Before the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
And the
RURAL UTILITIES SERVICE
Washington, D.C.

In the Matter of	)	
Broadband Initiatives Program and Broadband Technology Opportunities Program	)	Docket No. 0907141137-91375-05

COMMENTS OF AT&T INC.

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November 30, 2009

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INTRODUCTION AND EXECUTIVE SUMMARY

The National Telecommunications and Information Administration ("NTIA") and the Rural Utilities Service ("RUS") are to be commended for their initial efforts in implementing the broadband stimulus provisions of the Recovery Act.[1] However, as recognized in the recently released Joint Request for Information, the opportunity exists for improvement.[2] In AT&T's view, the primary means by which the Broadband Initiatives Program ("BIP") and the Broadband Technology Opportunities Program ("BTOP") can be improved is by better targeting support for anchor institutions and middle mile projects in unserved and underserved areas.

Congress recognized the importance of anchor institutions in the Recovery Act, and broadband projects involving anchor institutions are entitled to and worthy of funding from RUS and NTIA. Nevertheless, the rules for the first round of funding precluded anchor institutions from obtaining infrastructure funding unless they effectively functioned as broadband network operators. AT&T submits that the rules for the second funding round should be modified in two respects to facilitate more robust funding for anchor institutions consistent with Congressional intent. First, an anchor institution should be eligible for broadband stimulus funding if the institution uses those funds to obtain a high-capacity connection to an existing broadband network. Second, the definition of "eligible expenses" should be expanded to cover the non-recurring and recurring service expenses the anchor institution will incur in obtaining that high-capacity connection from a broadband service provider. These changes will further the interests of anchor institutions and their constituencies as well as advance the goals of the Recovery Act.

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[1] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009) ("Recovery Act").

[2] *See* Joint Request for Information, 74 Fed. Reg. 58940, 941 (2009) ("RFI") (RUS and NTIA seek to improve the applicant experience and strengthen the program impact of BIP and BTOP in achieving Recovery Act objectives).

Likewise, RUS and NTIA should fine tune the criteria used to evaluate middle mile broadband infrastructure projects to align more closely with Congress's intent. The current approach to middle mile funding poses the significant risk that RUS and NTIA will subsidize projects involving the overbuild of broadband infrastructure – a result that would undermine Congress's goal of using taxpayer dollars to fund economically viable projects for broadband deployment that offer long-term public benefits. For purposes of the second funding round, RUS and NTIA should: (i) adopt the same definition of "middle mile" as used by the FCC; and (ii) require an applicant seeking BIP and BTOP funds for a middle mile project to show that its proposal will extend service to an unserved or underserved area and will provide lower cost service than is available from existing service providers.

AT&T also proposes other changes to BIP and BTOP. First, applicants for infrastructure funding under BIP and BTOP should be required to disclose publicly the data upon which they rely and the methodology they used to determine that a proposed funding service area is unserved or underserved. Although RUS and NTIA should be careful to protect proprietary and commercially sensitive information, disclosures regarding the purportedly unserved or underserved nature of the proposed funding area are unlikely to raise such concerns. Furthermore, the disclosure of such information would ensure transparency and better enable existing service providers to evaluate and respond to infrastructure applications, which in turn will allow RUS and NTIA to ensure that stimulus funds are not spent on unnecessary or unsustainable projects. At the very least, the application process should be modified to facilitate the ability of existing service providers to submit information that RUS and NTIA will need in evaluating an applicant's representation that the proposed funded service area is "unserved" or "underserved."

Second, RUS and NTIA should clarify the application of the nondiscrimination and interconnection requirements under BIP and BTOP. Consistent with the Recovery Act, such requirements should apply only to the applicant that is awarded funding from RUS and NTIA. This approach would eliminate confusion regarding the reach of nondiscrimination and interconnection requirements, would advance the economic viability of proposed infrastructure projects, and would facilitate compliance efforts by RUS and NTIA.

RUS and NTIA should incorporate these modest changes in the next round of broadband stimulus funding. Doing so would help RUS and NTIA achieve the Recovery Act's job-creation and broadband-development goals by getting funding into the hands of those entities most ready and able to meet those goals.

DISCUSSION

I. RUS and NTIA Should Modify BIP and BTOP to Better Accommodate the Broadband Needs of Anchor Institutions and The Constituencies They Serve.

