December 2, 2009

Broadband Initiatives Program
Rural Utilities Service
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Stop 1599
Washington, D.C. 20250

Broadband Technology Opportunities Program
National Telecommunications and Information Administration
U.S. Department of Commerce
HCHB Room 4887
1401 Constitution Avenue, N.W.
Washington, DC 20230

VIA EMAIL AND USPS

Re: Erratum to Filed Comments
Docket No. 090309298-9299-01

To Whom It May Concern:

On November 30, 2009, NATOA et al, filed comments with NTIA and RUS in the above captioned docket. This erratum is being filed to correct two minor errors in the executive summary of the November 30, 2009 filing. A corrected copy of the filed comments is attached. If you have any questions regarding this filing, please contact the undersigned.

Sincerely,
/s/ Matthew R. Johnson
Matthew R. Johnson
Legal Fellow
NATOA

Attachment

Before the
DEPARTMENT OF COMMERCE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
and the
DEPARTMENT OF AGRICULTURE RURAL UTILITY SERVICE
Washington, D.C. 20230

In the Matter of	)	
	)	
Implementation of Section 6001 of the American Recovery and Reinvestment Act of 2009	)	
	)	
Implementation of Title I of the American Recovery and Reinvestment Act of 2009	)	Docket No. 090309298-9299-01

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS (NATOA), THE UNITED STATES CONFERENCE OF MAYORS (USCM), THE BENTON FOUNDATION, AND THE NEW AMERICA FOUNDATION'S OPEN TECHNOLOGY INITIATIVE

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November 30, 2009

EXECUTIVE SUMMARY

The National Association of Telecommunications Officers and Advisors, ("NATOA") the United States Conference of Mayors ("USCM"), and the Benton Foundation submit these comments in response to the Request for Information in the above referenced Matter.

- The application process must be streamlined to encourage more parties to apply.

- The Agencies should modify the requirement of providing historical financial statements because local governments often do not have such documents and alternative documentation could achieve the same purpose.

- The Agencies should amend the definition of "underserved area" so that applicants can establish the boundaries of a proposed service area by means other than census blocks.

- The definition of "underserved" must be amended to include other measures of affordability among the criteria so that applicants do not have to rely on information that incumbents claim is proprietary. Some alternative, reliable, metrics could include:
  - Areas where 60 percent or more of the households in that area qualify under the income eligibility rules of the free or reduced school lunch program.
  - Areas where unemployment is greater than 15 percent.
  - Areas where 20 percent of the population is at or below the poverty level.

- Actual, guaranteed minimum speeds in both directions, not "advertised" speeds, should be used to determine whether a proposed service area is unserved or underserved.

- The Agencies should focus on Anchor Institution Networks and other innovative demonstration models.

- The Agencies should allocate a portion of the funds in the BIP and BTOP programs to promote a regional economic development approach to broadband deployment.

- Transparency is in the public's interest and gives public-private partnership applicants equal footing with private entities.

- Applicants must have the ability to review and rebut information submitted to the Agencies by an incumbent to challenge an application.

- The Agencies must allow projects to be eligible for funding even if they do not demonstrate "sustainable" projected revenues so long as they show that the project is sustainable in other ways.

- The Agencies should affirm that local governments are explicitly permitted to apply for and receive grant funding.

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I. INTRODUCTION

The National Association of Telecommunications Officers and Advisors, ("NATOA") the United States Conference of Mayors ("USCM"), the Benton Foundation, and the New America Foundation's Open Technology Initiative (collectively "Commenters"), submit these comments in response to the Request for Information (RFI) in the above referenced Matter. NATOA has reviewed the comments of the New America Foundation, et al. and highly recommends same to the Agencies. NATOA associates itself with many of New America's comments, but has chosen to file independently as a demonstration of just how important the BTOP and BIP programs are to local governments across the nation.

II. INTERESTED PARTICIPANTS

Commenters are representatives of the American people in the most fundamental and immediate sense. We are local governments and agencies, all of which work directly with our respective communities to provide services, meet needs, build livable communities and improve

citizens' quality of life. We are in a unique position to understand what true broadband access might mean for our citizens and our communities, and we urge the National Telecommunications and Information Administration ("NTIA") and the Rural Utilities Service ("RUS") (collectively "the Agencies") to distribute the American Recovery and Reinvestment Act of 2009[1] ("ARRA") grants in a way that, true to the law's vision, will bring the most benefit to the most people.

