

**Before the  
DEPARTMENT OF COMMERCE  
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION  
Washington, DC**

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

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**COMMENTS OF XO COMMUNICATIONS, LLC  
AND NEXTLINK WIRELESS, INC.  
IN RESPONSE TO REQUEST FOR INFORMATION**

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### **Appendix**

XO Communications LLC/ Nextlink Wireless, Inc. Proposed Rules for Implementation of  
NTIA's Broadband Technology Opportunities Program (March, 2009)

## SUMMARY

XO/Nextlink are facilities-based providers of innovative telecommunications, broadband, and information services to customers nationwide. Because of their experience and expertise in building and operating network infrastructure throughout the country, XO/Nextlink have a keen understanding of what it takes to propel access to broadband services, and they have an intense interest in using funding from the Broadband Technologies Opportunities Program (“BTOP”) to deploy new broadband infrastructure expeditiously to as many customers as possible. They have already submitted in this docket a complete set of proposed rules implementing the BTOP, which are appended to these comments. In these comments, they elaborate on those rules as follows:

1. The American Recovery and Reinvestment Act of 2009 (“ARRA”) was adopted to stimulate the economy, and the BTOP should be viewed as a mechanism to achieve that critical goal through the deployment of new broadband infrastructure and increased use of that infrastructure.
2. The BTOP contains five co-equal purposes. The statute does not favor one purpose over another, except insofar as an activity will better achieve the aims of the ARRA. Thus, the Agency should reject entreaties from any source that seek to skew the purposes to favor one over another outside of the context of the economic recovery aims of the statute.
3. XO proposed in its rules for the BTOP a current generation wireline/fixed wireless broadband speed of 5 Mbps downstream and 1 Mbps upstream, and an advanced broadband wireline/fixed wireless speeds of 20 Mbps/5 Mbps for asymmetrical service and 10 Mbps/10 Mbps for symmetrical services. These performance characteristics are based on services offered in the market, which were reflected in the House based version of the program and other legislation.
4. XO’s proposed definitions of unserved and underserved seek to enable projects that further the economic stimulus goals of the ARRA and the aim of achieving universal current and advanced broadband service.
5. The statute is clear that the Agency is the ultimate decision-maker on all issues and awards – to ensure, as the *Presidential Memorandum* requires, that awards be “transparent” and “merit-based” and made consistent with the “purposes of the Recovery Act.” Any role played by the states must be consistent with that mandate.
6. The statute permits the Agency to expand the entities eligible to file applications to “any other entity, including a broadband service or infrastructure provider, that the Assistant Secretary finds to be in the public interest.” Because broadband service and infrastructure providers often have great experience in constructing infrastructure, which is crucial to creating jobs and economic output, their inclusion would certainly meet the objectives of the ARRA.
7. XO/Nextlink believe that the agency’s scoring of applications must first be grounded by the economic stimulus purposes of the ARRA. After the stimulus objectives are taken into account, the scoring system should be based on the specific requirements of the BTOP program. For the BTOP, these include increasing affordability, providing the greatest broadband speed, and enhancing service for health care delivery, education, or children.

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XO Communications, LLC (“XO”) and its corporate affiliate Nextlink Wireless, Inc. (“Nextlink”), through its undersigned counsel, hereby respectfully submits its comments to the Department of Commerce, National Telecommunications and Information Administration (“NTIA” or “Agency”) in response to the March 12, 2009 *Federal Register* notice for comments (“Notice”) to implement the Broadband Technology Opportunities Program (“BTOP” or “Program”) in the American Recovery and Reinvestment Act of 2009 (“ARRA”).<sup>1</sup>

XO/Nextlink are facilities-based providers of innovative telecommunications, broadband, and information services, such as Voice over Internet Protocol, data and internet access, network transport, hosting, fixed wireless access, and managed services, to businesses, enterprise, and carrier customers nationwide. Their network includes over

an 18,000 route mile intercity network, more than 3,000 fiber-fed buildings, and wireless spectrum in 81 markets. Because of their experience and expertise in building and operating network infrastructure throughout the country, XO/Nextlink have an intense interest in using funding from the BTOP to deploy new broadband infrastructure expeditiously to as many customers as possible. They have already submitted in this docket a complete set of proposed rules implementing the BTOP,<sup>2</sup> which are appended to these comments. In these comments, they elaborate on these rules and provide support for their adoption by the Agency.

## **I. The NTIA Broadband Technology Opportunities Program**

### **A. The Purposes of the ARRA and BTOP Drive Implementation.**

The ARRA is a unique and specific statute designed to address the severe economic downturn. Its purposes are to create jobs, promote economic recovery, and invest in infrastructure that will provide long-term economic benefits. The statute seeks to commence expenditures to achieve these objectives “as quickly as possible consistent with prudent management.”<sup>3</sup> The President reiterated this central objective in the March 20, 2009 memorandum to the Executive Branch departments and agencies on implementing the program: “merit-based selection criteria...shall be formulated to ensure that the funding furthers the job creation, economic recovery, and other purposes

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<sup>1</sup> *In the Matter of the American Recovery and Reinvestment Act of 2009 Broadband Initiatives*, Request for Information, Docket No. 090309298-9299-01, Rel. March 12, 2009. The BTOP is established in Section 6001 of the ARRA.

<sup>2</sup> See <http://www.ntia.doc.gov/broadbandgrants/comment.cfm?e=7E6DFBB3-EFE3-4DB3-830C-AC2FFC5ACD61>.

<sup>3</sup> Sec. 3(a)(1) and (4) and (b) of the ARRA.

of the Recovery Act.”<sup>4</sup> It is within this context that the BTOP was adopted – to stimulate the economy through the deployment of new broadband infrastructure and increased use of that infrastructure – and it is within this context that the broad purposes of the Program should be viewed. Whether the Agency is evaluating applications for grants to provide service to unserved areas, improve access to underserved areas, or stimulate demand, the economy recovery objective is paramount.

**B. The BTOP’s Purposes: Broad and Co-Equal.**

The BTOP contains five purposes: provide service to unserved areas; improve access to underserved areas; provide broadband education, training, and access to community institutions and vulnerable populations; improve access to public safety agencies; and stimulate demand. The statute does not favor one purpose over another, except insofar as an activity will better achieve the aims of the ARRA. This approach is supported in the *Conference Report*, which states that the “NTIA has discretion in selecting the grant recipients that will best achieve the broad objectives of the program.”<sup>5</sup> Thus, the Agency should reject entreaties from any source that seek to skew the purposes to favor one over another outside of the context of the economic recovery aims of the statute.

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<sup>4</sup> *Memorandum for the Heads of Executive Departments and Agencies, Subject: Ensuring Responsible Spending of Recovery Act Funds*, President Obama, March 20, 2009, Sec. 1. (“*Presidential Memorandum*”)

<sup>5</sup> *Conference Report on H.R. 1, American Recovery and Reinvestment Act of 2009, Division B, Title VI – Broadband Technology Opportunities Program, Conference Agreement, Summary*, February 12, 2009. (“*Conference Report*”)

### C. The Definition of Broadband Service Should Reflect Market

#### Conditions and be Forward Looking.

The definition of broadband service is a concept that has evolved with technology and customer demand and that has been described most often in terms of performance characteristics, that is, downstream and upstream speed.<sup>6</sup> The use of speeds in the definition reflects how broadband service is sold and purchased and how customers evaluate whether the product is working as advertised. Broadband speeds thus serve as objective standards upon which comparisons can be based, and for that reason XO/Nextlink favor their use by the NTIA for the BTOP. The Agency needs an objective standard to ensure it chooses applications based on merit and that grant awardees perform in accordance with their proposals. Using an objective standard, of course, is consistent with the directive in the *Presidential Memorandum*, and it will enhance the chances of projects being deployed successfully.

There are a variety of factors that effect how the Agency should define broadband service, including the transmission technology and network characteristics. First, as noted by the Conferees, there are technical differences between wireline and wireless networks.<sup>7</sup> However, it would be more precise to state that there are substantial

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<sup>6</sup> See, e.g. the Federal Communications Commission's ("FCC") Consumer & Government Affairs Bureau webpage on broadband: <http://www.fcc.gov/cgb/broadband.html>. In addition, providers of broadband service offer various tiers of service distinguished by different speeds, e.g. <http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1215838&highlight=>.

<sup>7</sup> *Conference Report, Conference Agreement Definitions.*

differences between networks providing fixed and mobile services.<sup>8</sup> The distinctions between fixed and mobile include the fact that with mobile service, spectrum may be limited, and speed is often sacrificed for mobility or broad coverage. Because these distinctions are so significant, the Agency should have separate broadband service definitions for fixed and mobile.

Network providers also make trade-offs between downstream and upstream speeds (symmetry) in providing services to meet customer needs. A minimum speed, of course, should be established for each to ensure the aims of the statute are met. However, the minimum speed required should differ depending on whether more asymmetrical or more symmetrical services are offered.

In addition to the two factors just discussed, broadband service can be further divided into lower speed service (often called basic or current generation broadband) that is more widely offered and accessed and next-generation (or advanced) service that has more recently entered the market. The House passed version of the BTOP program employed such a distinction. It defined basic broadband service as at least 5 Mbps downstream and 1 Mbps upstream and advanced wireline broadband service as at least 45 Mbps/15 Mbps.<sup>9</sup> There is evidence in the market to support these performance standards.<sup>10</sup> Today's most frequently subscribed to broadband cable modem and

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<sup>8</sup> Nextlink, for instance, a wireless provider, can provide on a point-to-point basis or point-to-multipoint basis very high speed services in both directions that are far in excess of what mobile providers offer.

<sup>9</sup> H.R. 629, 111<sup>th</sup> Congress, Sec. 1002(J)(1), (3). The legislation also defined (in paragraph (2)) advanced wireless broadband service as at least 3 Mbps/1 Mbps.

