

**Before the
National Telecommunications and Information Administration
and the
Rural Utilities Service
Washington, D.C. 20230**

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

**COMMENTS
of the
ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES**

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SUMMARY

In the selection process for awarding Recovery Act broadband funding, NTIA and RUS should give priority to those applicants that have demonstrated they have the proficiency and resources to bring sustainable telecommunications services to consumers in high-cost, difficult-to-serve areas. More specifically, priority should be given to financially stable applicants with an established track record of offering essential telecommunications services to all consumers in their service areas. This will help to ensure that funded projects are completed and result in sustained, high-quality, affordable access to broadband services for consumers.

In order for consumers to benefit from funding as soon as possible, applicants that already have at least some network infrastructure, network engineers, and customer service staff in place should receive priority. These experienced, “shovel ready” providers will help achieve the economic stimulus goals of the Recovery Act. Similarly, service providers that are integral parts of the communities they serve will best be able to respond to customers’ needs, while providing employment stability and opportunities in these areas. It is also important to prioritize projects that will offer the greatest bandwidth speeds to customers, as higher speeds permit the use of more broadband applications, which spurs demand.

NTIA and RUS should not permit “in-kind” contributions in lieu of the 20 percent funding requirement in order to avoid displacing private investment. Also, the agencies’ consultations with states should be expeditious and avoid adding additional bureaucracy or impeding the distribution of funding. Grants will most effectively advance broadband

deployment in the highest-cost areas, while loans may be most efficient in areas that are more conducive to sustainable broadband deployment.

It is important that the agencies be as forward-looking as possible when establishing its definitions of “unserved,” “underserved,” and “broadband,” recognizing that rapid technological and marketplace changes can render definitions out of date in a relatively short amount of time. For wireline technologies, an “unserved area” should be defined as those that lack access to speeds of at least 768 Kbps in the faster direction. This is the minimum speed the FCC uses to define basic broadband and is also the speed level that is necessary to utilize an increasing number of commonly used applications, which also stimulate broadband demand. An “underserved area,” in the wireline context, should be defined as those that lack access to speeds of at least 12 Mbps in the faster direction. This is the approximate minimum speed needed for today’s “triple play” of broadband data, voice, and video services, and also enables key applications such as robust telecommuting, advanced telemedicine, and education services. “Broadband service” should be defined per the FCC’s existing speed tier system, which recognizes that broadband is an evolving concept subject to rapid changes. Regardless of the definitions that are adopted, priority should be given to projects that are the most scalable and adaptable to meet growing consumer demands for higher speeds over the long term. Overall, wireline technologies best meet this criteria.

The widely-accepted principles contained in the FCC’s 2005 Broadband Policy Statement are sufficient to serve as the non-discrimination obligations of BTOP grant recipients and should not be supplemented. Any requirements going beyond these principles would threaten to discourage investment by imposing additional costs and

risks to deploying broadband in areas that are already challenging to serve. Transport and Internet backbone providers should be obligated to provide funding recipients and rural broadband providers with interconnection to the Internet backbone at just, reasonable, and non-discriminatory rates, terms, and conditions. This is necessary to ensure that rural broadband customers are able to access and use the online content, applications, and services of their choice.

A national broadband map should be derived from data collected from the recently revised FCC form 477. Placing additional costly reporting requirements on rural broadband providers will impede, rather than enhance, efforts to extend and improve broadband services in their territories.

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ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES**

I. INTRODUCTION & EXECUTIVE SUMMARY

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) hereby submits these comments in response to the Joint Request for Information (RFI) from the National Telecommunication and Information Administration (NTIA) and the Rural Utilities Service (RUS) in the above-captioned proceeding.¹ The RFI seeks comment on implementation issues surrounding the broadband programs authorized by the American Recovery and Reinvestment Act of 2009 (Recovery Act). The programs, which are to be administered by NTIA and RUS, are intended to accelerate sustainable broadband deployment in unserved and underserved areas of the nation.