NATOA's membership includes local government officials and staff members -- from across the nation -- who are responsible for developing and administering communications policy and the provision of communications services for their respective communities. NATOA's membership includes communities that have constructed, or are in the course of constructing broadband infrastructure, or are already offering broadband services to government entities, community anchor institutions, homes, and businesses within their jurisdictions. These members manage networks in urban, suburban and rural areas across America.[2]

The United States Conference of Mayors is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,202 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor.

The mission of the Benton Foundation ("Benton") is to articulate a public interest vision for the digital age and to demonstrate the value of communications for solving social problems. Benton is a longtime supporter of research on universal service and the potential of high-speed Internet connections for improving Americans' lives.

The Open Technology Initiative ("OTI") of the New America Foundation formulates policy and regulatory reforms to support open architectures and open source innovations and facilitates the development and implementation of open technologies and communications

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

networks. OTI promotes affordable, universal, and ubiquitous communications networks through partnerships with communities, researchers, industry, and public interest groups. OTI is committed to maximizing the potentials of innovative open technologies by studying their social and economic impacts – particularly for poor, rural, and other underserved constituencies. As an independent non-profit initiative, OTI provides in-depth, objective research, analysis, and findings for policy decision-makers and the general public.

III. COMMENTERS SUPPORT THE AGENCIES' DECISION TO STREAMLINE THE APPLICATION AND REVIEW PROCESS AND MAKE IT MORE TRANSPARENT.

Commenters endorse the two tentative conclusions outlined by the Agencies in the RFI. Specifically, we agree that the application process must be streamlined to encourage more parties to apply and the program can enhance its transparency by making an application's executive summary publicly available. As we will outline in greater detail below, Commenters believe that greater transparency will improve the process and that the executive summary should not be the only new information made publicly available.

IV. THE AGENCIES SHOULD MAKE THE FOLLOWING CHANGES IN THE FUNDING RULES FOR THE NEXT ROUND THAT ARE ADDRESSED IN THE RFI.

A. The Agencies Should Modify the Requirement of Providing Historical Financial Statements Because Local Governments often do not have Such Documents and Alternative Documentation Could Achieve the Same Purpose.

The Agencies ask:

> What type of information should RUS and NTIA request from new businesses, particularly those that have been newly created for the purpose of applying for grants under the BIP and BTOP programs? For example, should the agencies eliminate the requirement to provide historical financial statements for recently-created entities?[3]

[3] Request for Information, "Broadband Initiatives Program and Broadband Technology Opportunities Program," Docket No. 0907141137-91375-05 (released Nov. 16, 2009) at 3 (hereinafter "RFI").

Commenters support changes to the application process to reflect both of these realities expressed by the Agencies.

The Agencies should modify the requirement that local government and non-profit applicants provide historical financial statements because alternative documents can achieve the same purpose. The current application process is private sector-focused and assumes that applicants all maintain the types of documentation that are typical in the private sector. For example, it requires provision of past years financial statements, which are not documents that are typically maintained by most local governments, even many of those that already provide broadband services to their anchor institutions. Government anchor institution networks frequently do not maintain financial statements in the form required by the current rules. Many local governments offer these services to their anchors at no cost, sometimes as a community service and sometimes because the "customer" is part of the same local government entity as is the "provider." In other cases, governments offer the services on a "charge back" basis that is a matter of internal government accounting – as a result, they do not have historical financial statements.

Government and non-profit applicants should be permitted to use alternative documentation that would serve to demonstrate the sound financial credentials of the local governments and their ability to sustain the effort beyond the time period of the grant awards. Many local governments who do not keep historical financial statements could provide proof of their bond rating, size of budget, or a written commitment that the local government will sustain the network out of general funds. This type of commitment is common for local governments. For example, local governments often make commitments to maintain roads after construction.

The requirement to show historical financial statements is also inappropriate for a non-profit entity that seeks to meet the needs of members of the community that cannot afford broadband services; such non-profit applicants should be able to demonstrate financial stability by showing their track-records of obtaining grant or other sustainable funding sources. This type of alternative documentation still demonstrates the applicant's stability, which is the purpose of requesting such information.