<sup>10</sup> See, e.g. dsl Reports, Speed Test Statistics at <http://www.broadbandreports.com/archive>.

telephone company DSL offerings are in the range of 2-7 Mbps downstream and 768 kpbs-2 Mbps upstream.<sup>11</sup> Advanced wireline offerings, which are increasingly available, include Verizon's FiOS speeds that reach 50 Mbps/20 Mbps, AT&T's U-verse at 16 Mbps/4 Mbps, and Comcast's at 50 Mbps/10 Mbps.<sup>12</sup> Based on this information, XO proposed in its rules for the BTOP a current generation wireline/fixed wireless broadband speed of 5 Mbps/1Mbps, and an advanced asymmetrical broadband speed of 20 Mbps/5 Mbps and a speed of 10 Mbps/10 Mbps.<sup>13</sup>

**D. The Definitions of Unserved and Underserved Areas Should Promote the Objectives of the Act.**

Unserved areas are generally viewed as areas where potential customers lack access to broadband service.<sup>14</sup> Two questions then arise. First, what type of broadband

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<sup>11</sup> See, e.g. Comcast's recent conference call for 4<sup>th</sup> Quarter 2008 earnings at [http://library.corporate-ir.net/library/11/118/118591/items/324877/BE815051-EDB7-4672-9622-81F042A21561\\_4Q08Slides.pdf](http://library.corporate-ir.net/library/11/118/118591/items/324877/BE815051-EDB7-4672-9622-81F042A21561_4Q08Slides.pdf); Verizon at <http://www22.verizon.com/Residential/HighSpeedInternet/HSIvsCable/HSIvsCable.htm>.

<sup>12</sup> See, e.g. Verizon at <http://investor.verizon.com/news/view.aspx?NewsID=925>; AT&T at <http://www.att-services.net/att-u-verse/uverse-internet.html>; Comcast at <http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1215838&highlight=>.

<sup>13</sup> XO is aware that last year the FCC defined Basic Broadband Service as between 768 kbps and 1.5 Mbps. See, [http://www.fcc.gov/WCB\\_031908\\_open\\_meeting\\_slides.pdf](http://www.fcc.gov/WCB_031908_open_meeting_slides.pdf). However, as then Commissioner Copps noted, "Broadband must be an evolving definition." ([http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-08-89A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-89A3.pdf)) Since last March's Commission meeting on this issue, both offered and actual speed of service have increased measurably, and the Commission will be able to capture these increases in the new Form 477, which includes tiers that range to "Greater than 100 Mbps."

<sup>14</sup> XO believes the Agency should rely on Census Tracts to define geographic areas because this is a generally recognized and understood concept and because the

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service? XO/Nextlink submit that the goal should be to bring these potential customers the same type of access generally available in served areas, that is, current generation broadband service. The second question is how many potential customers in those areas need to lack service for the entire areas to be declared unserved. XO/Nextlink believe the Agency should be driven by the goal of universal broadband service, and, in their proposed rules, they provided that if as few as 10% of the potential customers in an area lacked service, the entire area should be viewed as an unserved area:

*Unserved Area* means a geographic area where at least 90% of the customers to be served by the project lack access to a provider of Current Generation Broadband Transmission Service (which is to be determined separately for wireline/fixed wireless or mobile wireless providers).

Defining underserved areas is more challenging, and definitions in current and previous federal and state legislation and regulations have been based on different concepts, including a lack of access to -- competitive current generation service, advanced service, or affordable or easily accessible current generation service.<sup>15</sup> XO/Nextlink believe all three concepts have validity and that the Agency should take an expansive view, employing each in the definition, because projects for each could meet the overriding economic recovery objectives of the ARRA. In addition, projects for each would meet the government's goal of ensuring all Americans have similar broadband access opportunities. They therefore proposed the following definition:

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FCC has used the concept in such filings as the FCC Form 477, which examines broadband service, and for demonstration of "substantial service" for wireless providers.

<sup>15</sup> See, e.g. *Resolution T-17143. Approval of the California Advanced Services Fund (CASF) Application Requirements and Scoring Criteria for Awarding CASF Awards*, Public Utilities Commission of the State of California, June 12, 2008,

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*Underserved Area* means:

- (1) (i) a geographic area that is not an unserved area where at least 90% of the customers to be served by the project lack access to more than one provider of Current Generation Broadband Transmission Service (which is to be determined separately for wireline/fixed wireless or mobile wireless providers) or (ii) a geographic area that is not an unserved area where at least 90% of the customers to be served by the project lack access to a provider of Advanced Broadband Transmission Service (which is to be determined separately for wireline/fixed wireless or mobile wireless providers);
- (2) a geographic area where at least 90% of the Community Anchor Institutions to be served by the project lack access to a provider of wireline/fixed wireless Advanced Broadband Transmission Service; or
- 3) any census tract which is located in (i) an empowerment zone or enterprise community designated under section 1391, (ii) the District of Columbia Enterprise Zone established under section 1400, (iii) a renewal community designated under section 1400E, or (iv) a low-income community designated under section 45D.

**E. States Have a Valuable But Limited Role.**

XO/Nextlink have participated extensively in the Virginia Commonwealth's Broadband Roundtable<sup>16</sup> and have found the process to be productive and effective. The state government of Virginia is well-organized and has acted objectively in proposing and implementing initiatives to bring higher-speed broadband to all residents of the Commonwealth. XO/Nextlink also know that while some other states are as sophisticated as Virginia on this issue, many states are just beginning the process, and some lag even farther behind. The statute recognizes the valuable role states could play by permitting the Agency to consult with the states to obtain their input on areas that are

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p.6; and H.R. 760, S. 350, Sec. 48D(e)(24), and H.R. 691, Sec. Sec. 45R(c)(3), 111<sup>th</sup> Congress.

<sup>16</sup> The Final Report of the Commonwealth's Broadband Roundtable was released on September 9, 2008 and can be accessed at: [http://www.otpba.vi.virginia.gov/roundtable\\_governor.shtml](http://www.otpba.vi.virginia.gov/roundtable_governor.shtml).

unserved and underserved and on how to allocate grant funds within a state. The statute also permits states and local governments to apply for grants.

Permitting states to consult and participate in applying for grants is not the same as requiring the Agency to adhere to state recommendations or requests. The statute is clear that the Agency is the ultimate decision-maker on all issues and awards – to ensure, as the *Presidential Memorandum* requires, that awards be “transparent” and “merit-based” and made consistent with the “purposes of the Recovery Act.” The question is how to take advantage of the capabilities of the states consistent with this mandate.

XO/Nextlink suggest the following will best balance these objectives. First, the Agency should seek from the states information on unserved and underserved areas and grant allocations but should weigh that information based on (1) whether that information is accompanied by known and acceptable methodologies and objective evidence and (2) whether, for grant allocation recommendations, it is consistent with the objectives of the ARRA and the purposes of the BTOP. Second, the Agency should accept state comments in this docket as to the rules the Agency should adopt to process and evaluate applications, and it should evaluate those comments in the same manner as it evaluates comments submitted by other interested parties. Third, the Agency should accept a state’s endorsement of an application submitted by another entity and factor that endorsement into its scoring formula only if there is evidence indicating the endorsement is merit-based and consistent with the purposes of the ARRA and BTOP. Of course, lack of a state’s endorsement should not eliminate an application from consideration, and such an application should be evaluated by the Agency based on its merits. Fourth, as the statute directs, the Agency should accept applications for grants from states (and other

political subdivisions thereof), and the Agency should evaluate and rank those applications no differently than it does for an application submitted by any other entity.

**F. Eligibility to File Applications Should Maximize Participation by Competent Entities.**

The statute permits the Agency to expand the entities eligible to file applications to “any other entity, including a broadband service or infrastructure provider, that the Assistant Secretary finds to be in the public interest.” Because broadband service and infrastructure providers normally have great experience in constructing infrastructure, which is crucial to creating jobs and economic output, their inclusion would certainly meet the objectives of the ARRA. In addition, by allowing these entities to apply, the Agency would be expanding the pool of potential projects that would most effectively and efficiently meet the objectives of the ARRA and the BTOP.

**G. The Application and the Filing Process Should Foster Serious Proposals from Bona Fide Entities.**

The Agency faces a daunting task in managing the process of reviewing applications for projects and awarding all funding by September 30, 2010. XO/Nextlink believe that the Agency can maximize the chances for success by mandating specific requirements for applicants and sufficient information in applications and by adopting strict procedures with deadlines:

1. Matching Funds Enhance Accountability and Provide Greater Assurance of Project Success -- The statute’s requirement that applicants provide at least 20% matching funds is essential to ensure accountability. The Agency should waive it only in the most exceptional cases where the need is great and it can be assured that the applicant

has sufficient financial strength to complete and sustain the project as proposed despite its inability to meet the matching funds requirement. To further ensure projects are successful, the Agency should require all applicants to post performance bonds.

2. Applications Should Be Viewed as Serious Business Plans – The Agency should view applications for grants as the same as requests entities may make for funding from private investors. This means sufficient documentation should be provided to evaluate the project and determine as possible its feasibility and sustainability.

XO/Nextlink have proposed a format for applications in its rules that is built upon the Community Connect Broadband Grant Program from the Rural Utilities Service and the grant programs of states like California and Maine.<sup>17</sup> It requires the applicant provide detailed information about such matters as its competence to deploy facilities, financial soundness, and details of the project plan. More specifically, among the information that should be included in the application are the following:

*1. Applicant and Service Area Information.*

- Background on the applicant, including operational and financial information for the previous five (5) years;
- Evidence of its legal existence and authority to enter into a grant agreement with the Agency and to perform the activities proposed under the grant application, including any certifications from local, state, and federal regulatory authorities;
- If applicable, certification that the applicant meets the Small Business Administration’s definition of a disadvantaged business concern, including whether it is a “small business,” woman-owned business, or minority-owned business; and

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<sup>17</sup> See, Community Connect Broadband Grant Program, 7 CFR 1739, adopted August 3, 2007 (“Community Connect Broadband Grant Program”); California Advanced Services Fund, Resolution T-17143, June 12, 2008 (“California Advanced Services Fund”); ConnectME Authority, 99-369 Chapter 101, (23 M.R.S.A. §3360-A, 35-A M.R.S.A. §§9201-9215), May 30, 2007.

- If applicable, a description of other broadband facilities and services currently being provided in the service area of a proposed project and thus whether such area is unserved or underserved.

2. *Statement of experience.* The applicant shall provide a written narrative describing its demonstrated capability and experience, if any, that will enable it to achieve the objectives of and implementing the activities in the project in an efficient, reliable, and sustainable fashion.

3. *Project design and costs.* The applicant shall submit a design of the project that contains at a minimum the following:

- The services to be provided by the project and the technology used to provide those services;
- The number of customers to be served by the project, the service area, and the average density of the households in the service area (expressed as households per square mile);
- Project budget;
- Engineering design studies providing an economical and practical engineering design of the project, including a detailed description of the facilities to be funded, technical specifications, data rates, and costs;
- If applicable, a design of the broadband education, awareness, training, access, equipment, and support to be provided by the applicant; and
- If applicable, an estimated price for services provided to customers using facilities supported by the project and, to the maximum extent practicable, the average price within the state for comparable Broadband Service.

