

Before the
DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration

DEPARTMENT OF AGRICULTURE
Rural Utilities Service

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| Joint Request for Comments on |) | NTIA Docket No. |
| Implementing the American Recovery |) | 090309298-9299-01 |
| and Reinvestment Act of 2009 |) | |

COMMENTS

These comments are filed on behalf of the Media Center at New York Law School and the law firm of Garvey Schubert Barer (the “Commenters”). The Commenters appreciate the opportunity of respond to the questions presented in the Joint Request for Information and Notice of Public Meetings (the “Joint Request”), in the above-referenced matters.

The American Recovery and Reinvestment Act (the “ARRA” or the “Act”) directs the National Telecommunications and Information Administration (“NTIA”) and the U.S. Department of Agriculture’s Rural Utilities Service (“RUS”) to undertake a nationwide broadband initiative. This initiative is designed to bring broadband service to those areas of the Nation that are underserved or unserved and to create new jobs by investing in new national directives. To assure that these goals will be achieved, the Act contains broad eligibility qualifications that make a wide range of entities eligible to receive grants.

Among the many questions on which NTIA and RUS seek comment are criteria for evaluating applications. These comments address one aspect of these criteria, namely the costs applicants will incur in preparing grant applications and designing broadband systems they propose.

The ARRA sets forth an extremely aggressive funding timetable such that new projects will be deployed and built within little more than two years. In light of the ARRA’s accelerated

program schedule, Federal authorities need to develop standards for costs to be recoverable under the ARRA.

In order for grantees under the NTIA's Broadband Technology Opportunities Program ("BTOP") or under the RUS' loan and grant programs to implement the ARRA directives effectively, the federal agencies must permit certain costs other than capital costs to be included in grant and loan applications. The costs that are eligible to be funded must extend beyond the costs of hardware deployment and include legal, engineering, technical and other ancillary professional transactional costs. The funding of these costs is an integral part of the construction of any broadband network. NTIA and RUS must therefore ensure that where grantees include these costs within any grant or loan proposal, the government will cover those costs at either the full value under the RUS program or at the 80% level under a BTOP grant.

A failure to include such costs in the grant program would particularly disadvantage smaller and more localized applicants which will need advice from consultants and vendors on how to plan an application and configure a proposed system. Applicants must therefore be encouraged to undertake these planning activities immediately in order to ensure that their plans are ready for implementation upon the receipt of a grant from NTIA or RUS.

Absent FCC mapping, which is due next February, sound broadband deployment proposals will require considerable research. Consulting engineers may be required to assess the existing services available in any region that could be used for broadband deployment and will analyze topography to determine what types of wireless, satellite or wireline technologies might be most appropriate for the area. Finally, engineers will be required to design networks, interface with hardware manufacturers and conduct deployed testing to ensure that constructed networks perform as intended. Legal counsel will inevitably be required, as well, on many

different points ranging from technology testing and proofing standards to negotiations of rights of way and asset access.

Those that receive federal funds for any new broadband deployment initiative under the ARRA must support their respective projects by contributing 20% of the total cost of construction and deployment. As the FCC set forth in its 800 MHz proceeding, communications projects often involve costs that are not directly related to the provision of broadband. These costs can include:

- Inventorying of current equipment and infrastructure facilities.
- Evaluating proposed frequencies or technologies (including use of Frequency Consultants)
- Defining the interoperability environment
- Equipment costs required for configuration, including programming, equipment upgrades
- Filing FCC applications where necessary
- Installation, testing, and engineering associated with configuration.
- Legal fees associated with negotiating agreements
- Preparing the cost estimates for implementation
- Educational events associated with network construction

While NTIA and RUS should allow grantees to use grant or loan money to fund transactional costs, these costs must not be excessive. We therefore propose that NTIA and RUS adopt a standard similar to the one adopted by the FCC for permitting reimbursement of expenses. That standard should permit any “reasonable expense” legitimately and prudently incurred in preparing or prosecuting the application or in carrying out the activities authorized by the grant.¹ To provide further guidance, NTIA and RUS would take a hard look at costs that exceed a fixed percentage of the hard costs involved in a network construction. In carrying out this “hard look” requirement, NTIA or RUS should scrutinize any proposals that exceed its standards by requiring the applicant to document and justify the excessive costs of the request.

¹ See 47 C.F.R. § 73.3597(c)(2) (creating a similar standard for costs that are permitted to be absorbed by a party seeking to acquire a construction permit for an unbuilt FCC facility).

Although entities provide legal, engineering or technical support to groups that are seeking to build networks, applicants do not have a “directory” of relevant services. We recommend that NTIA and RUS create a list of consulting groups that offer broadband-related services and that certify they will provide legal, engineering and technical consulting services on terms that will meet NTIA/RUS standards. Such a list would be particularly useful to smaller applicants who will need professional help in deploying a new network within the ARRA’s 2 year substantial construction deadline.

In summary, we recommend that NTIA and RUS permit that legal, engineering or other associated transactional or professional costs be funded under the ARRA and that NTIA and RUS establish and maintain a list of consultants that can provide applicants the practical advice they will need at a cost they can afford. Allowing these costs to be included and funded will ensure that the congressional directive of broadband deployment as a means of stimulating economic growth will be met in an efficient and expeditious manner.

Respectfully submitted,

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