¹ *American Recovery and Reinvestment Act of 2009 Broadband Initiatives*, Docket No. 090309298-9299-01, Joint Request for Information and Notice of Public Meetings, 74 Fed. Reg. 10716 (2009) (RFI).
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OPASTCO is a national trade association representing over 520 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve more than 3.5 million customers. Almost all of OPASTCO's members are rural telephone companies as defined in 47 U.S.C. §153(37).

When selecting recipients of Recovery Act funding, NTIA and RUS (collectively, the agencies) should give priority to financially stable applicants that have an established track record of offering essential telecommunications services to all consumers in their service territory. Priority should also be assigned to projects and applicants that can most readily adapt to the broadband needs of the future.

For wireline technologies, an "unserved area" should be defined as any location that does not have access to data speeds of at least 768 kilobits per second (Kbps), and an "underserved area" should be defined as any location that does not have access to data speeds of at least 12 megabits per second (Mbps). "Broadband" should be defined per the Federal Communications Commission's (FCC, Commission) speed tier system.

The principles contained in the FCC's 2005 Broadband Policy Statement are sufficient to serve as the non-discrimination obligations of BTOP grant recipients, and should not be supplemented. However, in order to enable rural broadband customers to access and use the online content, applications, and services of their choice, it is critical that transport and Internet backbone providers are obligated to interconnect with funding recipients at just, reasonable, and non-discriminatory rates, terms, and conditions. Finally, a national broadband map should be based upon data derived from the FCC's new broadband reporting vehicle, Form 477.

II. PRIORITY SHOULD BE GIVEN TO THOSE APPLICANTS THAT HAVE DEMONSTRATED THEY HAVE THE PROFICIENCY AND RESOURCES TO BRING SUSTAINABLE TELECOMMUNICATIONS SERVICES TO CONSUMERS IN HIGH-COST, DIFFICULT-TO-SERVE AREAS

A. Priority should be given to financially stable applicants with an established track record of offering essential telecommunications services to all consumers in their service areas

The RFI seeks comment on the standards, selection criteria, and priorities that NTIA and RUS should establish for the evaluation of grant and loan applications.² In order to meet the goals of the Recovery Act, the agencies should give strong priority to applicants that are financially stable, have a solid history of offering essential telecommunications services to all consumers in their area, and whose local presence makes them an integral part of the communities they serve.

Among the factors NTIA is required to consider under the Recovery Act is whether the award of a grant will increase the affordability of, and subscribership to, broadband service to the greatest population of users in the area.³ Another factor that must be considered is the ability of a project to provide the greatest broadband speed possible to the largest population in an area.⁴ Similarly, RUS is required to give priority to applicants that can “demonstrate that...all project elements will be fully funded...” and to “projects that provide service to the highest proportion of rural residents that do not have access to broadband service...”⁵

² *Id.*, 74 Fed. Reg. 10718, 10720.

³ *Id.*, 74 Fed. Reg. 10718, fn. 6.

⁴ *Id.*

⁵ *Id.*, 74 Fed. Reg. 10719-10720, fn. 17.

The deployment and ongoing provision of broadband services in sparsely populated rural areas is challenging, both financially and operationally. Therefore, grants and loans should be awarded to those applicants with a history of financial stability and that have demonstrable experience in offering essential telecommunications services to an entire community, including those in the most expensive and difficult-to-serve locations. This will help to ensure that funded projects are not only completed, but can be sustained and result in ongoing, high-quality, affordable access to broadband services for consumers. In rural areas, if funding is awarded to applicants that lack the ability and commitment to serve the highest-cost and most remote customers, achievement of the Recovery Act's broadband goals – to enhance access and adoption in unserved and underserved communities – will be thwarted.