4. *Scope of work.* The scope of work shall include, at a minimum:

- The specific activities and services to be performed under the project;
- The time-frames for accomplishing the project objectives and activities, and a demonstration that the project will be completed within two (2) years of the grant being awarded; and
- A budget for all capital, operational, and administrative expenditures.

5. *Financial information.* The applicant shall provide a narrative description and supporting evidence demonstrating the availability of funding to complete the project within two (2) years of the date of the award, sufficiency of resources and expertise necessary to undertake and complete the project, and, for infrastructure projects, demonstrating the sustainability of the project during building out and for two (2) years after completion.

6. *Certification on need for federal grant.* The applicant shall provide sufficient evidence demonstrating that the project would not have been implemented prior to September 30, 2010 without federal grant assistance.

7. *Certification that no other federal funds will be used.* The application shall certify that it is receiving no other federal funds for the project.

8. *Support from other entities.* The applicant shall describe any support for the project from any state or local government, health, educational, or social institutions, or any public safety entities in the project service area.

9. *Commitment to nondiscrimination and network interconnection obligations.* If applicable, the applicant shall provide certification that it will abide by the non-discrimination and network interconnection obligations.

10. *Compliance with other federal statutes.* The applicant must provide certification that is in compliance with other federal statutes and regulations.

3. Application Deadlines – XO/Nextlink agree with the Agency’s determination to make the grant review process more manageable by accepting applications in three tranches. The Agency also could facilitate its review of applications by dividing those tranches so that applications primarily seeking to serve unserved and underserved areas are filed at one time and applications filed for other purposes at a different time. The Agency also should adopt a deadline of 90 days for its review of applications.

4. Applications Should be Complete When Filed – XO/Nextlink believe all applications should adhere to a common format developed by the Agency with specific information requirements. Because this will facilitate the drafting of applications and because the Agency has tight deadlines, all applications must be complete when filed.

The Agency may ask for clarification if necessary, and applications that are rejected for being incomplete may be filed in later rounds.

5. Comments Should be Accepted on Applications – Again, because of the strict time limits in the statute, the Agency’s due diligence process for applications is abbreviated. To aid the Agency in examining the accuracy of information in applications, it should allow interested parties to have a short, 30 day, period during which they could submit additional factual information. The Agency can then rely on its expertise, as well as request clarifications from applicants, in completing its evaluation.

**H. Scoring Applications Should Follow the Purposes of the Act.**

XO/Nextlink believe that the Agency’s scoring of applications must first be grounded by the economic stimulus purposes of the ARRA. In other words, projects creating the most jobs and economic output should be favored. After the stimulus objectives are taken into account, the scoring system should be based on the specific requirements of the BTOP program. For the BTOP, these include increasing affordability, providing the greatest broadband speed, and enhancing service for health care delivery, education, or children. In their rules, XO/Nextlink proposed that these purposes and mandates be incorporated into a 100 point scoring system. The components of the proposed scoring system differ somewhat based on the project’s purpose, *e.g.* infrastructure construction or demand stimulation, but, again, scoring is primarily driven by components linked to economic stimulus.<sup>18</sup> Finally, XO/Nextlink believe that it is

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<sup>18</sup> Parts of the XO/Nextlink scoring system are based on the system used by the Community Connect Broadband Grant Program and the California Advance Services Fund.

important for the scoring system to be based on as many objective factors as possible to provide predictability for applicants, ensure merit-based scoring by the Agency, and enable post-award accountability. The following summarizes the XO/Nextlink proposal:

**I. UNSERVED AND UNDERSERVED INFRASTRUCTURE SCORING CRITERIA**

- (1) *Project Feasibility, Initiation, Completion, and Sustainability* (up to 30 points).
  - (A) *Feasibility* (up to 15 points). This criterion measures the project's overall chances for successful completion.
  - (B) *Initiation and Completion* (up to 10 points). This criterion measures the number of months the applicant has proposed to take to complete the project in light of the total cost of the project.
  - (C) *Affordability and Sustainability* (5 points). Five (5) points shall be awarded to an applicant that commits to charge each customer served over the infrastructure constructed as part of a grant a price for Broadband Service equal to or less than the average price for such comparable Broadband Service in the state for a period of at least two (2) years after service to a customer is initiated.
- (2) *Project Scope and Cost* (up to 40 points)
  - (A) *Funds Requested Per Potential Customer* (up to 20 points). This shall be determined based on the number of customers the applicant will be able to serve divided by the funding amount requested from the Agency.
  - (B) *Broadband Transmission Speed* (up to 20 points). This criterion represents the difference between the current average advertised and generally available broadband transmission speed per customer and the applicant's proposed advertised and generally available speed per customer in the proposed service areas.
- (3) *State endorsements, community institution connectivity, and community institution support* (up to 15 points).
  - (A) *State endorsement*. If a Governor of a state, or the Governor's designee, officially endorses the project set forth in that application, 5 points will be awarded.
  - (B) *Community anchor institution connectivity and community institution support* (up to 10 points). This criterion will be used to score applications based on the degree of connectivity to Community Anchor Institutions and the degree of support from such institutions. In the discretion of the Agency, applicants may receive up to 10 points for

demonstrating that it has connected a substantial number of these institutions and received comments in support from them for the project.

- (4) *Jobs Creation* (up to 15 points). The number of jobs directly created by the project, including for construction, support, and management.

## II. **EDUCATION, AWARENESS, TRAINING, ACCESS, EQUIPMENT AND SUPPORT PROJECTS SCORING CRITERIA**

The following formula shall be used to score any application that seeks to provide education, awareness, training, access, equipment, and support.

- (1) *Project Feasibility, Initiation, and Completion* (up to 30 points)
  - (A) *Feasibility* (up to 15 points). This criterion measures the project's overall chances for successful completion.
  - (B) *Initiation and Completion* (up to 15 points). This criterion measures the number of months the applicant has proposed to take to complete the project in light of the total cost of the project.
- (2) *Project Scope and Cost* (up to 20 points)

*Funds Requested Per Potential Customer*. This criterion is based upon the number of customers (or, if there are no customers, the number of individuals served by the project) the applicant will be able to serve divided by the funding amount requested from the Agency.
- (3) *State endorsements, community institution connectivity, and community institution and other government support* (up to 35 points).
  - (1) *State endorsement*. If a Governor of a state, or a Governor's designee, officially endorses a project, 15 points shall be awarded.
  - (2) *Community anchor institution connectivity and community institution support*. This criterion shall be used to score applications based on the degree of connectivity to Community Anchor Institutions and the degree of support from such institutions and government agencies. Applicants shall receive up to 20 points for demonstrating that it has connected a substantial number of these institutions and received comments in support from them and other government agencies for the project.
- (4) *Jobs Creation* (up to 15 points). The number of jobs directly created by the project, including for support and management.

## III. **PUBLIC SAFETY PROJECTS SCORING CRITERIA**

Public safety projects include projects designed to improve the availability and usability of Broadband Services for public safety institutions.

- (1) *Need for the type of services requested* (up to 25 points):
  - (A) For mass-disaster response (10 points);
  - (B) For day-to-day primary operations (e.g., fire-fighting, crime fighting, provision of medical care) (10 points);
  - (C) For support functions (e.g., billing, payroll, administrative functions) (5 points).
- (2) *Funds Requested Per Households in Area* (up to 20 points). This shall be determined based on the number of households the public safety agencies served in the project will cover divided by the funding amount requested from the Agency.
- (3) *Feasibility and Sustainability* (up to 15 points):
- (4) *Initiation and Completion* (up to 15 points). This criterion measures the number of months the applicant has proposed to take to complete the project in light of the total cost of the project.
- (5) *State endorsements* (up to 10 points). If a Governor of a state, or a Governor's designee, officially endorses a project, 10 points shall be awarded.
- (6) *Jobs Creation* (up to 15 points). The number of jobs directly created by the project, including for support and management.

**I. Non-discrimination/Interconnection Obligations Should Follow**

**Current and Known Laws and Regulations.**

The statute requires that the Agency “publish the non-discrimination and network interconnection obligations that shall be contractual conditions of grants...including, at a minimum, adherence to the principles contained in the Commissions’ broadband policy statement.” XO/Nextlink urge that the Agency require as contractual conditions only current and known obligations for two key reasons. First, these obligations meet the statutory mandate and provide sufficient protections for entities that wish to interconnect with the grantee. Second, by relying on current and known obligations, the Agency reduces uncertainty for grantees and lessens the chances of disputes and litigation. This point is most important because the primary goal of the program is to stimulate the economy not wind-up in court. Finally, because the BTOP is, at least for the moment, a

one-shot program, the Agency should not create new law that may not be applied to similar broadband infrastructure built without grant funding. XO/Nextlink thus proposed in their rules that the following non-discrimination and interconnection requirements apply as contractual conditions:<sup>19</sup>

*Non-discrimination and network interconnection obligations.* An entity that receives a grant to provide Broadband Service shall –

1. Not unjustly or unreasonably discriminate in charges, practices, classifications, regulations, facilities, or services for or in connection with the provision of Broadband Services provided using grant funding. This includes making or giving, directly or indirectly, by any means or device, any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage regarding access to or charges for Broadband Services;
2. Provide, for all of its facilities and equipment subject to the grant, opportunities for interconnection with another provider of telecommunications service or service providing access to the internet for the transmission and routing of such services at any technically feasible point within its network that is at least equal in quality to that provided by entity to itself or to any subsidiary, affiliate, or another other party to which the entity provides interconnection, and on rates, terms, and conditions, that are just, reasonable, and non-discriminatory, consistent with the requirements of 47 U.S.C. §§ 251 and 252; and
3. Allow customers using Broadband Services on facilities constructed in whole or in part using grant funding to access the lawful Internet content of their choice, run applications and use services of their choice, subject to the needs of law enforcement, and connect their choice of legal devices do not harm the network.

