will assist NTIA and RUS to distribute the approximately \$7.2 billion in grants and loans in an efficient and effective manner, as well as provide necessary information for applicants and the public.

Respectfully submitted,

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