It is important to note that the online interface must also accept alternative documentation. Until now, the interface was incapable of accepting such alternative documentation and the applicant could not submit an application for consideration unless it provided the specific forms required by the interface, such as the financial statements discussed above, even if such documentation did not exist.

B. The Agencies Should Amend the Definition of "Underserved Area" by Permitting Applicants to Establish the Boundaries of the Proposed Funded Service Areas by Means Other than Census Blocks and Should Permit Reliance on Metrics to Show "Underserved" that are Not Tied to Data in the Sole Possession of Incumbent Broadband Providers.

The RFI seeks information on whether the census block data requirement is too burdensome.[4] The RFI also seeks information on whether there should be changes to the definition of the term "underserved area."[5] Commenters applaud the Agencies' willingness to address these issues and agree that both issues highlighted by the Agencies require amendment.

It can be a challenge for communities to develop economically viable infrastructure projects when confined to the boundaries of census block areas. Moreover, many communities have implemented progressive land use policies to encourage the development of mixed income housing throughout an entire city or town. While the overall poverty level and the associated

[4] *Id.*
[5] *Id.* at 7

inability of residents of a community to afford broadband service may still exist, limiting a broadband project to a census tract does not account for the whole picture and can inadvertently serve to penalize communities that have instituted such progressive policies.

The Agencies are to be commended for noting that individuals are unserved (or underserved) even though broadband services are "present" when those services are unaffordable.[6] Commenters strongly believe that the definition of "underserved"[7] must be amended to include other measures of affordability among the criteria. The current definition does not take into account that high costs for adequate broadband service create a barrier to broadband adoption and utilization. Additionally, applicants must be able to establish that an area is underserved without reliance on an incumbent's proprietary data.

In the previous round, demonstrating "unaffordability" required that the applicant demonstrate that less than 40 percent of residents are purchasing "broadband" services, defined as 768 kbps downstream and 200 kbps upstream.[8] The most significant problem with this metric is that it requires that the applicant have access to information that is in the sole possession of the incumbent carrier. Local governments, non-profits, and new entrants to an area typically do not collect this information. Furthermore, incumbents repeatedly claim that this type of information is "proprietary" and therefore refuse to share it. The 40 percent uptake metric thus has the unintended consequence of putting applicants who are not incumbent providers at a severe disadvantage in showing that service is unaffordable.

Commenters propose that, when requesting applications for a second round of funding, the Agencies allow the use of alternative data to show that service in an area, although present, is unaffordable. Commenters further propose that the Agencies be flexible in the form of data that

[6] *See* 74 Fed. Reg. at 33109 (July, 9, 2009).
[7] *See* 74 Fed. Reg. at 33108.
[8] *Id.*

an applicant may offer to demonstrate that an area is underserved because service is unaffordable; such flexibility would go a long way to make more manageable the burden of collecting the relevant data. If the applicant can show that the method it used accurately shows lack of affordability and that the data is credible, that should be sufficient. Commenters offer the following alternatives that accurately demonstrate that an area is underserved because the residents of the area cannot afford to purchase existing broadband services. Please note that these are only an illustrative list, not a comprehensive one:

- Demonstrate that 60 percent or more of the households in that area qualify under the income eligibility rules of the free or reduced school lunch program. These percentages are often readily available from the local school districts and are reliable.

- Demonstrate that 20 percent of households in the proposed service area are at or below the poverty line.

- Demonstrate that the proposed service area currently has an unemployment rate that is 15 percent or higher.[9]

Another factor that must be taken into account when determining a useful definition for "underserved" is the current definition of "broadband" itself. While we recognize and applaud the fact that the Agencies provide additional credit for faster speeds, the inclusion of the existing definition of broadband as 786 kbps downstream and 200 kpbs upstream obscures what it means to be underserved and inhibits the ability of local governments, particularly in urban areas with high concentrations of vulnerable populations, to address social and economic inequities caused by the inability of a significant number of residents to purchase reasonable levels of connectivity.

[9] Commenters understand that these metrics will be variable over time. But, the program at issue here will determine eligibility only once during a limited time period (February to April of 2010). Therefore, long term stability in the metrics used to determine lack of affordability is not required. Nonetheless, were the Agencies to reuse the Notice of Funds Availability developed for this program at some later date, it could always amend the unemployment number to reflect the needs and goals of the future program.