**J. Broadband Mapping, While Beneficial, Cannot be a Prerequisite to Awarding Grants.**

XO/Nextlink supported the legislation authorizing the broadband mapping<sup>20</sup> and the portion of the ARRA appropriating funds to carry out this task. As demonstrated by

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<sup>19</sup> These provisions are based on sections 202(a) and 251(c)(2) of the Communications Act of 1934 (47 U.S.C. 202(a), 251(c)(2)), and the FCC's Wireline Broadband Order (Docket No. 05-15).

the many states and regional and local governments that have already engaged in this process, development and maintenance of broadband maps is an invaluable aid to policymakers. In a perfect world, the government would have engaged in the mapping process and the development of a national broadband strategy prior to awarding BTOP grants. That, however, is not what Congress has required in the ARRA, and, in fact, highlights the verity that stimulating the economy drives this statute. The statute requires that the Agency move simultaneously – and not sequentially -- in implementing the mapping process and awarding grants, and not adhering to this mandate would frustrate the purposes of the ARRA. The Agency should, of course, gather and use as much information in the grant process, including maps that have already been created. Finally, not having maps should not be viewed as a barrier to making sound decisions on applications for grants, since, at least under the proposed XO/Nextlink rules, applicants are to supply information about existing infrastructure and services and interested parties can comment on applications.

## **II. Conclusion**

In the ARRA, the President and Congress seek to alleviate the deleterious effects of the current severe economic downturn by funding a great many programs, including the BTOP. The Agency, while facing a significant challenge in implementing the Program, has a real opportunity to create jobs and economic growth by propelling access to broadband service. As a facilities-based provider of broadband services throughout the United States, XO/Nextlink have a keen understanding of the projects that can meet these

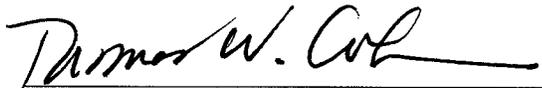
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<sup>20</sup> Public Law 110-385 (47 U.S.C. 1301 note).

objectives, and the comments they submit here, as well as their proposed rules, are based on that expertise and on the specific purposes and requirements of the statute.

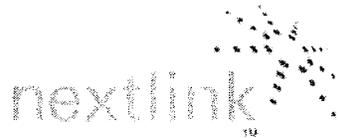
XO/Nextlink's interest also extends to the submission of applications for grants once the Agency issues its Notice of Funds Availability. They believe the BTOP can be successful and stand ready to assist the NTIA in making that a reality.

Respectfully submitted,



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April 13, 2009



Proposed Rules  
for  
Implementation of  
NTIA's  
Broadband Technology  
Opportunities Program

March 2009



March 9, 2009

Dr. Bernadette McGuire-Rivera  
Associate Administrator, NTIA  
United States Department of Commerce  
1401 Constitution Avenue, NW  
Washington, DC 20230

Dear Dr. McGuire-Rivera,

On behalf of XO Communications and Nextlink, I am pleased to submit these proposed rules for the implementation of NTIA's Broadband Technology Opportunities Program. With the passage of the American Recovery and Reinvestment Act of 2009, Congress recognized the critical need for broadband capability in all parts of the country for economic growth and job creation; as well as providing consumers access to advanced medical, educational, and community services. The need to promote greater deployment of broadband is reinforced by the newly released ITU "ICT Development Index" (ITI) indicating that the U.S. continues to decline in international standings, falling from its 11<sup>th</sup> place ranking in the last report to 17<sup>th</sup> place in the current report.

We have drafted these rules in an attempt to assist NTIA in its efforts to determine operating rules for this vital undertaking. We welcome the electronic posting of this document and any comments that might be received. If you have specific questions regarding any of the proposed issues contained herein, please feel free to contact the undersigned or our counsel, Thomas Cohen of Kelley Drye & Warren.

We look forward to further dialogue on these rules and hope they will assist in a swift and thoughtful dispersal of the broadband stimulus funds.

Sincerely,

A handwritten signature in cursive script that reads "Heather Burnett Gold".

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CC: Anna Gomez, Acting Administrator, NTIA  
Mark Siefert, Senior Advisor, NTIA  
Angela Simpson, Legal Advisor to the Acting Administrator, NTIA  
Michael Copps, Chairman, FCC  
Jonathan Adelstein, Commissioner, FCC  
Robert McDowell, Commissioner, FCC



**RULES TO IMPLEMENT  
NTIA'S BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM**

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**Sec. 1000. PURPOSES OF PROGRAM (BROADBAND SERVICES)**

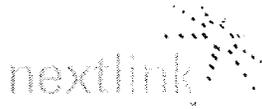
(a) GENERAL

The purposes of the National Telecommunications and Information Administration (“NTIA”) Broadband Technologies Opportunities Program (“the Program”) are to use financial assistance in the form of grants to eligible applicants to stimulate economic growth and create jobs by providing and enabling the use of expanded and more robust Broadband Services throughout the United States. These services will in turn deliver enhanced educational, health care, community, and public safety services.

(b) SPECIFIC PURPOSES

Because the development and use of broadband transmission service will stimulate economic growth and the creation of jobs while promoting, education, health, and safety, the Program shall seek to provide throughout the United States –

- (1) access to broadband transmission service for customers in unserved areas, as the term is defined in Sec. 1001(m);
- (2) improved access to broadband transmission service for customers in underserved areas, as the term is defined in Sec. 1001(l);
- (3) broadband education, awareness, training, access, equipment and support to –
  - (A) schools, libraries, medical and healthcare providers, community colleges and other institutions of higher education, and other community support organizations and entities to facilitate greater use of Broadband Service by or through these organizations;
  - (B) organizations and agencies that provide outreach, access, equipment, and support services to facilitate greater use of Broadband Service by low-income, unemployed, aged, and otherwise vulnerable populations; and
  - (C) job-creating strategic facilities located within a State-designated enterprise zone, Economic Development District designated by the Department of Commerce, Renewal Community or Empowerment Zone designated by the Department of Housing and Urban Development, or Enterprise Community designated by the Department of Agriculture;
- (4) improved access to, and use of, Broadband Service by public safety agencies; and
- (5) increased demand for broadband, economic growth, and job creation.



**Sec. 1001. DEFINITIONS**

- (a) *Agency* means the National Telecommunications and Information Administration and any of its sub-agencies.
- (b) *Advanced Broadband Transmission Service* means, (i) for a wireline or fixed wireless provider, providing on an advertised and generally available basis to each customer an asymmetrical information transfer rate equivalent to at least 20 megabits/second from the provider to the customer (downstream) and at least 5 megabits/second from the customer to the provider (upstream) or a symmetrical information transfer rate equivalent to at least 10 megabits/second between the provider and the customer, and, (ii) for a mobile wireless provider, providing on an advertised and generally available basis to each customer an information transfer rate equivalent to at least 6 megabits/second from the provider to the customer (downstream) and at least 1.5 megabits/second from the customer to the provider (upstream).
- (c) *Bandwidth* means the capacity of the radio frequency band or physical facility needed to carry the Broadband Service.
- (d) *Broadband Service* means Current Generation Broadband Transmission Service or Advanced Broadband Transmission Service that enables customers to access the internet at least at the speeds required herein between the customer and the internet access node.
- (e) *Current Generation Broadband Transmission Service* means, (i) for a wireline or fixed wireless provider, providing on an advertised and generally available basis to each customer an information transfer rate equivalent to at least 5 megabits/second from the provider to the customer (downstream) and at least 1 megabit/second from the customer to the provider (upstream), and, (ii) for a mobile wireless provider, providing on an advertised and generally available basis to each customer an information transfer rate equivalent to at least 1.5 megabits/second from the provider to the customer (downstream) and at least 768 kilobits/second from the customer to the provider (upstream).
- (f) *Community Anchor Institutions* means public schools or education centers, public libraries, medical clinics, hospitals, community colleges, public universities, or law enforcement, fire and ambulance facilities.
- (g) *Customer* means a household or business as measured by the U.S. Census.
- (h) *Grantee* means any entity receiving a grant under the Program.
- (i) *Matching Funds* means the applicant's qualified contribution to the project, as set forth in section Sec. 1005(f).
- (j) *Project* means the applicant's proposed increase in the supply of, or demand for, broadband transmission service for a specific geographic area consistent with the purposes set forth in Sec. 1000 and which is to be financed by the grant and Matching Funds.
- (k) *Public Safety Broadband Communications Service* means the provision of Broadband Service to entities designated by the federal, state, or local governments as public safety entities.
- (l) *Underserved Area* means: (1) (i) a geographic area that is not an unserved area where at least 90% of the customers to be served by the project lack access to more than one provider of Current Generation Broadband Transmission Service (which is to be determined separately for wireline/fixed wireless or mobile wireless providers) or (ii) a geographic area that is not an unserved area where at least 90% of the customers to be served by the project lack access to a provider of Advanced Broadband Transmission Service (which is to be determined separately for wireline/fixed wireless or mobile



wireless providers); (2) a geographic area where at least 90% of the Community Anchor Institutions to be served by the project lack access to a provider of wireline/fixed wireless Advanced Broadband Transmission Service; or (3) any census tract which is located in (i) an empowerment zone or enterprise community designated under section 1391, (ii) the District of Columbia Enterprise Zone established under section 1400, (iii) a renewal community designated under section 1400E, or (iv) a low-income community designated under section 45D.

- (m) *Unserved Area* means a geographic area where at least 90% of the customers to be served by the project lack access to a provider of Current Generation Broadband Transmission Service (which is to be determined separately for wireline/fixed wireless or mobile wireless providers).



**Sec. 1002. PROCESS AND TRANSPARENCY**

(a) **BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM WEBSITE**

The Agency shall maintain a website (“Program website”) to facilitate the exchange of information with the public and applicants for grants. The website shall be updated regularly and shall include links to copies of any Agency announcements, actions, or decisions regarding the Program.

(b) **PUBLIC NOTIFICATION OF AGENCY HEARINGS, WORKSHOPS, AND OTHER OFFICIAL AGENCY PROCEEDINGS**

The Agency shall open to the public all conferences, meetings not subject to subsection (e), workshops, site visits, and its similar interactions with non-Agency persons, and the Agency shall provide notice of such activities on the Program’s website at least five (5) calendar days in advance to facilitate public attendance

(c) **PUBLIC INFORMATION AND INSPECTION OF RECORDS**

(1) *Public posting of all Agency rulemakings and decisions.* The Agency shall post all information released relating to the Program, including but not limited to rulemakings, comments, orders, and other decisions, on the Program’s website within two (2) calendar days of submission or release.

(2) *Public posting of all applications for grants, comments on applications, state endorsements of applications, awards of grants, denials or rejections of grants, grantee status reports, and grantee requests for modifications.* The Agency shall post applications for funding received under the Program, comments on applications, state endorsements of applications, awards of grants, denials or rejections of grants, grantee status reports, grantee requests for modifications, and any other information transmitted between the Agency and the applicant or grantee on its website within two (2) calendar days of receipt.