In order for consumers to benefit from the Recovery Act's broadband programs as quickly as possible, NTIA and RUS should also give priority to applicants that already have network infrastructure, network engineers, and customer service staff in place. Factors such as quality customer support, accurate billing, reliable network maintenance, and sustainability of services all must be considered.⁶ Like all of the programs established by the Recovery Act, the broadband programs are intended to stimulate the economy as quickly as practical. Therefore, it would be inefficient and counterproductive to award grants and loans to inexperienced providers that are not

⁶ In areas served by rural ILECs, the financial stability, experience, and service track record of an applicant should outweigh the goal of incenting the entry of additional providers. While consumer choice can be valuable, service territories that are high-cost and sparsely populated throughout are often incapable of generating sufficient volume to naturally sustain even one, much less multiple, broadband providers. Therefore, sustainability of service should be a key consideration in rural ILEC service areas. In the event that funding is granted to a duplicative service provider in an area where multiple providers cannot naturally be sustained, there should be a streamlined process for interested parties to petition for a reconsideration of that decision.

“shovel ready.” Existing facilities-based telecommunications providers will already have in place at least some of the underlying infrastructure and experienced staff that is necessary to quickly and successfully implement a project that generates immediate and ongoing economic activity.

NTIA and RUS should also give weight to applications from providers that are integral parts of the communities they serve. Local telecommunications providers with a community presence will be able to maintain infrastructure and respond to customer service needs more quickly than very large companies, where a customer service call may be routed to another state, or even out of the country. Additionally, job retention and creation are key goals of the Recovery Act’s broadband programs.⁷ Rural LECs are often among the largest employers in the communities they serve. Thus, funding broadband expansion by these carriers will provide greater job stability for existing employees while creating new employment opportunities in hard-hit rural communities.

NTIA and RUS should also prioritize projects that will offer the greatest bandwidth speeds to the greatest percentage of consumers in the area.⁸ In order for broadband adoption to be sustainable,⁹ the speeds that are available to an area must keep pace with consumer demands and be able to evolve with new broadband-enabled services and applications that are increasingly bandwidth intensive. The greater the speeds that are offered, the more services and applications consumers may utilize, which in turn drives adoption. Therefore, projects that aim to offer the highest speeds to the greatest

⁷ RFI, 74 Fed. Reg. 10717, fn. 2; 10720.

⁸ RFI, 74 Fed. Reg. 10718, fn. 6; 10720.

⁹ NTIA has indicated that it may wish to prioritize proposals that encourage sustainable adoption of broadband service, and seeks comment on what factors impact adoption rates. *Id.*, 74 Fed. Reg. 10718.

number of consumers in an area should receive priority consideration in the selection process.

B. The agencies should not permit “in-kind” contributions in lieu of the 20 percent funding requirement

The RFI notes that the Recovery Act limits the Federal share of funding for any proposals made under NTIA’s Broadband Technology Opportunities Program (BTOP) to 80 percent of the total grant.¹⁰ Therefore, NTIA grant applicants must, in most instances, fund at least 20 percent of a project’s cost.

The agencies should be especially cautious about applications that rely on “in-kind” contributions, such as right-of-way access, to achieve the 20 percent threshold. “In-kind” contributions would not only thwart the purpose of the 20 percent requirement, but would also displace private investment, contrary to the goals of the Recovery Act.¹¹ Rights-of-way are generally managed by government entities, which also often serve as tax collectors, building and zoning code enforcers, and franchise authorities. When entities with these types of responsibilities provide telecommunications services, the potential for conflicts of interest has a profound chilling effect on private investment in broadband infrastructure.

C. Consultations with states should occur expeditiously and not impede funding

The RFI requests comment on the appropriate role of states in selecting applications for funding.¹² State governments can play a consulting role, and their

¹⁰ *Id.*, 74 Fed. Reg. 10718. The Recovery Act does allow for the Federal share to rise above 80 percent if the applicant petitions NTIA and demonstrates financial need.

¹¹ *Id.*

¹² RFI, 74 Fed. Reg. 10717.

perspectives merit consideration. However, it is important for the agencies to distribute funding with dispatch, and the selection process should not include an extra layer of bureaucracy at the state level.

