

**Before The**  
**U.S. DEPARTMENT OF COMMERCE**  
**NATIONAL TELECOMMUNICATIONS AND**  
**INFORMATION ADMINISTRATION**

**U.S. DEPARTMENT OF AGRICULTURE**  
**RURAL UTILITIES SERVICE**

**FEDERAL COMMUNICATIONS COMMISSION**

<b>In the Matter of</b>	)	
	)	
<b>American Recovery and Reinvestment</b>	)	<b>RUS Docket No.</b>
<b>Act of 2009</b>	)	<b>090309298-9299-01</b>
	)	
<b>Broadband Initiatives</b>	)	<b>FCC GN Docket No. 09-40</b>
	)	

**COMMENTS OF EARTHLINK, INC. AND NEW EDGE NETWORKS, INC.**

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April 13, 2009

## **EXECUTIVE SUMMARY**

EarthLink and New Edge believe that competitive wholesale broadband access is the best mechanism to fulfill the Recovery Act's directives for nondiscrimination and interconnection and ensure "neutrality" on the Internet. Indeed, the Recovery Act is grounded in the premise that broadband service competition best provides consumers unique benefits.

Wholesale broadband access on nondiscriminatory terms, which enables competition from diverse Competing Providers (including Internet Service Providers, Information Service Providers, and competitive carriers ("CLECs")), provides a 'market-based' solution to address net neutrality concerns raised by numerous parties in this and other proceedings. Broadband service competition drives consumer choices, enables access to greater and more diverse sources of information, and permits greater use of Recovery Act-recipient infrastructure as the economic catalysts for local and national information markets. When multiple companies utilize the broadband networks that are deployed, the value of the infrastructure and networks is magnified for all.

Accordingly, the NTIA, RUS and the FCC should establish concrete and enforceable conditions for "last mile" network providers choosing to apply for and to profit from available federal monies. Specifically, the "nondiscrimination" and "network interconnection" obligations of the Recovery Act should be defined to require broadband network providers that receive Recovery Act funds to provide to Competing Providers nondiscriminatory wholesale broadband access across the recipient's entire network, at commercially reasonable rates, along with state-of-the-art electronic ordering and provisioning systems.

The terms of the Recovery Act grants and loans should also explicitly state that Competing Providers are third party beneficiaries under the grant or loan contractual terms so that they would be lawfully entitled to pursue enforcement of such nondiscrimination and interconnection obligations. These specific and readily-achievable conditions will directly fulfill both the letter and the public interest goals of the Recovery Act.

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EarthLink, Inc., and New Edge Networks, Inc.,<sup>1</sup> in response to the *NTIA/RUS Notice*<sup>2</sup> and the *FCC Public Notice*,<sup>3</sup> files these comments on the implementation of the Broadband Telecommunications Opportunities Program (“BTOP”) and the RUS grant/loan program for broadband systems enacted in the American Recovery and Reinvestment Act of 2009 (“Recovery Act”). EarthLink and New Edge limit these comments to the “nondiscrimination” and “interconnection” obligations that will be contractual obligations of the BTOP grants and the

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<sup>1</sup> EarthLink, Inc., is an Internet service provider (“ISP”), providing nationwide Internet access and related value-added services to individual and business customers. The company’s primary service offerings are dial-up and high-speed Internet access services and related value-added services, such as search, advertising and ancillary services sold as add-on features to our Internet access services. In addition, New Edge Networks (“New Edge”), a wholly-owned subsidiary of EarthLink, is a competitive LEC that builds and manages private IP-based wide area networks for businesses and communications carriers using a blend of available access technologies (including DSL, T1 lines, fiber-optic and wireless broadband connections).

<sup>2</sup> 47 Fed. Reg. 10716 (Mar. 12, 2009) (“*NTIA/RUS Notice*”).