(3) *Confidential Business Information.* An applicant for a grant may request that materials or information submitted to the Agency be withheld from public inspection.

(A) Any party submitting information or materials to the Agency may submit therewith a request that business information not be made routinely available to parties requesting the applicant’s information under the Freedom of Information Act (“FOIA,” 5 U.S.C. § 552).

(1) Applicants submitting applications and grantees submitting reports are responsible for designating business information pursuant to the Department of Commerce’s rules governing FOIA requests (15 C.F.R. § 4.9).

(2) Along with the unredacted application or status report, such parties shall provide a redacted copy of the application or status report for publication on the Program website.

(B) Requests for materials including business information will be handled as specified by the Department of Commerce’s rules governing FOIA requests (15 C.F.R. § 4.9).

(C) If the materials are submitted voluntarily (*i.e.*, absent any direction by the Agency), the person submitting them may request the Agency to return the materials without consideration if the request for confidentiality should be denied. In that event, the materials shall ordinarily be returned (*e.g.*, an

application shall be returned if it cannot be considered on a confidential basis). Only in the instance where the public interest so requires will the materials be made available for public inspection.

- (1) If submission of the materials is required by the Agency to pursue an investigation into fraud, waste, or abuse and the request for confidentiality is denied, the materials shall be made available for public inspection.
  - (D) If no request for confidentiality is submitted, the Agency assumes no obligation to consider the need for non-disclosure but may determine on its own motion that the materials should be withheld from public inspection.
  - (E) If a request for confidentiality is denied, the person who submitted the request may, within five (5) business days, file an application for review by the Agency. If the application for review is denied, the person who submitted the request shall be afforded five (5) business days in which to seek a judicial stay of the ruling. If these periods expire without action by the person who submitted the request, the materials shall be returned to the person who submitted them or shall be placed in a public file. Notice of denial and of the time for seeking review or a judicial stay shall be given by telephone, with follow-up notice in writing. The first day to be counted in computing the time periods established in this subsection is the day after the date of oral notice. Materials will be accorded confidential treatment and not disclosed to the requesting party until the Agency acts on any timely applications for review of an order denying a request for confidentiality, and until a court acts on any timely motion for stay of such an order denying confidential treatment.
  - (F) Third party owners of materials submitted to the Agency by another party may participate in the proceeding resolving the confidentiality of the materials.
- (d) PUBLIC COMMENTS
- (1) *Public comments on rules and reports.* Any person may submit comments on any proposed rule, report to Congress, or any other report issued or received by the Agency related to funding under the Program. All such comments shall be submitted electronically and shall be posted on the Program's website within one (1) calendar day of receipt by the Agency.
  - (2) *Public comments on applications.* Any person or entity may submit comments and any state may submit endorsements on any application for a grant within thirty (30) calendar days from the date on which the application is filed.
  - (3) *Public comments on requests for modifications.* Any person may submit comments on a grantee proposal for modifications (as set forth in Sec. 1010(d)) within fifteen (15) calendar days from the date on which the request for modification is filed.
- (e) EX PARTE COMMUNICATIONS
- (1) *Ex Parte Communications Defined.* An *ex parte* communication is any oral or written communication regarding a pending matter or proceeding, including an application for a grant, between a member of the Agency and any other party that does not occur in an Agency public hearing, Agency workshop, or other official Agency proceeding, or on the official Agency record for the proceeding.



- (A) *Procedural discussions exempted.* Public notice requirements do not apply to communications between parties, including staff, for the purpose of exchanging information on or otherwise discussing procedural issues.
  - (B) *Federal intergovernmental meetings exempted.* The Agency may meet without public notice with federal agencies for the purpose of discussing any matter.
- (2) *Required Disclosure of Ex Parte Communications*
- (A) *Written presentations.* A person who makes a written *ex parte* presentation subject to this section shall submit no later than the next business day an electronic copy of the presentation through the Program's website for inclusion in the public record. The presentation (and cover letter) shall clearly identify the proceeding to which it relates, including the identity of an application for a grant, if any, shall indicate a full and complete copy has been submitted through the Program's website, and must be labeled as an *ex parte* presentation. If the presentation relates to more than one proceeding, a copy shall be filed for each proceeding.
  - (B) *Oral Presentations.* A person who makes an oral *ex parte* presentation subject to this section shall, no later than the next business day after the presentation, submit through the Program's website a memorandum which summarizes the new data or arguments. A memorandum shall contain a summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed. The memorandum (and cover letter) shall clearly identify the proceeding to which it relates, including the identity of an application for a grant, if any, shall indicate that a full and complete copy has been filed electronically, and must be labeled as an *ex parte* presentation. If the presentation relates to more than one proceeding, a memorandum shall be filed for each proceeding.

**Sec. 1003. ROLE OF THE STATES**

(a) **ALLOCATION OF GRANTS AMONG STATES**

The Agency shall notify the Governor of each state of the opportunity to identify areas within the state that are unserved or underserved and to provide its preferences on the allocation of grants for projects to serve those areas. The Agency shall consider such preferences in the award of grants as set forth in Sec. 1008.

(b) **CONSULTATION OF THE STATES**

- (1) Any state official or state agency may submit a comment on any application or post-grant report covering a geographic area within that state.
- (2) A Governor of a state, or the Governor's designee, may submit a formal endorsement of any grant application submitted to the Agency covering a geographic area within that state by providing a certification that grant of the application will meet a compelling need. Such a certification must include:
  - (A) A statement describing the compelling need;
  - (B) A statement describing how the state identified the compelling need;
  - (C) A statement that the state considered this and other applications on a competitively and technologically neutral basis.
- (3) The Agency shall consider comments or endorsements from a state in the award of grants as set forth in Sec. 1008.

**Sec. 1004. ELIGIBILITY TO FILE APPLICATION**

(a) To be eligible for a grant under the Program, an applicant shall be:

- (1) A state or political subdivision thereof (including municipalities and counties), the District of Columbia, or a territory or possession of the United States;
- (2) An Indian tribe (as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450(b)) or a native Hawaiian organization;
- (3) A nonprofit foundation, corporation, institution, or association; or
- (4) A legally organized entity, including public or private corporations, limited liability companies, and cooperatives.

**Sec. 1005. FILING OF APPLICATIONS FOR PROJECTS**

**(a) ELIGIBLE PROJECTS**

To be eligible for a grant, the applicant shall submit an application pursuant to the requirements of this part for a project that is consistent with the Purposes of the Program set forth in Sec. 1000.

**(b) FILING GROUPS AND FILING PERIODS FOR APPLICATIONS**

(1) Applications for projects shall be filed in any of three filing periods (“Rounds”) and in the filing groups as follows:

(A) For projects to provide service in unserved areas, applications shall be filed no later than July 1, 2009 (Round 1), November 1, 2009 (Round 2), and April 1, 2010 (Round 3);

(B) For projects to provide service in underserved areas, applications shall be filed no later than August 1, 2009 (Round 1), December 1, 2009 (Round 2), and April 1, 2010 (Round 3);

(C) For projects to provide broadband education, awareness, training, access, equipment, and support, applications shall be filed no later than September 1, 2009 (Round 1), January 1, 2010 (Round 2), and April 1, 2010 (Round 3);

(D) For projects to provide service to public safety agencies, applications shall be filed no later than September 1, 2009 (Round 1), January 1, 2010 (Round 2), and April 1, 2010 (Round 3).

(2) An applicant who has an application denied or otherwise rejected may re-file that application or one or more different applications in a subsequent filing period.

(3) Individual applicants may file more than one application in any filing period, but no more than one application related to any geographic area in the same filing period, and may not be granted more than one application over all filing periods in the same geographic area.

**(c) GRANT ALLOCATIONS AND LIMITATIONS.**

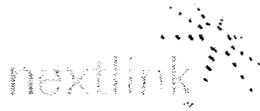
Fifteen (15) calendar days prior to the filing deadline for each filing period and filing group, the Agency shall notify the public of the maximum amount of grant funds it intends to award for that particular filing period and filing group. Nothing shall preclude the Agency from determining that it is in the public interest to limit the total amount of funds that can be awarded to an applicant, including its affiliates, so long as the Agency issues a public announcement at least sixty (60) calendar days in advance of a particular filing period when that determination is to apply.

**(d) ELECTRONIC FILING ONLY**

All applications, comments, and *ex parte* communications on applications shall be submitted electronically as indicated on the Program’s website.

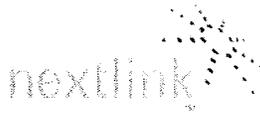
**(e) COMPLETE WHEN FILED AND CLARIFICATIONS**

(1) All applications shall follow the format set forth in Sec. 1007 and be complete when filed. Any application not compliant with this requirement shall be rejected without prejudice for subsequent filing. Once a determination is made that an application is incomplete, the Agency shall notify the applicant of that status within one (1) calendar day in writing and electronically.



- (2) The Agency may contact an applicant to clarify any statements, representations, or other information contained in the application. Notice of any such contact and the applicant's response shall be posted within one (1) calendar day on the Program's website.
- (f) **MATCHING FUNDS AND WAIVERS OF REQUIREMENT**
- (1) The applicant must contribute Matching Funds which are at least twenty percent (20%) of the cost of the project and shall be in the form of –
    - (A) Cash for eligible grant purposes.
    - (B) In-kind contributions for purposes that could have been financed with grant funds. In-kind contributions must be new or non-depreciated assets with established monetary values. Manufacturers' or service providers' discounts shall not be considered as Matching Funds.
    - (C) Services or facilities provided free of charge or at a reduced charge to customers of the project, so long as the value of the services and facilities are established by a reputable appraiser unaffiliated with the applicant.
    - (D) Costs incurred by the applicant, or by others on behalf of the applicant, for facilities, installed equipment, or other services rendered prior to submission of the completed application shall not be deemed to qualify as Matching Funds.
  - (2) Any financial assistance from federal sources shall not be deemed to qualify as Matching Funds unless there is a federal statutory exception specifically authorizing the federal financial assistance to be considered as such.
  - (3) The Agency shall waive the requirement that the applicant provide Matching Funds if the Agency finds that the applicant has demonstrated with specificity that it has attempted to acquire funding from a substantial number of sources, all these potential sources of funding have formally declined to provide such funding, and its financial status, operations, and reporting are sufficient and sound.
- (g) **PERFORMANCE BOND**
- Prior to a grant being awarded, the applicant must demonstrate to the Agency that it has obtained a performance bond whose value is equal to that of the grant and which amount will be paid to the U.S. Treasury in the event the applicant defaults or otherwise does not complete the project in accordance with the terms of the grant.
- (h) **REVIEW OF APPLICATIONS**
- (1) **REVIEW PROCESS**

Applications conforming with the requirements of this part will be evaluated competitively by a panel of NTIA employees selected by the Assistant Secretary and will be awarded points as described in the scoring criteria in Sec. 1008. Nothing shall preclude the Agency from using non-NTIA employees, including from the private sector, to assist the panel in evaluating applications. In scoring the applications, the Agency shall rely upon the information contained in the application or provided to the Agency upon request and upon its own knowledge and expertise to determine the accuracy, weight, and credibility of any statements and information included in the application as well as the feasibility of the proposed project. Applications in each filing period shall be ranked by the Agency, and the Agency shall award grants in rank order until all grant funds allocated for the particular filing period and filing group are expended. The Agency has sole



discretion to determine the number and size of awards granted consistent with the ranking of applications.