Consistent with the request by RUS and NTIA for "suggestions" as to "how they can better target their remaining funds to achieve the goals of the Recovery Act,"[3] AT&T proposes that BIP and BTOP be modified to better accommodate the needs of anchor institutions. RUS and NTIA can do so by directly funding anchor institutions – including hospitals, libraries, schools, community colleges, public-safety organizations, community centers, and even governmental agencies – while obviating the need for such institutions to function as broadband network operators.

Congress was clear that the Recovery Act was intended to provide and improve broadband access to anchor institutions.[4] As AT&T highlighted in its initial comments,

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[3] *See* RFI, 74 Fed. Reg. at 58942.

[4] *See* Recovery Act, § 6001(b)(3).

supporting anchor institutions directly will advance many of the Recovery's Act's goals.[5] To begin with, funding anchor institutions will promote the Recovery Act's economic goals as many such institutions already have designed "shovel-ready" projects that have been shelved by budget cuts or difficult economic conditions. Direct funding of anchor institutions will also advance the Recovery Act's broadband deployment and adoption goals by enabling these institutions to use broadband to fulfill their missions, which the Recovery Act stresses as a priority.[6] In particular, those institutions can bring broadband to bear on the educational, health-care, and job-training needs of "vulnerable" populations—another statutory priority.[7] And in many cases, providing connectivity to public and non-profit institutions accessible to the public—such as libraries or community centers—may be the fastest means of bringing broadband to the "greatest population of users in the area."[8]

The importance of anchor institutions to achieving the goals of the Recovery Act was underscored in testimony in the FCC's workshops conducted in connection with the National Broadband Plan.[9] For example, at an August 19, 2009 workshop, Thomas Kamber, Executive Director of Older Adults Technology Services (OATS), when talking about the best methods for

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[5] *See* American Recovery and Reinvestment Act of 2009 Broadband Initiatives, NTIA and RUS Docket No. 090309298-9299-01, Comments of AT&T Inc. pp. 3-5 (filed April 13, 2009).

[6] *See* Recovery Act § 6001(b)(3)(A), (g)(3), (g)(5).

[7] *See id.* § 6001(g)(4), (h)(2)(C).

[8] *Id*. § 6001(h)(2)(A)-(B), (b)(1)-(2); *see also* RFI at 58942 (noting that "ensuring that anchor institutions … have high-speed connectivity to the Internet can contribute to sustainable community growth and prosperity" by "stimulat[ing] development of last mile services that would directly reach end users in unserved and underserved areas").

[9] *See* Federal Communications Commission *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, A National Broadband Plan for Our Future,* GN Docket Nos. 09-137, 09-51, Notice of Inquiry, FCC 09-65 (rel. Aug. 7, 2009).

reaching those populations that underutilize broadband (seniors in particular), stated that "it's critical to invest in anchor institutions."[10] At an August 20, 2009 workshop, Carrie Lowe, Director, Program on Networks for the Office of Information Technology Policy, American Library Association, noted that "as people come into the library, experience broadband for the first time, demand is going to grow both within the library and within the home. So we see our role as that community anchor institution."[11] Despite the importance of anchor institutions to broadband deployment and adoption, the Bill and Melinda Gates Foundation has found that approximately 80 percent of anchor institutions lack access to fiber facilities.[12]

As initially constructed, the BTOP and BIP programs, while well-intentioned, were not designed to provide broadband infrastructure funding to anchor institutions. In essence, in order to receive funding, the broadband infrastructure programs require that an applicant construct and operate a broadband network, which the vast majority of anchor institutions are unwilling or unable to do. This requirement is explicit in the current definitions of "last mile" and "middle mile" projects for which infrastructure funding is limited, although neither term is contained in the Recovery Act. A "last mile" project is defined as "any infrastructure project the predominant purpose of which is to provide broadband service to end users or end user-devices …."[13] For a

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[10] FCC *National Broadband Plan Workshop*: Programmatic Efforts to Increase Broadband Adoption and Usage – What Works and What Doesn't?. Transcript, at 31 (August 19, 2009) (transcript available at http://www.broadband.gov/docs/ws_11_efforts_adoption.pdf) (last accessed on November 18, 2009).