State governments function differently. NTIA and RUS may, in some cases, find it challenging to discern which component of a state's government is the most appropriate to consult with for Recovery Act purposes. Depending on the state, it may be the public utility commission, the governor's office, the legislature, or some other body that has been charged with overseeing and encouraging broadband deployment and adoption. As states do not have one common method or body designed to address broadband issues, the agencies should accept input in whatever manner a state deems prudent. However, in the interest of awarding funding as quickly as practical, the ultimate selection should remain streamlined at the federal level.

D. Grants will most effectively advance broadband deployment in the highest-cost areas, while under more favorable conditions, loans may be most efficient and allow more projects to be funded

The RFI asks what mechanisms the agencies should use in order to most effectively distribute funding.¹³ In general, grants will be the most effective means to deploy broadband services in the highest-cost areas that are the most difficult to serve. In addition to the considerable costs of initial deployment, providing service to customers in the highest-cost areas is challenging because of the costs of ongoing network maintenance, which often cannot be financed through the revenues generated by a sparsely populated customer base. Therefore, a low-interest or even interest-free loan may not be sufficient to make a broadband project economically feasible in the most

¹³ *Id.*, 74 Fed. Reg. 10718, 10720.

expensive locations. Thus, for these types of proposals, grants will be the preferred method of funding. However, in rural areas with relatively higher population densities and favorable demographics that are more capable of naturally supporting the long-term provision of broadband, loans may be a more efficient method of funding that will allow more projects to be supported.

III. FOR WIRELINE TECHNOLOGIES, “UNSERVED AREAS” SHOULD BE DEFINED AS THOSE THAT LACK ACCESS TO SPEEDS OF AT LEAST 768 KBPS AND “UNDERSERVED AREAS” SHOULD BE DEFINED AS THOSE THAT LACK ACCESS TO SPEEDS OF AT LEAST 12 MBPS; “BROADBAND” SHOULD BE DEFINED PER THE FCC’S SPEED TIER SYSTEM; PRIORITY SHOULD BE GIVEN TO PROJECTS THAT CAN MOST READILY ADAPT TO FUTURE DEMANDS FOR HIGHER SPEEDS

The RFI notes that the Conference Report on the Recovery Act instructs NTIA to consult with the FCC on defining the terms “unserved area,” “underserved area,” and “broadband.”¹⁴ It is challenging to define these terms because rapid technological and marketplace changes can render definitions out of date in a relatively short amount of time. That is why it is important for the agencies to be as forward-looking as possible when establishing its definitions, recognizing that it will likely be some time before the definitions are adjusted.¹⁵

¹⁴ *Id.*, 74 Fed. Reg. 10719. Similarly, the RFI asks how RUS should define “high speed broadband” at 74 Fed. Reg. 10720.

¹⁵ The FCC first defined broadband as 200 Kbps in 1999. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunication Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2406 (1999). That definition remained in place for nine years until 2008, when the FCC divided broadband into seven connection speed categories, or “tiers.” *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriber Data*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, 9700-9701, ¶ 20 (Broadband Reporting Order).

Also, regardless of the definitions that are adopted, the agencies should give priority to projects that can most easily be upgraded to offer higher speeds in the future as consumers' needs and expectations evolve. Overall, wireline technologies best meet this criteria. Wireless technologies, including those used by a number of OPASTCO members, clearly have a role to play as speeds improve, and mobile wireless platforms offer their own unique advantages that consumers value. However, over the long term, wireline technologies are the most scalable and adaptable in terms of speed and capacity, and should receive consideration commensurate with this comparative advantage. By funding projects that utilize technologies that are best able to evolve with consumer demands for higher speeds, it would better ensure that the broadband service in these areas can keep pace with the rest of the country and encourage greater broadband subscribership.

Speed definitions that are established for Recovery Act funding purposes should consider consumer expectations and future scalability. Therefore, at least for wireline technologies, an "unserved area" should be defined as any location that lacks access to speeds of at least 768 Kbps in the faster direction. This is the minimum speed for Basic Broadband Tier 1 service, as currently defined by the FCC.¹⁶ While slower speeds can accommodate basic Internet-enabled services, an increasing number of commonly used applications that also stimulate broadband demand operate more efficiently at 768 Kbps or faster. Setting the definition of an "unserved area" below the FCC's own minimum definition of basic broadband would risk denying consumers in these areas access to a level of service that most consumers in served areas of the country have come to expect.