(2) REVIEW PERIOD AND DEADLINES FOR AWARDS

The Agency shall complete the review of an application and determine whether to award a grant for the proposed project no later than ninety (90) calendar days after the final filing date for the first two filing periods (Rounds 1 and 2) and not later than September 30, 2010 for the final filing period (Round 3).

(i) NOTIFICATION OF AWARDS

The Agency shall formally notify an applicant electronically and in writing of a decision to award or not award a grant, including the basis for awarding or not awarding a grant for an application, and shall post such decisions and grant documentation specified in Sec. 1009 on the Program's website. Without limitation, the Agency shall specify the scoring points received.

(j) APPEALS OF AWARD DECISIONS

An applicant whose application is denied or otherwise rejected may file an appeal with the Agency within fifteen (15) calendar days of the date of formal notification of denial or rejection and seek to have a grant awarded. The appeal shall be accompanied by documentation providing with specificity the rationale and evidence that would support the award of a grant. The Agency shall act on the appeal within forty-five (45) calendar days and shall award a grant only if the denial or rejection was based on inaccurate scoring and ranking of the application. An applicant that has filed for an appeal may not resubmit the application until the Agency issues a decision.

**Sec. 1006. USE OF GRANTS FOR THE PROVISION OF BROADBAND AND RELATED SERVICES**

**(a) ELIGIBLE GRANT PURPOSES**

Grant funds may be used to finance:

- (1) In unserved areas, or in underserved areas described in Sec. 1001(l)(1)(i) or (3), the acquisition of equipment, instrumentation, networking capability, hardware and software, digital network technology, and infrastructure used in the provision of Current Generation or Advanced Broadband Transmission Service and the construction and deployment of such service related infrastructure;
- (2) In underserved areas described in Sec. 1001(l)(1)(ii) or (2), the acquisition of equipment, instrumentation, networking capability, hardware and software, digital network technology, and infrastructure used in the provision of Advanced Broadband Transmission Service and the construction and deployment of such service related infrastructure;
- (3) For projects dedicated to providing public safety broadband communications services, the acquisition of equipment, instrumentation, networking capability, hardware and software, digital network technology, and infrastructure used in the provision of such services and the construction and deployment of such service related infrastructure;
- (4) Access to Broadband Service, including use of end-user equipment, by Community Anchor Institutions;
- (5) Access to Broadband Service, including use of end-user equipment, by low-income, unemployed, aged, and otherwise vulnerable populations; and
- (6) The purchase of land, buildings, or building construction needed to carry out the project.

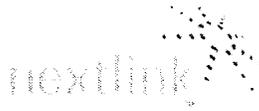
**(b) INELIGIBLE GRANT PURPOSES**

- (1) For projects seeking to provide Broadband Service in unserved or underserved areas or to provide public safety communications, operating expenses incurred in providing such service are ineligible for grants, except as provided in subsections (a)(4) and (a)(5) of this section.



**Sec. 1007. APPLICATION INFORMATION REQUIREMENTS**

- (a) Applications shall be prepared in conformance with the provisions of this part. A completed application shall include the following documentation, studies, reports and information in a form satisfactory to the Agency.
- (b) Completed applications shall include the following:
  - (1) *An Application for Federal Assistance.* A completed Standard Form 424.
  - (2) *An Executive Summary of the Project.* The applicant shall provide the Agency with a summary of the project, including the following:
    - (A) A description of the project, including, where applicable, the number of subscribers, households, and businesses covered by the project and jobs (expressed in person-hours) directly created to perform the project;
    - (B) A description of the applicant, including all affiliated entities and unaffiliated partners;
    - (C) The projected total project cost and an explanation as how that cost was derived;
    - (D) If applicable, an overview of the Broadband Service infrastructure to be developed, including the types of equipment, technologies, and facilities to be used, and the Broadband Service to be advertised and generally available to customers;
    - (E) If applicable, an overview of the specific objectives that are to be accomplished by the broadband education, awareness, training, access equipment, and support to be provided to the entities described in section Sec. 1000(b)(3);
    - (F) If applicable, a description of the availability of existing Broadband Service in the proposed project area and the methodology used to support the description;
    - (G) A demonstration that the proposed project meets the purposes of the Program and that it will be completed within two (2) years of a grant being awarded; and
    - (H) A demonstration that the project would not have been implemented prior to September 30, 2010 without federal grant assistance.
  - (3) *Applicant and Service Area Information.* Each applicant shall provide the following information:
    - (A) Contact information, including an e-mail and postal address to be used to receive official notices from the Agency;
    - (B) Background on the applicant, including operational and financial information for the previous five (5) years;
    - (C) Evidence of its legal existence and authority to enter into a grant agreement with the Agency and to perform the activities proposed under the grant application, including any certifications from local, state, and federal regulatory authorities;
    - (D) If applicable, a description of the applicant's current telecommunications and broadband infrastructure;
    - (E) If applicable, a description of service areas where the applicant currently provides telecommunications, broadband, wireless, video, or satellite service;



- (F) If applicable, a description of the applicant's activities over the previous five (5) years in providing broadband education, awareness, training, access, equipment, and support to meet purposes similar to those set forth in Sec. 1000(b);
  - (G) If applicable, a description of the applicant's activities over the previous five (5) years in providing Broadband Services to public safety agencies;
  - (H) If applicable, certification that the applicant meets the Small Business Administration's definition of a disadvantaged business concern, including whether it is a "small business," woman-owned business, or minority-owned business; and
  - (I) If applicable, a description of other broadband facilities and services currently being provided in the service area of a proposed project and thus whether such area is unserved or underserved.
- (4) *Statement of experience.* The applicant shall provide a written narrative describing its demonstrated capability and experience, if any, that will enable it to achieve the objectives of and implementing the activities in the project in an efficient, reliable, and sustainable fashion.
- (5) *Project design and costs.* The applicant shall submit a design of the project that contains at a minimum the following:
- (A) A brief narrative discussing the proposed project;
  - (B) The services to be provided by the project and the technology used to provide those services;
  - (C) The number of customers to be served by the project, the service area, and the average density of the households in the service area (expressed as households per square mile);
  - (D) Project budget, including any expenditures that total more than \$10,000 ("significant expenditures");
  - (E) All existing and proposed facilities, services, or both that are part of the project;
  - (F) Engineering design studies providing an economical and practical engineering design of the project, including a detailed description of the facilities to be funded, technical specifications, data rates, and costs;
  - (G) If applicable, a design of the broadband education, awareness, training, access, equipment, and support to be provided by the applicant;
  - (H) If applicable, an estimated price for services provided to customers using facilities supported by the project and, to the maximum extent practicable, the average price within the state for comparable Broadband Service; and
  - (I) If applicable, a map of the proposed Service Area reflecting the proposed location of any key facilities.
- (6) *Scope of work.* The scope of work shall include, at a minimum:
- (A) The specific activities and services to be performed under the project;
  - (B) A description specifically identifying the entities and individuals who will carry out the activities and services and their relevant qualifications and experience;

- (C) The time-frames for accomplishing the project objectives and activities, and a demonstration that the project will be completed within two (2) years of the grant being awarded; and
  - (D) A budget for all capital, operational, and administrative expenditures reflecting the line item costs for Eligible Grant Purposes in Sec. 1006 and other sources of funds necessary to complete the project.
- (7) *Scoring criteria documentation.* Each grant applicant shall address and provide documentation on how it meets each of the scoring criteria detailed in Sec. 1008, except for areas scored by the Agency in its discretion.
- (8) *Financial information.* The applicant shall provide a narrative description and supporting evidence demonstrating the availability of funding to complete the project within two (2) years of the date of the award, sufficiency of resources and expertise necessary to undertake and complete the project, and, for infrastructure projects, demonstrating the sustainability of the project during building out and for two (2) years after completion. At minimum, the following financial information is required:
- (A) All projected expenses, including all sources of funding (both public and private) for the project;
  - (B) A demonstration that it satisfies the Matching Funds requirement unless a waiver is filed;
  - (C) Performance bond documentation;
  - (D) Certified financial statements, if available; otherwise, the most current income statement and balance sheet for existing operations; and
  - (E) Pro-forma financial information for five (5) years, evidencing the sustainability of the project; and
  - (F) If applicable, a description of other broadband facilities and services currently being provided in the service area of a proposed project and thus whether such area is unserved or underserved.
- (9) *Certification on need for federal grant.* The applicant shall provide sufficient evidence demonstrating that the project would not have been implemented prior to September 30, 2010 without federal grant assistance.
- (10) *Certification that no other federal funds will be used.* The application shall certify that it is receiving no other federal funds for the project.
- (11) *Support from other entities.* The applicant shall describe any support for the project from any state or local government, health, educational, or social institutions, or any public safety entities in the project service area.
- (12) *Commitment to nondiscrimination and network interconnection obligations.* If applicable, the applicant shall provide certification that it will abide by the non-discrimination and network interconnection obligations in Sec. 1010(b)(1).
- (13) *Compliance with other federal statutes.* The applicant must provide certification that is in compliance with other federal statutes and regulations.



**Sec. 1008.**

**SCORING OF APPLICATIONS TO DETERMINE AWARDS**

(a)

**UNSERVED AND UNDERSERVED INFRASTRUCTURE SCORING CRITERIA**

The following formulas shall be used to score an application that seeks to provide access in unserved areas or improved access in underserved areas. Unless specifically stated otherwise, the same formulas will be used for each services category and for underserved and unserved areas. All eligible applications shall receive points (Maximum 100 pts) pursuant to the following scoring criteria:

**SCORING CRITERIA DEFINED**

(1) *Project Feasibility, Initiation, Completion, and Sustainability* (up to 30 points). The Agency shall not consider whether the applicant has requested or receives a waiver of the Matching Funds requirement in making any of these scoring determinations.