[11] FCC *National Broadband Plan Workshop*: Education, Transcript, at 165-66 (August 20, 2009) (transcript available at http://www.broadband.gov/docs/ws_13_edu.pdf) (last accessed on November 18, 2009).

[12] *See* Federal Communications Commission *Comment Sought on Cost Estimates for Connecting Anchor Institutions to Fiber*, DA 09-2194 (rel. October 8, 2009).

[13] *See* Department of Agriculture, Rural Utilities Service, Department of Commerce, National Telecommunications and Information Administration, *Broadband Initiatives Program and Broadband Technology Opportunities Program*, Notice of Funds Availability, 74 Fed. Reg. 33104, 33111 (July 9, 2009)("NOFA").

"middle mile" project under BIP, applications "must connect at least two points without predominantly providing broadband service to the premise of end users, and must be capable of bringing broadband service to eligible service areas."[14] An anchor institution could not meet either of these definitions unless it operated a broadband network used to provide broadband service either to end users or other entities.[15]

In very limited circumstances, an anchor institution can construct and operate a broadband network, but only at great expense. Not surprisingly, most anchor institutions appear unwilling to assume the role of broadband network operator. We believe that is why RUS and NTIA received so few broadband infrastructure applications from anchor institutions in the first round of funding.[16]

The conclusion is clear: most anchor institutions do not want to be in the business of owning, operating, and maintaining a broadband network. For the vast majority of anchor

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[14] *Id*. at 33114. Under BTOP, "applications for Middle Mile projects must be for unserved or underserved areas and have a predominant purpose other than providing broadband service to end users or to end-user devices and may include interoffice transport, backhaul, Internet connectivity, or special access." *Id*.

[15] *See* BIP/BTOP Frequently Asked Questions at p. 20 (http://broadbandusa.sc.egov.usda.gov/files/BIP_BTOP_FAQ_I-III.pdf) (last accessed on November 18, 2009) (noting that community anchor institutions are eligible to participate and that "one such project may be proposing to create a regional fiber ring to connect schools, hospitals, or other community anchor institutions.").

[16] Based on AT&T's review of the information released by RUS and NTIA regarding first round funding applicants, the agencies received approximately 40 broadband infrastructure applications from anchor institutions, which represents less than 1 percent of the total infrastructure applications filed. *See* Press Release, *Commerce and Agriculture Announce Strong Demand for First Round of Funding to Bring Broadband, Jobs to More Americans* (Aug. 27, 2009) (noting that approximately 1,500 broadband infrastructure applications were filed in the first funding round) (available at http://www.ntia.doc.gov/press/2009/BTOP_BIP_090827.html). Anchor institutions located in service areas of broadband service providers that receive funding for last mile projects may indirectly benefit from BIP and BTOP, since recipients of last mile funding must provide broadband service to all end-users, including anchor institutions. *See* NOFA, 74 Fed. Reg. at 33108. However, anchor institutions that are not so fortunate to be located in such an area have limited options for obtaining funding for broadband service under existing program rules.

institutions, a more cost-effective solution is to purchase connectivity to an existing middle mile network from a broadband service provider. The BIP and BTOP programs should be modified to permit anchor institutions to obtain the funding necessary to obtain such connectivity.

The shortcomings of the current programs cannot be overcome solely by targeting funds for Middle Mile "Comprehensive Community" projects "that will deliver middle mile infrastructure facilities into a group of communities and connect key anchor institutions within those communities."[17] This proposal is predicated upon large infrastructure projects that will require considerable time, effort, and resources to implement. Anchor institutions, many with limited budgets and constrained resources, will not be able to orchestrate a Comprehensive Community project by the deadline for the next round of funding (which is expected to be sometime in the first quarter of 2010). Moreover, the construction of an entirely new middle mile network creates the same likelihood of overbuilding as the current approach to middle mile projects, which is discussed in greater detail below.

Instead of targeting funds for large community projects, RUS and NTIA can better help anchor institutions and their constituents by facilitating their ability to obtain broadband infrastructure funding directly to meet their individual broadband needs; this also would better align the BTOP and BIP programs with the intent of the Recovery Act. RUS and NTIA can do so by implementing two measures in the next funding round that will enable anchor institutions to connect to existing broadband infrastructure.