¹⁶ Broadband Reporting Order, 23 FCC Rcd 9691, 9700-9701 ¶ 20 (2008).

This would be unacceptable, and funding projects that provide service below this level would not be a good use of Recovery Act dollars. At the same time, setting the definition too high would be unrealistic and strain the limited funds available under the BTOP and RUS programs. Defining an “unserved area” as those without access to at least 768 Kbps in the faster direction is a balanced approach that will help provide an acceptable level of broadband to more customers.

An “underserved area,” at least for wireline technologies, should be defined as any location that lacks access to speeds of at least 12 Mbps in the faster direction. This is the approximate minimum speed needed for today’s “triple play” of broadband data, voice, and multiple standard definition video bundles (or one high-definition television channel). Equally important, this level of service also enables applications such as robust telecommuting (with high quality video), advanced telemedicine, education services, and intelligent building control.¹⁷ Thus, funding projects that can bring this level of service to rural consumers will result in the job creation/retention, economic growth, and stimulation of broadband demand that is called for by the Recovery Act.¹⁸

Regarding the definition of “broadband,” NTIA and RUS should utilize the broadband definition system established by the FCC less than one year ago. This system divides broadband into seven connection speed categories or “tiers,” ranging from 768 Kbps to 1.5 Mbps in the faster direction (Basic Broadband Tier 1, discussed above), to greater than 100 Mbps in the faster direction (Broadband Tier 7).¹⁹ This forward-looking definition recognizes that broadband remains an evolving concept, based on rapid

¹⁷ *The Evolving Broadband Infrastructure: Expansion, Applications, and Regulation*, Congressional Research Service, R40230 (Feb. 19, 2009), p. 3, Table 1.

¹⁸ RFI, 74 Fed. Reg. 10717, fn. 2, 10720.

¹⁹ Broadband Reporting Order, 23 FCC Rcd 9700-9701, ¶ 20.

changes in technology and evolving consumer demands and expectations. The FCC's definition should therefore be used for Recovery Act purposes.

The RFI asks if the different characteristics of different technologies should be considered when applications for funding are evaluated, and whether different threshold speeds should be established for different technologies.²⁰ It is appropriate to allow for the varying capabilities of different broadband delivery methods when establishing threshold speed criteria. For instance, the definitions proposed above may not be suitable for mobile wireless platforms. However, as discussed above, the agencies should give priority consideration to long-term scalability when evaluating applications.

IV. THE PRINCIPLES CONTAINED IN THE FCC'S 2005 BROADBAND POLICY STATEMENT ARE SUFFICIENT TO SERVE AS THE NON-DISCRIMINATION OBLIGATIONS OF BTOP GRANT RECIPIENTS AND SHOULD NOT BE SUPPLEMENTED; TRANSPORT AND INTERNET BACKBONE PROVIDERS SHOULD BE OBLIGATED TO PROVIDE FUNDING RECIPIENTS WITH INTERCONNECTION AT JUST, REASONABLE, AND NON-DISCRIMINATORY RATES, TERMS, AND CONDITIONS

The RFI asks how non-discrimination and network interconnection obligations should be defined for purposes of the BTOP.²¹ The RFI explains that the Recovery Act stipulates that these definitions shall, at a minimum, adhere to principles contained in the FCC's 2005 Broadband Policy Statement.²²

²⁰ RFI, 74 Fed. Reg. 10718, 10720.

²¹ *Id.*, 74 Fed. Reg. 10719.

²² *Id.*, citing *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *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*, CC Docket Nos. 95-20, 98-10, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling*, GN Docket No. 00-185, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005).

OPASTCO fully supports the Commission's Broadband Policy Statement.