For example, a community or part of a community where only a minority of residents have the ability to utilize more advanced applications requiring quality two – way video transmissions will be at a distinct disadvantage compared to other neighborhoods where a majority has such capability. Is it fair that children in more affluent areas will be able to do homework aided by two way transmissions of high quality video content while others in more economically challenged areas must do with less because the current definition of broadband prevented their local government from even qualifying for the federal funds needed to create the conditions that would result in more affordable and more robust levels of connectivity? We urge the Agencies to consider a new bolder definition of broadband that will allow for high quality, interactive video exchanges. We believe that an absolute floor for such a definition should be 3 Mbps symmetrical. By raising the bar the Agencies will find that many more communities and particularly cities with high concentrations of urban poor will become eligible for funding and will provide compelling proposals to serve areas where a significant number of people cannot afford a quality connection to the Internet. What is more, in so doing we will do much to promote the development of advanced broadband networks capable of meeting the information, communication, and entertainment needs of our residents.

C. "Advertised" Speed Should Not be Used to Determine Whether a Proposed Service Area is Unserved and Underserved. Actual, Guaranteed Minimum Speeds in the Downstream and Upstream Direction Should be the Standard Used.

The RFI asks whether "advertised" speeds should be used to determine whether a proposed service area is unserved or underserved.[10] We believe that this is a critical issue that should be addressed before the next round of funding. Commenters urge that advertised speeds not be used to determine whether an area is unserved or underserved for three reasons. First, media markets

[10] RFI at 7

are typically much larger than service areas, particularly in rural areas, thereby throwing into question the availability of a service in the market area, let alone the speed. Second, the use of advertised rather than actual speeds as a metric has the unintended consequence of incentivizing gaming of the system and may result in new advertising that is targeted to deter BTOP and BIP projects. Third, even when the service is technically available, carrier advertising has historically been an inaccurate reflection of the speed end users actually receive. Advertised speeds are frequently based on manufacturer bench tests or theoretical maximums that are seldom achieved.

Take, for example, the speeds advertised by cable operators using hybrid fiber-coaxial (HFC) networks. Despite the noted improvements of DOCSIS 3.0 channel bonding, which cable operators are touting as capable of providing 100 Mbps downstream and more, the fact remains that all users on a given node share the advertised bandwidth so the actual speeds realized by each user will depend on the number of users on the same node who log on simultaneously. The more users online, the slower the Internet connection. The speeds experienced during peak usage times will be a fraction of speeds available at other times – indeed, for much of the day, consumers may be receiving connectivity that does not meet the Agencies' definition of broadband.

To give some perspective a recent technical audit of the Comcast system in Seattle revealed that approximately 500 subscriber homes share the bandwidth at the node. Many of those homes have cable modem service. This is why cable companies must always qualify advertised speeds as "up to." Such a qualifier renders the advertised speeds meaningless because even 100 kbps would meet the definition. Perhaps most disturbingly, the shared nature of the cable network could lead to the absurd and detrimental situation where communities that are successful in increasing broadband adoption and use rates will actually do a disservice to their residents

because their success in this area will contribute to slower internet speeds for others. For this reason alone providers should be required to demonstrate guaranteed minimum speeds.

Similarly, in the case of the telephone company networks, DSL and ADSL2+ networks can reach theoretical maximum speeds of "up to" 18- 24 Mbps downstream under ideal conditions (and after substantial monthly payments by subscribers). Actual speeds are also a fraction of the advertised speeds, particularly as one's distance from the central office increases, and upstream speeds are usually below 1 Mbps at best, and sometimes are more comparable to dial-up speeds..

If the Agencies rely on incumbent representations regarding speed, the metric should not be advertised speeds. Instead, the incumbents must be able to demonstrate the provision of "guaranteed minimum speeds in both directions." In other words, the incumbent must be able to guarantee the accuracy of the speed it claims in contesting BTOP and BIP applications in areas it considers "served." Otherwise, incumbents are empowered effectively to veto projects based on an often inflated advertised speed and marketing gimmicks that are unreliable and misleading. The incumbents should be required to show that the speed they are claiming is the *actual* minimum speed that is guaranteed to an individual premise.