First, RUS and NTIA should create a new category of last mile projects that would allow anchor institutions to receive funds directly for the facilities or equipment necessary to establish a last mile connection to an existing broadband network. The rules should specify that anchor

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[17] *See* RFI, 74 Fed. Reg. at 58942.

institutions are not required to serve all end users or provide broadband service to other entities in a service area.

Second, RUS and NTIA should expand the definition of "eligible costs" to cover nonrecurring (*e.g.,* special construction charges) and recurring service expenses incurred by an anchor institution in obtaining a high-speed connection from a broadband service provider. Under the current rules, costs eligible for funding under BIP and BTOP are limited to capital expenses.[18] While this limitation is appropriate for a broadband network operator -- which presumably will enjoy a revenue stream from the broadband services it provides using a government-funded network that could cover ongoing operational expenses – that is not the case for an anchor institution purchasing connectivity from a broadband service provider. Unlike broadband network operators, anchor institutions are unlikely to use or view broadband as an income stream, since their missions, by definition, are community focused. Under the circumstances, the current prohibition on using BIP or BTOP funds for nonrecurring or recurring service expenses precludes anchor institutions from benefiting from the programs.

At the same time RUS and NTIA should clarify the nondiscrimination and interconnection requirements for anchor institutions that obtain funding under this proposed mechanism. These requirements currently presume that the recipient of funding will be a network operator providing broadband service to end users or other entities, which, under the approach adopted by RUS and NTIA, triggers the obligation to allow others to interconnect with that network and to use that network to provide broadband service without "discrimination."[19] But these requirements will have a much different application to an anchor institution that is not

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[18] *See* NOFA, 74 Fed. Reg. at 33112.

[19] *Id*. at 33111 ("All Broadband Infrastructure (both BIP and BTOP) applicants must commit to the following Nondiscrimination and Interconnection Obligations …".).

operating a broadband network, but rather is merely using funds under BIP or BTOP to obtain broadband connectivity from an existing service provider. Thus, NTIA and RUS should clarify that anchor institutions that obtain funding as proposed above may specify and "self define" how they plan to comply with the general nondiscrimination and interconnection requirements.[20]

II. RUS and NTIA Should Fine Tune the Criteria for Evaluating Funding Proposals for Middle Mile Broadband Infrastructure Projects

In the first funding round, RUS and NTIA defined a "Middle Mile project" as a "broadband infrastructure project that does not predominantly provide broadband service to end users or to end-user devices, and may include interoffice transport, backhaul, Internet connectivity, or special access."[21] A middle mile project was eligible for funding "if one interconnection point terminates in a proposed funded service area that qualifies as unserved or underserved for Last Mile projects."[22] Under the round one approach, RUS and NTIA utilized a very broad concept of a "middle mile" project and placed few practical limits on the types of such projects that could be funded.

But this approach ignores the multitude of middle mile options that exist in today's market. For example, AT&T has deployed extensive fiber facilities to a vast majority of central offices and Managed Internet Service points of presence throughout its 22-state incumbent wireline territory. Such fiber facilities enable the provision of a broad array of broadband services including DS3, SONET and Ethernet.

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[20] *See* RFI, 74 Fed. Reg. at 58944 (requesting comment as to whether nondiscrimination and interconnection requirements should "continue to be applied to all types of infrastructure projects regardless of the nature of the entity").

[21] *See* NOFA, 74 Fed. Reg. at 33109.

[22] *Id.*

And AT&T is not alone. As consumer demand for broadband services has continued to increase – and in particular, with the explosion in consumer demand for *wireless* broadband services – competitive options for middle mile facilities are rapidly expanding throughout urban and suburban areas (and increasingly in rural areas as well).[23] An extraordinarily large array of companies are rushing to build new high-capacity facilities or expand their existing ones, ranging from CLECs like Level 3 to the cable companies to wireless providers like Clearwire and FiberTower, and dozens of others.[24] For example, cable companies already have ubiquitous cable and fiber networks, which they have been investing billions of dollars to upgrade to offer high-capacity transport and Ethernet connectivity.[25]

To be sure, there are certain *rural* areas where there may be no middle mile facilities or where the cost of such facilities may be extremely expensive.[26] The lack of viable alternatives in