Certainly, consumers are entitled to access the lawful Internet content of their choice, run applications and use services of their choice, utilize their choice of legal devices that do not harm the network, and are entitled to competition among network providers, application and service providers, and content providers.²³ These non-discrimination principles for broadband providers have been in place for nearly four years and are widely accepted and adhered to. However, any obligations imposed on funding recipients that go beyond these principles risks discouraging investment by imposing additional costs and creating additional risks to deploying broadband in areas that are already challenging to serve. Should any provider violate the principles contained in the Broadband Policy Statement, the Commission has the authority to take enforcement action, which it has already demonstrated a willingness to do.²⁴ Furthermore, it would be entirely appropriate for NTIA to consider, on a case-by-case basis, de-obligating the funds awarded to a provider that violated the principles of the Broadband Policy Statement. With the ability for both the FCC and the agencies to take remedial action in the event of a violation, further obligations on funding recipients would only serve to deter broadband deployment in hard-to-serve areas, contrary to the goals of the Recovery Act.

With regard to network interconnection obligations, transport and Internet backbone providers should be obligated to provide funding recipients with

²³ Broadband Policy Statement, 20 FCC Rcd 14987, 14988, ¶ 4.

²⁴ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, File No. EB-08-IH-1518, *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,"* WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008).

interconnection at just, reasonable, and non-discriminatory rates, terms, and conditions.²⁵

For rural broadband providers in particular, this has become increasingly critical as more rural consumers subscribe to broadband and popular applications and services that ride over the Internet require significant amounts of bandwidth. These trends impel rural broadband providers to upgrade their connections to the Internet backbone in order to meet growing consumer demands. Thus, rural broadband providers need interconnection to transport and Internet backbone services at fair and non-discriminatory rates, terms, and conditions in order to provide customers with access to the online content, applications, and services of their choosing. If funding recipients are obligated to adhere to the non-discrimination principles in the Broadband Policy Statement, then it is essential that they receive non-discriminatory interconnection to transport and Internet backbone services.

Acquiring affordable Internet backbone access has long been a challenge for rural broadband providers. The pricing of backbone access is partly based on mileage from the backbone facility. In addition, merger activity has resulted in the consolidation of backbone providers, reducing rural broadband providers' ability to choose among them, and to connect to multiple providers to establish redundancy. A survey of OPASTCO members conducted in April 2007 revealed that 59 percent of respondents have only one backbone provider available. Meanwhile, Internet backbone providers increasingly compete with rural broadband providers in the retail market as a result of consolidation.

²⁵ Interconnection between retail providers, as typically defined in the context of narrowband service, is inapplicable in the context of broadband service. Interconnection in the broadband world occurs between a facilities-based retail service provider, an intermediate transport provider, and an Internet backbone provider.

This gives backbone providers both the ability and incentive to discriminate against rural providers that are dependent upon them for backbone access.

Therefore, the agencies should work with the FCC to ensure that transport and Internet backbone providers are obligated to provide funding recipients, and other rural broadband providers, with interconnection on a “most favored nation” basis, *i.e.*, at the same rates and under the same terms and conditions that backbone providers offer to their retail affiliates, subsidiaries, and largest customers. To help enforce these obligations, at the request of a retail broadband provider, the FCC should review the rates, terms, and conditions offered by transport and backbone providers on a confidential basis. This would ensure that discriminatory practices are not being hidden behind non-disclosure provisions in contracts that rural broadband providers are often forced to agree to in order to secure Internet backbone access. When rural broadband providers are forced to obtain transport and backbone access at unreasonable or discriminatory rates, terms, and conditions, the ability of rural consumers to access and use the online content, applications, and services of their choosing is jeopardized, contrary to the Broadband Policy Statement and the goals of the NTIA and RUS programs.