There exist many free software programs available that allow a user to quickly test the speed of an internet connection as well as latency and network delay, which are other valuable indicators of network performance. The Agencies should require that incumbent providers certify with Commission the guaranteed minimum upstream and downstream speeds to each individual premise. Absent such certification, the Commission should consider working with providers and local governments to create a credible and verifiable process to test these speeds at regular intervals from pre approved test points to ensure that minimum speeds advertised are

actually realized. The Agencies should also clarify that minimum speeds means speeds guaranteed to an individual premise, not an aggregate speed.

D. Priorities in the Next Round of Funding

1. The Agencies would benefit the greatest number of consumers near term by focusing on Anchor Institution Networks as well as other innovative demonstration models.

The RFI asks: "[s]hould RUS and/or NTIA focus on or limit round 2 funding on projects that will deliver middle mile infrastructure facilities into a group of communities and connect key anchor institutions within those communities?"[11] Our response is that the Agencies should focus on such projects given their demonstrated successes and proven efficiencies, but that funding should not be entirely limited to such projects at the expense of fiber-to-the-home (FTTH) pilots. When creating the BTOP program as part of the ARRA, Congress specifically established connecting anchor institutions with broadband as one of its priorities.[12] But Congress also intended that this funding should also support a variety of different approaches and encourage creative thinking and new collaborations that would promote the development of next generation networks.

Commenters applaud the agencies for appreciating the value of Anchor Institution Networks to the deployment of broadband and we support a focus on such networks in the second round of funding.[13] Anchor institutions are vital to our nation's communities. These institutions include libraries, schools, hospitals and other health care providers, government buildings, emergency services, community media centers, and many more. Developing networks

[11] RFI at 5.
[12] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001.
[13] *See* Letter from Greg Nickels, President of USCM and John Hickenlooper, Chair of USCM's Transportation and Communications Committee to The Honorable Gary Locke, Secretary of Commerce (Aug. 17, 2009) (attached hereto as Appendix 1).

between these anchor institutions would allow those institutions to improve their broadband capabilities in ways that would benefit the entire community from health care to education to public safety. The Agencies should place some focus on such middle-mile projects; however, funding should not be entirely limited to such projects.

We believe that any focus on middle mile anchor institution networks should not come at the expense of communities that have already made considerable investments in connecting anchor institutions and are now seeking funds for expanding such anchor networks or leveraging these middle mile platforms to provide more advanced last mile services to a broader population. We further believe that the Agencies should not miss the opportunity to FTTH pilots that would investigate the feasibility and impact of this incredibly important architecture.

While the focus in middle mile infrastructure is well placed, NATOA believes the public interest would be better served if the Agencies support a wide variety of different options and approaches. The rules and scoring criteria should encourage different broadband infrastructure deployments from middle mile to anchors institutions as well as last mile wireless and FTTH last mile projects. Such a variety of options will reap the most benefits to the greatest number of people.

- It will allow communities to address their unique needs
- Different approaches will yield a wealth of data that will help inform efforts of a national broadband plan
- It will serve to create metrics for evaluating the success of different deployment in creating jobs, improving education, healthcare, public safety and the delivery of government services.
- It will lead to the creation of holistic models that incorporate demand side and supply side, connecting individual residences to anchor institutions such as schools and healthcare clinics while providing hardware, training and computer literacy.

We urge the Agencies to not completely exclude last mile projects that could greatly increase broadband service in areas where it is currently unavailable or unaffordable or where the actual speeds experienced by users are insufficient to meet community demand. The Agencies must keep funding open to projects that would provide service directly to homes and businesses such as providing last mile connections to public housing projects or to commercial areas where the infusion of broadband could spur significant economic development for local communities. Thus, we agree that anchor institutions should be a primary focus of the second round of funding; however, last-mile projects that would deploy broadband to undeserved areas or would encourage economic development and job growth should not be ineligible under the next round's application rules.

Specifically, we hope that the Agencies will fund a range of projects that have the potential to demonstrate the feasibility of FTTH—the "holy grail" of broadband infrastructure, which is being built at a stunningly fast rate by our competitor nations in the Pacific Rim and Europe, and in China.

The BTOP and BIP programs have the potential to point the way to new models. The comprehensive communities model is one of these, but surely FTTH is also one. If there is no attempt to use these programs to demonstrate business and technology models that incorporate FTTH, Commenters believe an opportunity will have been wasted for the federal government to investigate the feasibility of this incredibly important architecture that is so important to our global competitiveness.