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[23] *See*, *e.g.*, Reply Comments of AT&T Inc., WT Docket No. 09-66, at 11, 22, 29-30 (filed July 13, 2009); Comments of AT&T Inc., WT Docket No. 09-66, at 20, 25-26, 33-34 (filed June 15, 2009); AT&T Supplemental Comments, WC Docket No. 05-25, Casto Declaration at ¶¶ 7-23, 55-60 (filed Aug. 8, 2007); AT&T Supplemental Reply Comments, FCC WC Docket No. 05-25, at 7-23 (filed Aug. 15, 2008) (summarizing sworn testimony of AT&T, Verizon, Qwest and Embarq and identifying the detailed Exhibits submitted by these incumbents).

[24] *See* Letter from James W. Cicconi, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-25, at 2-4 (filed June 22, 2009).

[25] S*ee*, *e.g.*, Dallas Clement, FCC *National Broadband Plan Workshop*; Deployment – Wired Transcript, at 35 (Aug. 12, 2009) ("Relative to wireless back haul from cell sites . . . in our commercial business it's a growth area. We're getting calls in our franchises from wireless providers who are preparing for their 4G networks and they're looking for lower cost alternatives for back haul. And because we're there and we can do sort of spurs off of our network, we feel as though it's a big growth area and we're deploying capital to that area to be able to satisfy that demand"); Neville Ray, FCC *National Broadband Plan Workshop*; Wireless Broadband Deployment – General Transcript, at 45-46 (Aug. 12, 2009) ("I think that competitive forces work in metro areas where there's a lot of fiber, be that from the utility company, from the cable company, from the existing, you know, telco provider"); Yankee Group 4G Network Backhaul Summit, *PowerPoint Presentation of CFN Services*, at 4 (Sept. 15, 2009) ("Time Warner, Comcast, Cox and other MSOs are adding cell sites to their existing (typically Ethernet) fiber networks").

[26] *See*, *e.g.*, FCC *National Broadband Plan Workshop*, Wireless Broadband Deployment – General; Transcript, at 45-46 (Aug. 12, 2009) (T-Mobile USA Senior Vice President

such rural areas is attributable to two factors -- high distance and low population densities. Because rural ISPs are farther from Internet connection points, their middle mile facilities must cover much longer distances, which means that the physical facilities necessary to connect the ISP to the Internet will cost more.[27] In addition, population densities in these rural communities are much lower, and therefore these higher costs must be spread over fewer customers. The result, inevitably, is higher per-user (or per megabit) costs.

These fundamental challenges – high distance and low population densities in rural areas – cannot be changed. However, the marketplace has developed many creative market solutions to rural distance/density concerns, and there are powerful economic forces drawing more and more investment in middle mile facilities – both wireline and wireless – to serve even remote rural areas.[28] Nonetheless, conditions do, and will continue to, vary, and RUS and NTIA should

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Engineering, Neville Ray) (noting that there are plenty of fiber backhaul options in urban and suburban areas).

[27] *See*, *e.g.*, Bringing Broadband To Rural American, Report on a Rural Broadband Strategy, Michael J. Copps, ¶ 114 (May 22, 2009) ("Rural Broadband Report") ("Although rural broadband networks are fundamentally similar to broadband networks in non-rural areas in that they involve both a local access or distribution network and a backhaul component, rural broadband networks are also typically built in locations that are geographically more removed from internet backbone nodes."); *id.*, ¶ 114, n.182 (quoting NECA "2001 study that 55% of rural switches are more than 70 miles from an Internet Backbone provider node and 10% are more than 200 miles away").

[28] For example, in the FCC's broadband workshops, numerous participants confirmed that wireless backhaul options are increasingly available and cost-effective in rural areas *See* Neville Ray, FCC *National Broadband Plan Workshop*; Wireless Broadband Deployment – General Transcript, at 45-46 (Aug. 12, 2009) ("as you move to suburban fringe and rural areas, those [fiber] opportunities are much tougher to find, but there are good microwave solutions, as Ed [Evans, Stelera Wireless] mentioned, and some carriers are totally deploying their back haul solutions on a microwave basis"); Hunter Newby, FCC *National Broadband Plan Workshop*; Deployment – Wired Transcript, at 30 (Aug. 12, 2009) ("it's the combination of fiber and microwave, which for backhaul from towers that don't have much fiber can cover a much larger swath of the country along this way"); Tom Sawnobori, FCC *National Broadband Plan Workshop*; Wireless Broadband Deployment – General Transcript, at 47 (Aug. 12, 2009) ("There are microwave solutions of significant bandwidth that will support LTE and other fourth generation technologies"); *id.* at 46 (Jake Macleod, Bechtel Telecommunications) ("Obviously, a lot of carriers are now moving to Ethernet, and wireless is definitely a solution, but typically only where you can't get fiber or high-speed Ethernet solution").