<sup>3</sup> *FCC Public Notice*, DA 09-668 (rel. Mar. 24, 2009) (“*FCC Public Notice*”).

statutory preference for RUS grants and loans for “broadband systems that will deliver end users a choice of more than one service provider.” As explained herein, the goals of the Recovery Act will be best promoted by requiring broadband network provider grantees to offer wholesale broadband access with adequate ordering systems as a condition of receiving broadband funds. This wholesale broadband access will empower consumers and businesses and help stem potential anticompetitive abuses, effectively providing a ‘market-based’ solution to the net neutrality concerns raised by numerous parties before Congress and the FCC.

### **INTRODUCTION**

EarthLink and New Edge applaud the work of the NTIA, RUS and the FCC to establish an open and transparent process for promoting broadband services across America, especially in rural areas, through federal government loan and grant programs. All three federal agencies have shown in their actions to date – in the public meetings, in coordinating their respective roles, and in their focus on the core mission of promoting economic development through deployment of broadband services and technologies – a strong dedication to execute fully the letter and purposes of the Recovery Act.

EarthLink and New Edge believe that competitive wholesale broadband access is the best mechanism to fulfill the Recovery Act’s directives for nondiscrimination and interconnection and ensure “neutrality” on the Internet. As noted during the public hearings, the first goal of the Recovery Act’s broadband stimulus funding is to bring broadband services to people and businesses by giving service competitors access to deployed high-speed pipes.<sup>4</sup> Indeed, the

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<sup>4</sup> Statement of Rick Wade, Senior Advisor and Acting Chief of Staff of the Department of Commerce, March 10, 2009, Washington, D.C., *American Recovery and Reinvestment Act of 2009, Broadband Initiative Kick-Off*, Transcript, Alderson Reporting Company, 17-18.

Recovery Act is grounded in the premise that broadband service competition best provides consumers unique benefits.<sup>5</sup>

Wholesale broadband access on nondiscriminatory terms, which enables competition from diverse Competing Providers (including Internet Service Providers, Information Service Providers, and competitive carriers (“CLECs”)), provides a ‘market-based’ solution to address net neutrality concerns raised by numerous parties in this and other proceedings. Broadband service competition drives consumer choices, enables access to greater and more diverse sources of information, and permits greater use of Recovery Act-recipient infrastructure as the economic catalysts for local and national information markets. Robust competitive choices of access to the Internet also promote sustainable adoption of broadband services and use of upstream Internet content and services. In short, encouraging multiple companies to utilize the broadband networks that are deployed magnifies the value of the infrastructure and networks for all.

Accordingly, in delineating the terms of the broadband funding under the Recovery Act, the NTIA, RUS and the FCC should establish concrete and enforceable conditions for “last mile” network providers choosing to apply for and to profit from available federal monies. Specifically, the “nondiscrimination” and “network interconnection” obligations of the Recovery Act should be defined to require broadband network providers that receive Recovery Act funds to provide to Competing Providers nondiscriminatory wholesale broadband access across the

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<sup>5</sup> Broadband service competition driven by “nondiscrimination” and “interconnection” is a central aspect of the Recovery Act’s mandate to NTIA, just as choice of more than one service provider must be a priority for the USDA’s RUS funding decisions. *See*, Recovery Act, Title VI, § 6001(j), Division A, Title I. Additionally, such competition is one of the FCC’s four referenced broadband policy statement principles (“*To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to competition among network providers, application and service providers, and content providers.”) FCC CC Dkt. No. 02-33, *Policy Statement* at ¶4, August 2005, FCC No. 07-31).

recipient's entire network, at commercially reasonable rates, along with state-of-the-art electronic ordering and provisioning systems.

In addition, the terms of the Recovery Act grants and loans should explicitly state that Competing Providers are third party beneficiaries under the grant or loan contractual terms so that they would be lawfully entitled to pursue enforcement of such nondiscrimination and interconnection obligations. These specific and readily-achievable conditions will directly fulfill both the letter and the public interest goals of the Recovery Act.