In addition, the importance of FTTH is particularly acute when we think about the purposes of BTOP and BIP—to bring the benefits of broadband technology to the unserved and

underserved. Because of its enormous capacity, FTTH has the potential to deliver transformative technology into the lives of people who have never had broadband.

For example, Commenters are aware of a number of cities and nonprofits across the country that have been conducting feasibility studies and pilots that demonstrate how a direct fiber connection between a school and a home could enable parents who work multiple jobs or multiple shifts to communicate over high-quality videoconferencing equipment with their children's' teachers. In this way, they could have input and impact on their children's school lives in a way that is simply not feasible over lower-capacity connections.

Another transformative application enabled by FTTH is homesourcing—bringing jobs that could be outsourced to other countries to home-based workers in this country, who work remotely over a very-high-bandwidth Internet connection. Homesourcing (a jobs and development model that is of strong interest to the Obama administration) is generally understood to require high-quality videoconferencing capabilities, which not only gives managers and business owners confidence about what their remote employees are doing, but enables jobs like customer service and related highly interactive work. Innovative FTTH pilots have the potential to demonstrate how broadband technology can enable homesourcing, and thereby exponentially multiply the impact of the ARRA funding by creating sustainable long-term jobs, as well as immediate ones.

The Agencies have a unique opportunity to pilot FFTH in an environment that is focused not on selling products and services, but on meeting the needs of vulnerable populations that are at the core of the vision of BTOP and BIP. Surely, FTTH is a model that should at least be tested.

2. The Agencies should allocate a portion of the remaining funds in BIP and BTOP programs to promote a regional economic development approach to broadband deployment.

The RFI asks: "Should RUS and/or NTIA allocate a portion of the remaining funds available under the BIP and BTOP programs to promote a regional economic development approach to broadband deployment?"[14] Commenters agree that the Agencies should allocate a portion of the remaining funds to promote regional economic development through broadband.

In recent years, ongoing collaboration between local governments and private-public partnerships has allowed municipalities to think about broadband in a regional context. This collaboration has happened for a number of reasons. First, internal communications need to be regional and interoperable for public safety reasons and because of the efficiency and cost-savings that a regional system provides. Second, the economics of broadband deployment become more compelling when the needs and demands of communities can be aggregated regionally. Economies of scale apply not only to the capital expenses and operating costs that are less per capita when broadly shared; they also apply when a subscriber base covers an entire region rather than a single municipality. This makes the project less risky in terms of generating future revenue because the large subscriber base will ensure sustainability. Third, economic development is a regional matter. Places with solid municipal broadband offerings generally lead to neighboring communities learning how it works and provides an incentive to extend the original network rather than starting a new one.

Regional collaboration also allows the leveraging of different internal resources. For example, in a collaborative network between an urban and rural area, an urban area may be able to leverage their existing, extensive internal capacity. A rural area could, in turn, provide

[14] RFI at 6.

customer service call centers or home-sources virtual call centers that could be useful to the urban area.

Regional collaboration would also allow providers to use open fiber infrastructure between two areas that are geographically distant from one another to provide wireless networks for last mile service in both locations. Collaboration would allow school districts to use networks to share resources over their fiber without relying on public Internet services.

A regional approach would also allow for broadband development projects that would promote job growth in areas that are technically "served" under the current definitions, but do not have fast enough speeds or affordable enough prices to encourage the kind of job growth that is beneficial to the community.

E. Transparency is the Public's Interest and Greater Transparency Gives Public-Private Partnership Applicants Equal Footing with Private Entities.

Commenters applaud the Agencies for seeing the importance of transparency in the application review process.[15] We agree with President Obama that transparency "promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset."[16]

Here, we believe transparency is most vitally lacking on the part of the Agencies' review process, not necessarily on the part of the applicant. Most notably, transparency is absent when an incumbent can challenge an application, claim that the "data" used to challenge the application are "proprietary" and effectively veto an application without providing the applicant a chance at a fair rebuttal.

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[15] *See* RFI at 4.

[16] President Barack Obama, "Transparency and Open Government," Memorandum for the Heads of Executive Departments and Agencies, available at http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.