target funding in the second round for the build out of middle mile infrastructure in unserved and underserved areas where rural middle mile distance and density issues truly stand as an obstacle to the Nation's broadband goals.

This approach is consistent with the goals of the Recovery Act, the primary purposes of which are to deploy broadband to unserved and underserved consumers.[29] But these purposes will not be achieved if BIP and BTOP funding is diverted to subsidize the construction of largely duplicative networks or to finance upgrades to existing networks, as applicants apparently sought to do in the first funding round.[30]

To address these shortcomings, RUS and NTIA should design the criteria for funding proposed middle mile broadband infrastructure projects to better align them with the goal of serving unserved and underserved areas. First, RUS and NTIA should adopt the FCC's definition of "middle mile," which the FCC defines as "the transport and transmission of data communications from the central office, cable headend, or wireless switching station to an Internet point of presence."[31] Adopting this definition would more appropriately target funds to projects to deploy broadband to unserved and underserved consumers and would be consistent

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[29] *See, e.g.,* Recovery Act, §§ 6001(b)(1), (2).

[30] Sean Buckley, *Level 3 poses itself as middle mile broadband provider*, Fierce Wireless (Aug. 23, 2009), http://www.fiercetelecom.com/story/level-3-poses-itself-middle-mile-broadband-provider/2009-08-23 (Level 3 has applied for middle mile funds, asserting that "it plans to use a combination of the funding and its own money to install new equipment in existing buildings located in rural areas along the route of its network" to "create . . . middle mile connections" to serve its rural customers, as well as "government agencies," "local schools" and "colleges.").

[31] Public Notice, *Comment Sought On Impact Of Middle And Second Mile Access On Broadband And Development, NBP Public Notice #11 FCC 09-66*, GN Docket Nos. 09-47, 09-51, 09-137 (rel. Oct. 8, 2009).

with the coordination efforts between those federal agencies responsible for broadband policy.[32] Under this definition, applicants seeking middle mile infrastructure funding should be required to disclose publicly the locations of the two end points of their proposed middle mile service, at least one of which must be located in an area that qualifies as unserved or underserved for Last Mile projects.

Second, RUS and NTIA should require an applicant seeking BIP and BTOP funds for a middle mile project to show that its proposal is the most economically viable alternative for serving an unserved or underserved area and will provide lower cost service than is available from existing service providers. Little purpose would be served in using BIP and BTOP funds to construct a large fiber network solely to provide a single interconnection point in an unserved or underserved area, when such construction largely duplicates an existing fiber network and when other more economically viable alternatives to provide such service may exist. The same is true for applications that seek funding for projects that would result in rural ISPs paying the same or more for broadband as compared to existing service alternatives.

III. RUS and NTIA Should Require Applicants to Disclose Publicly the Basis for Their Determination That the Proposed Service Area is Unserved or Underserved.

Consistent with the importance of transparency to the Recovery Act funding process,[33] all applicants should be required to disclose publicly the data and methodology upon which they relied to determine that their proposed service areas are unserved or underserved. The disclosure of such information is essential for an existing service provider to respond completely to

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[32] *See* Rural Utilities Service, Broadband Initiatives Program (BIP) Quarterly Program Status Report, at 5 (Nov. 17, 2009) ("As requested by Congress and the White House, RUS, NTIA, and the FCC are working together to leverage authorities and resources to develop and implement a coordinated Federal government approach to address the challenge of expanding the access and quality of broadband services across the country").

[33] *See* RFI, 74 Fed. Reg. at 58942.

representations in an application regarding the unserved or underserved status of the proposed service area and for RUS and NTIA to evaluate fully whether an application qualifies for funding. For example, in the first funding round, existing service providers were handicapped in their ability to respond to applications seeking BIP or BTOP funds for a middle mile project because the location of the proposed interconnection point that purportedly terminated in an unserved or underserved area was not publicly disclosed.