V. A NATIONAL BROADBAND MAP SHOULD BE DERIVED FROM DATA COLLECTED FROM THE RECENTLY REVISED FCC FORM 477

The RFI describes NTIA’s requirement under the Recovery Act to establish a nationwide broadband map. The RFI then asks how granular the map’s information should be, and how the FCC and NTIA can work together on the collection of broadband data.²⁶ While OPASTCO agrees that the agencies need accurate data in order to make

²⁶ RFI, 74 Fed. Reg. 10718.
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informed decisions, it is important to note that it has been less than one month since rural broadband providers were required to complete the newly revised and far more granular version of the FCC's broadband reporting vehicle, Form 477.²⁷ Therefore, the national broadband map should be based upon data compiled by the FCC from the new Form 477.

In order to complete the new version of Form 477, rural broadband providers were required to drastically alter their recordkeeping practices. Providers not only had to supply far more details about their service offerings and broadband speeds, but also were required to do so at the Census Tract level.²⁸ Because rural broadband providers have not previously maintained Census Tract data in their normal course of business, extraordinary efforts were necessary to achieve compliance.

There has been no opportunity to evaluate whether these new reporting requirements will fulfill the goal of assisting policymakers to craft appropriate broadband policies by providing greater understanding about the extent of broadband deployment. Additional reporting requirements should not be imposed upon rural broadband providers unless it can be conclusively demonstrated that the Census Tract level and other requirements of the new Form 477 are insufficient. It is obviously premature to make that determination so soon after broadband providers' first submission using the new form.

In 2006, the Government Accountability Office (GAO) suggested to the FCC that it should "develop information regarding the degree of cost and burden that would be

²⁷ Broadband Reporting Order, 23 FCC Rcd 9691. *See also, Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriber Data*, WC Docket No. 07-38, Order, DA 09-430 (rel. Feb. 23, 2009).

²⁸ Broadband Reporting Order, 23 FCC Rcd 9691, 9695, ¶ 10.

associated with various options for improving the information about broadband deployment.”²⁹ Accordingly, mapping initiatives should first measure the costs to service providers, especially small providers, as required by the Regulatory Flexibility Act³⁰ and the Paperwork Reduction Act.³¹ In any event, more granular data reporting requirements should not force rural broadband providers to revamp their billing, recordkeeping, and/or customer service systems. For broadband providers like rural ILECs, which average only 19 employees, such labor-intensive demands only serve to undermine, rather than enhance, efforts to improve broadband availability and quality in their territories.

It is also important that the agencies maintain the confidentiality of proprietary information. Rural ILECs, especially those offering voice, video, and broadband data services in competition with large national providers, have found predatory pricing to be an all too common occurrence. Predatory pricing drives service providers out of the marketplace, reduces customer choice, and has a chilling effect on network investment. If competitively sensitive data is inadequately protected, rural ILECs will be further dissuaded from making new investments in broadband infrastructure, beyond those that Recovery Act funding might make possible.

VI. CONCLUSION

The agencies should give priority to financially stable applicants that have an established track record of offering essential telecommunications services to all

²⁹ United States Government Accountability Office, *Broadband Deployment Is Extensive throughout the United States, but It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas*, GAO-06-426 (May 2006), pp. 38-39.

³⁰ 5 U.S.C. §§ 601-612

³¹ 44 U.S.C. §§ 3501–3520.

consumers in their service territory. Projects that can most easily adapt to the broadband needs of the future should also receive additional consideration.

For wireline technologies, an “unserved area” should be defined as any location that does not have access to data speeds of at least 768 Kbps, and an “underserved area” should be defined as any location that does not have access to data speeds of at least 12 Mbps. “Broadband” should be defined per the FCC’s speed tier system, which recognizes that broadband is an evolving concept.

The principles contained in the FCC’s 2005 Broadband Policy Statement are sufficient to serve as the non-discrimination obligations of BTOP grant recipients, and should not be supplemented. However, in order to provide rural broadband customers with the ability to access and use the online content, applications, and services of their choice, it is critical that transport and Internet backbone providers are obligated to interconnect with funding recipients at just, reasonable, and non-discriminatory rates, terms, and conditions. Finally, a national broadband map should be based upon data derived from the FCC’s new broadband reporting vehicle, Form 477.

Respectfully submitted,

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