(A) *Feasibility* (up to 15 points). This criterion measures the project’s overall chances for successful completion. The Agency shall assign points to an application in its discretion considering all relevant factors. Among the factors to be considered are:

- (1) The experience of the applicant, including the experience of its key project personnel;
- (2) The ability of the applicant to obtain the necessary labor and materials at the price specified in the application;
- (3) Use of proven technologies; and
- (4) Evidence of legal organization and authority.

(B) *Initiation and Completion* (up to 10 points). This criterion measures the number of months the applicant has proposed to take to complete the project in light of the total cost of the project. Points will be determined based on the following formula:

$$\text{Timeliness Points} = (\text{Min} (m / tc)) / (m_1 / tc_1) * 10$$

- (1) Where “m<sub>1</sub>” is the number of months proposed for completion of the specific project being scored.
- (2) Where “tc<sub>1</sub>” is the total cost of the proposed project.
- (3) Where Min (m / tc) is the smallest ratio for any project submitted of the proposed number of months to complete the project divided by the total cost.

(C) *Affordability and Sustainability* (5 points). Five (5) points shall be awarded to an applicant that commits to charge each customer served over the infrastructure constructed as part of a grant a price for Broadband Service equal to or less than the average price for such comparable Broadband Service in the state for a period of at least two (2) years after service to a customer is initiated.

(2) *Project Scope and Cost* (up to 40 points)

(A) *Funds Requested Per Potential Customer (FRPPC)*. This shall be determined based on the number of customers the applicant will be able to serve divided by the funding amount requested from the Agency. Points will be determined based on the following formula:

Unserved Areas:

$$\text{FRPPC Points} = (\text{Min}(a) * (d)) / (a_1 * d_1) * 20$$

Underserved Areas:

$$\text{FRPPC Points} = (\text{Min}(a) / a_1) * 20$$

a = Funds Requested / Potential Customers; “d” is the average number of homes per square mile in the proposed service territory.

- (1) “a<sub>1</sub>” is the “a” for the specific project being scored;
- (2) “Min(a \* d)” is the lowest product of “a” and “d” values of any project submitted by an applicant during the current filing window;
- (3) “d<sub>1</sub>” is the “d” for the specific project being scored;
- (4) “Min(a)” is the lowest “a” for any project submitted by an applicant during the current filing window.

- (B) *Broadband Transmission Speed.* This criterion represents the difference between the current average advertised and generally available broadband transmission speed per customer and the applicant’s proposed advertised and generally available speed per customer in the proposed service areas. Points will be determined separately for each service category based on the following formula:

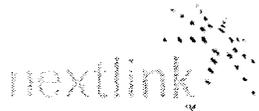
Wireline/Fixed Wireless providers:  $\text{Speed Points} = b_{\text{wireline}} / \text{Max}(b_{\text{wireline}}) * 20$

Mobile providers:  $\text{Speed Points} = b_{\text{mobile}} / \text{Max}(b_{\text{mobile}}) * 20$

- (a) “b<sub>wireline</sub>” is the “b” value for the specific wireline/fixed wireless project being scored;
- (b) “b<sub>mobile</sub>” is the “b” value for the specific mobile wireless project being scored;
- (c) “b” = (proposed service upload speed – current service upload speed) + (new service download speed – current service download speed)
- (d) Max(b) is the highest “b” value of any project submitted by an applicant during the current filing window, which shall be computed separately for wireline/fixed wireless and mobile providers;

- (3) *State endorsements, community institution connectivity, and community institution support (up to 15 points).*

- (A) *State endorsement.* If a Governor of a state, or the Governor’s designee, officially endorses the project set forth in that application, 5 points will be awarded.
- (B) *Community anchor institution connectivity and community institution support.* This criterion will be used to score applications based on the degree of connectivity to Community Anchor Institutions and the degree of support from such institutions. In the discretion of the Agency, applicants



may receive up to 10 points for demonstrating that it has connected a substantial number of these institutions and received comments in support from them for the project.

- (4) *Jobs Creation* (up to 15 points). The number of jobs directly created by the project, including for construction, support, and management. The points awarded shall be determined by the following formula:

$$\text{Jobs Points} = (j_1 / tc_1) / (\text{Max}(j / tc)) * 15$$

$j$  = Direct jobs projected to be created by the project (expressed in person-hours of work to be expended by all individuals directly working on the project)

$tc$  = Total cost of project

(1) " $j_1 / tc_1$ " is the ratio " $j / tc$ " for the specific project being scored;

(2) " $\text{Max}(j / tc)$ " is the highest ratio " $j / tc$ " of any project submitted by an applicant during the current filing window.

- (b) EDUCATION, AWARENESS, TRAINING, ACCESS, EQUIPMENT AND SUPPORT PROJECTS

The following formula shall be used to score any application that seeks to provide education, awareness, training, access, equipment, and support pursuant to Sec. 1000(b)(3). All eligible applications shall receive points (Maximum 100 pts) pursuant to the following scoring criteria:

#### SCORING CRITERIA DEFINED

- (1) *Project Feasibility, Initiation, and Completion* (up to 30 points)

(A) *Feasibility* (up to 15 points). This criterion measures the project's overall chances for successful completion. Among the factors to be considered are:

- (1) The experience of the applicant;
- (2) The ability of the applicant to obtain the necessary labor and materials at the price specified in the application;
- (3) Use of proven technologies and methodologies; and
- (4) Evidence of legal organization and authority.

(B) *Initiation and Completion* (up to 15 points). This criterion measures the number of months the applicant has proposed to take to complete the project in light of the total cost of the project. Points will be determined based on the following formula:

$$\text{Timeliness Points} = (\text{Min}(m / tc)) / (m_1 / tc_1) * 15$$

(1) Where " $m_1$ " is the number of months proposed for completion of the specific project being scored.

(2) Where " $tc_1$ " is the total cost of the proposed project.

(3) Where  $\text{Min}(m/tc)$  is the smallest ratio for any project submitted of the proposed number of months to complete the project divided by the total cost.

- (2) *Project Scope and Cost* (up to 20 points)

- (A) *Funds Requested Per Potential Customer (FRPPC)*. This criterion is based upon the number of customers (or, if there are no customers, the number of individuals served by the project) the applicant will be able to serve divided by the funding amount requested from the Agency. Points shall be determined based on the following formula:

$$\text{FRPPC Points} = (\text{Min}(a) / a_1) * 20$$

a = Funds Requested / Potential Customers

- (1) "a<sub>1</sub>" is the "a" for the specific project being scored;
  - (2) "Min(a)" is the lowest "a" value of any project submitted by an applicant during the current filing window.
- (3) *State endorsements, community institution connectivity, and community institution and other government support* (up to 35 points).
- (A) *State endorsement*. If a Governor of a state, or a Governor's designee, officially endorses a project, 15 points shall be awarded.
  - (B) *Community anchor institution connectivity and community institution support*. This criterion shall be used to score applications based on the degree of connectivity to Community Anchor Institutions and the degree of support from such institutions and government agencies. Applicants shall receive up to 20 points for demonstrating that it has connected a substantial number of these institutions and received comments in support from them and other government agencies for the project.
- (4) *Jobs Creation* (up to 15 points). The number of jobs directly created by the project, including for support and management. The points awarded shall be determined by the following formula:

$$\text{Jobs Points} = (j_1 / tc_1) / (\text{Max}(j / tc)) * 15$$

j = Direct jobs proposed to be created by the project (expressed in person-hours of work to be expended by all individuals directly working on the project)

tc = Total cost of project

- (1) "j<sub>1</sub> / tc<sub>1</sub>" is the ratio "j / tc" for the specific project being scored;
  - (2) "Max(j / tc)" is the highest ratio "j / tc" of any project submitted by an applicant during the current filing window.
- (c) **PUBLIC SAFETY PROJECTS**  
Public safety projects include projects designed to improve the availability and usability of Broadband Services for public safety institutions. All eligible applications shall receive points (Maximum 100 pts) pursuant to the following scoring criteria:

**SCORING CRITERIA DEFINED**

- (1) *Need for the type of services requested* (up to 25 points):
  - (A) For mass-disaster response (10 points);
  - (B) For day-to-day primary operations (e.g., fire-fighting, crime fighting, provision of medical care) (10 points);

(C) For support functions (e.g., billing, payroll, administrative functions) (5 points).

- (2) *Funds Requested Per Households in Area (FRPHA)* (up to 20 points). This shall be determined based on the number of households the public safety agencies served in the project will cover divided by the funding amount requested from the Agency. Points will be determined based on the following formula:

$$\text{FRPHA Points} = (\text{Min}(h * d) / (h_i * d_i)) * 20$$

$h$  = Funds Requested / Potential Households; “ $d$ ” is the average number of homes per square mile in the proposed service territory.

- (1) “ $h_1$ ” is the “ $h$ ” for the specific period being scored;
- (2) “ $\text{Min}(h * d)$ ” is the lowest product of “ $h$ ” and “ $d$ ” values of any project submitted by an applicant during the current filing window;
- (3) “ $d_1$ ” is the “ $d$ ” for the specific project being scored;
- (4) “ $\text{Min}(h)$ ” is the lowest “ $h$ ” for any project submitted by an applicant during the current filing window.

- (3) *Feasibility and Sustainability* (up to 15 points):

- (A) The ability of the Applicant to obtain the necessary labor and materials at the price specified in the application;
- (B) Any technological barriers (including those requiring new or innovative technological solutions) to the successful completion of the project;
- (C) The availability of funds to maintain the project once construction of the project is complete.

- (4) *Initiation and Completion* (up to 15 points). This criterion measures the number of months the applicant has proposed to take to complete the project in light of the total cost of the project. Points will be determined based on the following formula:

$$\text{Timeliness Points} = (\text{Min}(m / tc) / (m_1 / tc_1)) * 15$$

(1) Where “ $m_1$ ” is the number of months proposed for completion of the specific project being scored.

(2) Where “ $tc_1$ ” is the total cost of the proposed project.

(3) Where  $\text{Min}(m / tc)$  is the smallest ratio for any project submitted of the proposed number of months to complete the project divided by the total cost.