RUS and NTIA are understandably interested in ensuring that the broadband infrastructure projects funded by BIP and BTOP make economic sense.[34] It would be a waste of taxpayer money and would serve no public benefit if BIP and BTOP funds were used to pay for projects that are not economically viable. RUS and NTIA should be particularly wary of projects that propose constructing facilities in areas where broadband service is already available. Adding more competitors to areas already served by existing providers is not a surefire path to economic viability, since the new entrant must be able to entice customers away from existing providers (in addition to adding new customers) – and it does nothing to address the needs of consumers in areas that are not served by *any* broadband providers.

RUS and NTIA cannot be expected to assess this risk in a vacuum. RUS and NTIA need data from as many sources as possible. Complete and comprehensive broadband maps are unlikely to be available by the time the second funding round is underway. Accordingly, RUS and NTIA will need as much information as possible from existing service providers in order to determine whether the proposed service area is truly unserved or underserved as represented by the applicant. (AT&T attempted to do its part in round one when commenting upon specific projects). But any such information is likely to be incomplete without existing service providers

[34] *Id*. at 58944 (requesting comment on how NTIA and RUS should assess the cost effectiveness and cost reasonableness of a particular project).

having access to the data and methodology upon which the applicant relied to declare an area "unserved" or "underserved."

RUS's and NTIA's tentative conclusion to release publicly "the application's executive summary" during the second funding round is a good start.[35] However, RUS and NTIA also should require public disclosure of an applicant's response to questions requiring the applicant to describe the methodology, sources of data, and analytical approaches used to determine if proposed service areas are unserved or underserved (Question No. 17 in the application used in the first round of funding). Likewise, middle mile project applicants should be required to disclose the location of the interconnection point that purportedly qualifies the project for BIP or BTOP funding. Such information is unlikely to raise concerns regarding proprietary or commercially sensitive information and will facilitate a more thorough and complete review by RUS and NTIA to ensure that all program requirements have been met.

In addition, NTIA and RUS should modify the application response process. Instead of relying on individual responses submitted for thousands of discrete proposed service areas, NTIA and RUS should collect census block level data about broadband service availability from existing providers. This would allow NTIA and RUS themselves to analyze the applications and compare them to the footprints of existing broadband service providers. And to the extent broadband mapping information is available in at least some states, NTIA and RUS also should utilize that data in conducting its review of broadband infrastructure applications to assess whether they are truly targeting unserved and underserved areas.

If NTIA and RUS decline to modify the overall structure of the application process, then at a minimum they should implement several process modifications to facilitate the ability of

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[35] *Id*. at 58942.

broadband service providers to submit useful information. First, if applicants will still be required to provide information regarding the proposed funded service areas at the census block level, the full 15-digit Federal Information Processing Standards (FIPS) census block designation should be released for each service area so that the state and county can be easily identified. Regardless of application level reporting required for second round applications, the census number string should start with the state digits and go down to the designated level.

Second, NTIA and RUS should find a way to provide all census blocks in an application when they exceed 7500 to allow service providers to evaluate the entire service area.

Third, NTIA and RUS should limit the ability of applicants to gerrymander their service areas by filing individual applications for multiple (sometimes more than 100) service areas covering a single project.

Fourth, NTIA and RUS should post a common application number any time application information is provided, such as on the Public Notice Funding website or any summary websites, which facilitates the ability of existing service providers and the public to match applications from different locations. This information would be especially useful in distinguishing between multiple applications from a single applicant.

Fifth, the Public Notice Funding website also should include the application designations (*e.g.*, BIP/BTOP, Last Mile/Middle Mile, Rural/Non-Rural, etc.), which would minimize the amount of additional work required to search other websites for this information.

Sixth, information posted in summary fashion should be posted in a sortable format, such as Excel, to reduce the amount of manual data extraction necessary for timely review.

Seventh, to ensure a more complete review of proposed funded service areas, RUS and NTIA should consider giving existing service providers more than 30 days to respond to a

broadband infrastructure application. It is difficult for existing service providers to capture posted application data, analyze the large number of applications in their service areas, and formulate and submit full and complete responses within a 30-day period.