### **DISCUSSION**

The Recovery Act clearly requires BTOP grantees and RUS funding recipients to make commitments to broadband "nondiscrimination," "interconnection" and consumer choice of service providers. Thus, Division A, Title I of the Recovery Act requires the RUS, when awarding funds, to give priority "to project applications for broadband systems that will deliver end users a choice of more than one service provider." Similarly, Title VI, Section 6001(j) requires NTIA to:

Concurrent with the issuance of the Request for Proposal for grant applications pursuant to this section, the Assistant Secretary shall, in coordination with the Commission, publish the *non-discrimination and network interconnection obligations* that shall be contractual conditions of grants awarded under this section, including, at a minimum, adherence to the principles contained in the Commission's broadband policy statement (FCC 05-15, adopted Aug. 5, 2005).

Together, these requirements evidence the clear intent of Congress and the Administration to enhance economic recovery through a competitive broadband framework.

It is unquestioned that the Recovery Act is a bold step to meet pressing economic circumstances and that broadband has a vital role to play. In the public hearings, wholesale broadband access has been specifically identified as the mechanism to meet the needs of today's

un-served and underserved populations.<sup>6</sup> While there are many paths to competition, EarthLink and New Edge urge that the most rapid, specific and straightforward approach is to adopt wholesale broadband service access obligations for broadband network providers seeking Recovery Act funds. Given the industry's ample practical, legal and technological experience with wholesale access, a specific requirement that broadband network providers offer wholesale Layer 3 broadband access with adequate wholesale automated ordering processes can be readily implemented and will swiftly meet the Recovery Act's goals.

**1. Recovery Act Recipients Must Commit to Offer Wholesale Layer 3 Access**

A contractual condition of eligibility for receipt of Recovery Act broadband funds should expressly require that any BTOP grantee/RUS recipient that is a broadband network provider offer wholesale broadband access for Competing Providers (*i.e.*, Information Service Providers including ISPs and CLECs) across the recipient's entire network. To promote efficient, straightforward and rapid implementation, the obligations should be further defined as follows:

- (a) Any recipient that is a broadband network provider (regardless of technology or platform) shall offer layer 3 broadband service access (at least 1.5 Mbps downstream) on a wholesale basis to Competing Providers;
- (b) The wholesale broadband access service shall be priced at a commercially-reasonable discount from retail prices, including 5% to 15% tiered discounts for Competing Providers delivering higher volumes;

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<sup>6</sup> Statement of Valerie Fast Horse, Council Member and Director, IT, Coeur d'Alene Tribe, March 17, 2009, Las Vegas, NV, Session One, *American Recovery and Reinvestment Act of 2009 Broadband Initiative*, Transcript, at 74.

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- (c) The recipient shall not impose any Early Termination Fees or installation fees in the wholesale broadband service where the Competing Provider furnishes the end user customer premises equipment (“CPE”) and customer care; and
- (d) Wholesale service rates and terms shall be offered on a public and non-discriminatory basis to all, including affiliates of the recipient, starting within six (6) months of accepting the Recovery Act funds, and shall be maintained for at least five (5) years.

These specific requirements will address the practical and substantial impediments that competing service providers face when seeking to bring their competitive broadband options to users, especially in underserved areas. Rather than promote particular broadband providers, these basic obligations create the fertile ground for broadband service providers to meet the needs of consumers and thereby encourage the sustainable adoption of broadband services.

Notably, there is ample precedent today in both the commercial arena<sup>7</sup> and as a legal matter<sup>8</sup> to ensure that these obligations are clear. As such, these contractual obligations will best meet the Recovery Act’s goals of speedy broadband service deployment, stimulating job growth and greater economic expansion through broadband services.

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<sup>7</sup> For example, EarthLink provides DSL via wholesale arrangements with AT&T, Qwest, Verizon and Covad, and it provides cable modem service via wholesale arrangements with Time Warner Cable and Comcast. *See* EarthLink 2008 10-K statement, at 3.