- (5) *State endorsements* (up to 10 points). If a Governor of a state, or a Governor’s designee, officially endorses a project, 10 points shall be awarded.

- (6) *Jobs Creation* (up to 15 points). The number of jobs directly created by the project, including for support and management. The points awarded shall be determined by the following formula:

$$\text{Jobs Points} = (j_1 / tc_1) / (\text{Max}(j / tc)) * 15$$

$j$  = Direct jobs proposed to be created by the project (expressed in person-hours of work to be expended by all individuals directly working on the project)

tc = Total cost of project

- (1) " $j_1 / tc_1$ " is the ratio " $j / tc$ " for the specific project being scored;
- (2) " $\text{Max}(j / tc)$ " is the highest ratio " $j / tc$ " of any project submitted by an applicant during the current filing window.



**Sec. 1009. GRANT DOCUMENTATION AND DISTRIBUTION OF FUNDS**

- (a) The terms and conditions of grants shall be set forth in grant documents prepared by the Agency. The documents shall require the applicant, including any affiliated entities or partners in the project, to own or control all equipment and facilities financed by the grant. Among other matters, the Agency may prescribe any conditions it deems warranted in advancing funds, including any terms and conditions applicable to the construction and operation of the project.

**Sec. 1010. POST-AWARD REPORTING, COMPLIANCE, MODIFICATION, AND PENALTIES**

**(a) REPORTING**

- (1) *Frequency of Reports.* Every grantee shall report quarterly on the grantee's use of the assistance and its progress in fulfilling the objectives for which such grant funds were provided. The first report will be due ninety (90) calendar days from the date of the award of the grant, and an updated report will be due every ninety (90) calendar days thereafter.
- (2) *Content of Reports.* Every report submitted to the Agency shall include:
  - (A) A comparison of the actual accomplishments to the objectives established for that period in either the application or a previously filed report.
  - (B) A description of any problems, delays, or adverse conditions which have occurred, or are anticipated, and which may or will affect the attainment of overall project objectives, prevent the meeting of time schedules or objectives, or preclude the attainment of particular project work elements during the established time periods. This disclosure shall be accompanied by a statement of the action taken or planned to resolve or ameliorate the situation.
  - (C) A list of significant expenditures made during the most recent reporting period. The list should be specific enough to allow the Agency to determine how the money was spent.
  - (D) Objectives and timetable established for the next reporting period.

**(b) COMPLIANCE REQUIREMENTS**

- (1) *Non-discrimination and network interconnection obligations.* An entity that receives a grant to provide Broadband Service shall –
  - (A) not unjustly or unreasonably discriminate in charges, practices, classifications, regulations, facilities, or services for or in connection with the provision of Broadband Services provided using grant funding. This includes making or giving, directly or indirectly, by any means or device, any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage regarding access to or charges for Broadband Services;
  - (B) provide, for all of its facilities and equipment subject to the grant, opportunities for interconnection with another provider of telecommunications service or service providing access to the internet for the transmission and routing of such services at any technically feasible point within its network that is at least equal in quality to that provided by entity to itself or to any subsidiary, affiliate, or another other party to which the entity provides interconnection, and on rates, terms, and conditions, that are just, reasonable, and non-discriminatory, consistent with the requirements of 47 U.S.C. §§ 251 and 252; and
  - (C) allow customers using Broadband Services on facilities constructed in whole or in part using grant funding to access the lawful Internet content of their choice, run applications and use services of their choice, subject to the



needs of law enforcement, and connect their choice of legal devices do not harm the network.

- (2) *Audit Requirements.* Each grantee shall have a yearly audit conducted by a licensed and independent Certified Public Accounting firm ("CPA").
  - (A) The audit standards to be applied to Program awards are the "Government Auditing Standards" ("GAS") issued by the issued by the Comptroller General of the United States. In the interest of efficiency, the grantees are required to retain their own independent CPA to perform these audits. The Department of Commerce's Office of Inspector General ("OIG") reserves the right to conduct audits as deemed necessary and appropriate.
  - (B) Each grantee must establish an annual "as of" audit date within twelve months of the date of receipt of the first advance of funds from grants approved by the Agency and shall prepare financial statements as of the date established.
  - (C) The grantee will not limit the scope of the audit to the extent that the CPA is unable to provide an unqualified opinion that the financial statements are presented fairly in conformity with GAAP.
    - (1) If the CPA determines during the audit that an unqualified opinion cannot be issued due to a scope limitation imposed by the grantee, the CPA should use professional judgment to determine what levels of the grantee's management should be informed.
    - (2) After informing the grantee's management, if the scope limitation is not adequately resolved, the CPA should immediately contact the Agency. The Agency will endeavor to resolve the matter with the grantee.
  - (D) Until the grantee's approved project is completed, the grantee shall furnish three copies of the auditor's report, report on compliance and on internal control over financial reporting, and management letter to Agency within one hundred-twenty (120) calendar days of the as of audit date.
  - (E) A grantee that qualifies as a unit of state or local government or Indian tribe as such terms are defined in the Single Audit Act of 1984 (31 U.S.C. 7501 *et seq.* ), the Single Audit Act Amendments of 1996 (31 U.S.C. 7505 *et seq.*) and OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations (copy available from the Executive Office of the President, Publication Services, 725 17th St., NW., Suite 2200, Washington, DC 20502; 202-395-7332), must comply with this part as follows:
    - (1) A grantee that expends \$300,000 or more in a year in federal awards shall have an audit performed and submit an auditor's report meeting the requirements of the Single Audit Act of 1984 and the Single Audit Act Amendments of 1996.
    - (2) A grantee that expends less than \$300,000 in federal awards during the year shall have an audit performed in accordance with the requirements of this part.
    - (3) A grantee shall notify the Agency, in writing, within thirty (30) calendar days of the as of audit date, of the total federal awards expended during the year and shall state whether it will have an



audit performed in accordance with the Single Audit Act of 1984 and the Single Audit Act Amendments of 1996, or this part.

(a) If an audit is performed in accordance with the Single Audit Act of 1984 and the Single Audit Act Amendments of 1996, an auditor's report that meets the requirements of the Single Audit Act of 1984, and the Single Audit Act Amendments of 1996, will be sufficient to satisfy that borrower's obligations under this part.

(F) Pursuant to the terms of the audit agreement, the CPA shall make all audit-related documents, including auditors' reports, work-papers, and management letters available to the Agency, or its designated representative, upon request and must permit Agency, or its designated representative, to photocopy all audit-related documents.

(c) CERTIFICATION

(1) Every twelve (12) months following grantee's recipient of the funds provided under the Program, a grantee shall submit to the Agency a certification that it has complied with the terms of its grant. At a minimum, the certification shall be made by an officer of the entity receiving the grant and certify that:

- (A) It has complied with the non-discrimination and interconnection requirements of subsection (b)(1) of this section.
- (B) It has obtained an audit from a independent auditor and that a full and complete copy of that audit is attached to the certification being submitted.
- (C) The grantee has only used funds received from the Program for permissible purposes.
- (D) The grantee does not anticipate deviating from either the terms of its grant or the rules governing the use of the fund in the following year.

(d) MODIFICATIONS TO PROJECT

(1) *Project Modifications Require Agency Approval.* A grantee may not make any material modifications to the project without receiving Agency approval prior to committing to such modifications. Material modifications include:

- (A) Modification of the proposed service area by more than a *de minimis* amount.
- (B) Modifications that would result in a reduction of the speed of the Broadband Service to be provided by the project by more than 5%.
- (C) Modification of the technology used to provide services.
- (D) Modifications that would reduce the number of customers that would have access to services offered by the project by more than 5%.
- (E) An extension in the completion date for the project by more than fourteen (14) days.
- (F) A projected or actual increase of 5% or more of any of the projected expenses in any of the following categories:
  - (1) Capital expenses (*e.g.*, equipment, facilities, real estate);
  - (2) Labor expenses (*e.g.*, wages, contractor related expenses);
  - (3) Operational expenses (*e.g.*, interconnection facilities, electricity).



- (2) *Modifications for Good Cause.* Any grantee may request for good cause a material modification of the terms of the project for which a grant was received by submitting the modification to the Agency along with:
    - (A) A brief narrative explaining the nature and necessity of the modification;
    - (B) If applicable, a description of how the services to be provided by the project or the technology used to provide those services will be modified;
    - (C) The number of affected potential customers;
    - (D) The effect on the proposed project budget and, if necessary, a new budget;
    - (E) Any new engineering or system design studies supporting the modification;
    - (F) Any modification of the estimated price for services provided to customers using facilities supported by the project;
    - (G) If applicable, a map of the modified proposed service area reflecting the proposed location of any key facilities or expense items; and
    - (H) If applicable, a new time-frame for accomplishing the project objectives and activities, including a list of objectives to be accomplished in the next ninety (90) calendar days.
  - (3) *Criteria for modifications.* Modifications shall be granted upon a showing that the requested modifications:
    - (A) Comply with the purposes of the Program and the application submitted by the grantee;
    - (B) Do not significantly diminish the ability of the grantee substantially to achieve the objectives included in the application; and
    - (C) Do not constitute or result from waste, poor management, or deception of the Agency in the grantee's application.
  - (4) *Timing.* The Agency shall issue a decision on a requested modification within thirty (30) calendar days of its submission, except that if a grantee, within the reasonable discretion of the Agency, demonstrates a need for immediate action, the Agency will issue its decision within ten (10) calendar days.
- (e) INVESTIGATIONS FOR NON-COMPLIANCE AND ASSESSMENT OF PENALTIES
- (1) *Notification.* The Agency may at any time issue a letter of inquiry to the grantee.
  - (2) *Opportunity to Respond and Agency Determination.* A grantee receiving a letter of inquiry shall respond within fourteen (14) calendar days. Upon receiving a response, the Agency shall determine whether an investigation into any allegations of wrongdoing is warranted.
  - (3) *Agency Investigation.* In conducting an investigation, the Agency may require the grantee to provide any and all documentation relating to the grant. The Agency may conduct interviews with officers and employees of the grantee.
  - (4) *Opportunity to Cure.* A grantee subject to an investigation for non-willful breaches of the terms of its grant shall be given an opportunity to cure the breach by taking remedial steps set forth by the Agency.
  - (5) *Penalties for non-compliance or breach.* The Agency may revoke a grant and require forfeiture of a performance bond if a grantee fails to cooperate with an Agency investigation or if the Agency determines that the grantee willfully breached the terms of its grant. The Agency may impose fines for non-willful breaches that are not cured in a timely fashion.