Finally, for middle mile applications, should NTIA and RUS decide not to make end point identifications available at the census block level, they should provide middle mile end points at the census block group level.

IV. RUS and NTIA Should Clarify That the Nondiscrimination and Interconnection Requirements Only Apply to Funding Recipients.

The Recovery Act required that NTIA "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 August 5, 2005)."[36] In the first NOFA, both RUS and NTIA adopted nondiscrimination and interconnection requirements, which were extended to "any contractors or subcontractors" that a recipient of broadband stimulus funding employs "to deploy or operate the network facilities for the infrastructure project."[37] This expansive approach to nondiscrimination and interconnection is problematic for several reasons.

First, the scope of the nondiscrimination and interconnection requirements is currently unclear. The terms "contractors" and "subcontractors" are not defined in either the NOFA, the Recovery Act, or guidance issued by the Office of Management and Budget ("OMB").[38] As a

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[36] *See* Recovery Act, § 6001(j).

[37] NOFA, 74 Fed. Reg. at 33111.

[38] *See* Requirements for Implementing Sections 1512, 1605, and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards, 74 Fed. Reg. 18449 (April 23, 2009) (to be codified at 2 C.F.R. Part 176); Memorandum for the Heads of Departments and Agencies from Peter R. Orszag, Director, OMB, regarding Implementing Guidance for the Reports on Use of Funds Pursuant to the American Recovery and Reinvestment Act of 2009 (June 22, 2009).

result, the entire industry is left to speculate about who specifically may be subject to these requirements and under what circumstances. For example, does a supplier of fiber that is "deployed" in the construction of a broadband infrastructure project have nondiscrimination and interconnection obligations? Similarly, what about a common carrier furnishing facilities purchased by an awardee pursuant to a tariff, which the common carrier cannot lawfully refuse to furnish? Furthermore, while the nondiscrimination and interconnection obligations only extend to the facilities purchased with BIP or BTOP funds, how is a supplier supposed to know the source of the funds used to purchase the goods or services from the supplier? The net effect of this confusion is to cause vendors concerned about being saddled with interconnection and nondiscrimination obligations to decline to participate in broadband infrastructure projects, which may threaten the cost effectiveness and economic viability of such projects.

Second, the current approach to nondiscrimination and interconnection requirements poses a significant oversight problem for NTIA and RUS.[39] Because of the uncertainty regarding the entities to which such requirements actually apply and whether and to what extent these requirements must be "flowed down" by the recipient, NTIA and RUS will have difficulty ensuring compliance.

The straightforward solution to these problems is to make the recipient of broadband infrastructure funding ultimately responsible for the applicable nondiscrimination and interconnection requirements.[40] To the extent a funding recipient relies on contractors or

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[39] In testimony to Congress on October 27, 2009, the GAO observed that NTIA and RUS face significant challenges in overseeing funded projects. *See Recovery Act, Preliminary Observations on the Implementation of Broadband Programs*, Government Accountability Office (October 2009).

[40] This would include the ability of anchor institutions to specify and self define how they plan to comply with the general nondiscrimination and interconnection requirements. *See supra* at pages 8-9.

subcontractors to fulfill the project, then it is the recipient's responsibility to manage the project and ensure overall compliance with the applicable requirements. This approach is consistent with the Recovery Act and would resolve any confusion regarding responsibility and enforceability while also avoiding the creation of any loopholes in the requirements. A funding recipient seeking to delegate this responsibility to a contractor or subcontractor could do so by making this delegation explicit in the underlying contract between the parties, in which case the contractor or subcontractor would be knowingly and voluntarily assuming the applicable nondiscrimination and interconnection requirements. But by making the funding recipient ultimately responsible, the delegation of the applicable nondiscrimination and interconnection requirements would not absolve the recipient of liability in the event of noncompliance with these requirements. In such a situation, NTIA or RUS need only look to funding recipients to find a "breach of their loan or grant agreements" or "to cure the default."[41]

CONCLUSION

For the foregoing reasons, RUS and NTIA should modify the BIP and BTOP programs as recommended by AT&T.

Respectfully Submitted,

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November 30, 2009

[41] NOFA, 74 Fed. Reg. at 33111.