<sup>8</sup> Thus, there is substantial precedent under Communications Act and in FCC decisions fleshing out the practical scope and regulatory parameters of nondiscrimination, resale, wholesale access and related requirements. *See, e.g.*, 47 U.S.C. §§ 201, 202, 251, 252. *See also, Policy and Rules Concerning the Interstate, Interexchange Marketplace Report and Order*, 16 FCC Rcd. 7418, ¶¶ 46-48 (2001) (noting nondiscrimination obligation for wholesale ISP access and resale under Title II); *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd. 19237, ¶ 21 (1999); *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd. 24011 (1998); *Third Computer Inquiry, Report and Order*, 104 F.C.C. 2d 958 (1986).

**2. Recovery Act Fund Recipients Must Provide Adequate Wholesale Automated Ordering Processes**

Central to utilizing wholesale broadband access is the availability of adequate automated ordering processes to ensure orders can be efficiently and rapidly placed to serve end users. Especially in underserved areas and outside of top tier markets, outdated and manual ordering processes increase delays and are error-prone. Today and for our future growth, up-to-date ordering systems are essential to enhance broadband deployment and adoption. As such, BTOP grantee/RUS recipients subject to the wholesale broadband service access obligation should offer to all Competing Providers:

- (a) A “state-of-the-art” automated electronic ordering, provisioning and escalation system (“System”) that is nondiscriminatory and effective, permitting Competing Providers to order any communications services of the BTOP grantee (*i.e.*, not just services where BTOP moneys expended) across grantee’s entire service area. The System should permit Competing Providers to receive “real-time” updates of order status, to initiate and file repair and trouble tickets, etc. System should permit Competing Providers to log into and use all functionalities via Internet connection without additional charges (and any software necessary should be offered under no-fee license); and,
- (b) A single point of interconnection with Competing Providers for traffic exchange across the grantee’s network.

State-of-the-art ordering systems benefit all broadband users, network providers and service competitors, further enhancing the sustainability of deployed broadband infrastructure. Further, just as with the basic wholesale broadband access requirement, there exists today ample precedent to implement these obligations.

**3. Competing Providers and Consumers Should Be Deemed Third Party Beneficiaries**

Finally, to ensure effective compliance of these conditions without involving the respective federal agencies in complex litigation, the BTOP/RUS contracts and loan grants should establish expressly that Competing Providers are “third-party beneficiaries” under the award contracts. With express third-party beneficiary status, Competing Providers will have the ability to negotiate effectively with loan/grant recipients and, when necessary, to enforce BTOP grantee’s nondiscrimination and interconnection obligations for the benefit of the public interest.

EarthLink and New Edge recognize that the Recovery Act broadband funds are just a first step in our nation’s broadband future, albeit a vital one. At this juncture, clear and specific implementation is critical. These two conditions and enforcement mechanism outlined above are specific and would not involve the NTIA, the FCC or RUS in significant debates concerning the scope or legitimate purposes of the “net neutrality” debate. To the contrary, wholesale broadband access and operations systems as outlined above have been-well established in the telecommunications and Internet marketplace for years. There can be no legitimate argument from any side of the “Net Neutrality” debate that they cannot comprehend these two comprehensive wholesale conditions.

Further, these conditions would interject the significant benefits of real marketplace competition for consumer choice between providers.<sup>9</sup> For broadband consumers within the service areas of BTOP/RUS recipients, and for the nation as a whole, this broadband competition

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<sup>9</sup> As recently explained by the Open Internet Coalition, “The BTOP language instructs the NTIA to make sure that publicly-funded networks are open;” to realize that goal OIC recommends that “[g]rant recipients must offer bandwidth for Internet service upon reasonable request, on rates, terms and conditions that are just, reasonable, and nondiscriminatory.” Letter from Markham Erickson, Executive Director, Open Internet Coalition, to Anna Gomez, Dep’ty Ass’t Sec’y, NTIA (Mar. 9, 2009).

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will mean a greater choice of providers and services, greater price competition, and a higher commitment to customer service/quality.

**CONCLUSION**

For the foregoing reasons, EarthLink urges the NTIA, RUS and the FCC to implement the broadband initiatives of the Recovery Act in a manner that ensures the benefits for consumers of rigorous competition between broadband providers, as specifically outlined above.

Respectfully submitted,



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