Likewise, the state review process of applications could also benefit from enhanced transparency. An example of an improvement in this process could be that the Agencies require that state reviews be open to applicants and provide applicants with an ability to respond to criticisms leveled by the state reviewing agency. Because of potential conflicts of interest a state may have through its connections to a carrier or with its own broadband grant/loan interests, the Agencies must be careful about the weight a state's recommendations are given. If a state refuses to allow an applicant to participate in the review process, in an open and transparent manner, the Agencies should afford those state recommendations only minimal weight in making funding determinations.

V. THE AGENCIES SHOULD MAKE THE FOLLOWING CHANGES IN THE FUNDING RULES FOR THE NEXT ROUND THAT ARE NOT ADDRESSED IN THE RFI.

A. Applicants Must Have the Ability to Review and Rebut Information Submitted to the Agencies by an Incumbent to Challenge an Application.

An applicant must be permitted the opportunity to review and rebut any information submitted to the Agencies to challenge the applicant's characterization of the area. Too often, incumbents challenge an application claiming that an area did not meet the funding requirements and would then claim that its challenge relied on "confidential" or "proprietary" information that it could not share with the applicant. This is fundamentally unfair to the applicant who is given no ability to rebut the incumbent's characterization. Data used in carrier objections must be made public or provided to the applicant so that it has the ability to present counter-evidence or otherwise offer a rebuttal that is fully informed and most useful to the Agencies. Conversely, if a carrier objects to such data being made public, then that "confidential" information should be excluded from the record or assigned no weight.

B. The Agencies Must Allow Projects to be Eligible for Funding Even if They Do Not Demonstrate "Sustainable" Projected Revenues so Long as They Show that the Project is Sustainable in Other Ways.

The RFI does not address whether other metrics are suitable for showing project viability beyond whether it can be sustained by projected revenues. Commenters argue that local government and non-profit applicants should be allowed to demonstrate viability in other ways. The application, by requiring documentation of projected revenues, assumes a for-profit model and has the unintended impact of prioritizing private sector projects that serve the most economically-feasible of unserved and underserved areas rather than non-profit projects that seek to serve those who may not represent revenue sources. Commenters urge the Agencies to expand their vision of a "sustainable" and therefore fundable project. A variety of innovative approaches and collaborations will be needed to respond to the unique needs of many different communities. To a local government or a non–profit the advancement of social and economic goals bring returns that are not always readily quantified in the types of financial reporting instruments issued by the private sector (and required by the BTOP and BIP applications).

The Agencies should allow a degree of flexibility in demonstrating sustainability of the projects. Local governments and non-profit entities often define success in different ways then purely for-profit private entities. The application should allow for public funds to be used to further a public service, in this case broadband deployment, without requiring that the applicant show "sustainability" simply as a matter of cash flow and revenues.

For example, local government commitments to support a project can be a suitable alternative. Local governments have the ability to sustain a project through the use of savings, such as operating funds that are currently being used for inferior leased circuits. This funding can be reallocated for the development of a municipal broadband network without reliance on projected revenues from outside entities.

In fact, the requirement that an applicant realize sustainable revenues from an area that is unserved or underserved is self-defeating for many of the most critically underserved areas. Most areas that are unserved or underserved lack broadband availability exactly because private carriers have determined that extending service to these areas is not profitable. These carriers determined that sufficient revenues will not flow from these areas so they had no market-based reason for extending service to those areas. Thus, requiring a showing of projected revenues as a qualifier for funding these areas will exclude those areas and residents *least* likely to obtain service through the private sector and least able to pay a "sustainable" rate for service. Yet surely the ARRA is intended to serve such residents, regardless of whether their payments can financially sustain a network.

When a non-profit or government entity submits an application for funding an area, the main objective is to provide a public service for the residents of that area who may not be able to afford to pay a "sustainable" rate for the service. The drivers for municipal and non-profit networks tend not to be projected revenues and profit. Rather, the driving goals are to keep costs low so that prices for consumers (who are also constituents) would also be kept low (or free). This incents local governments and non-profits to look for revenue sources other than charging the users of the service. This incentive keeps service more affordable and is also sustainable for the area. In instances such as the one just described, revenues may not be necessary to show sustainability when the incentives of a local government are different from those of a private entity.

Commenters therefore request that the application process be changed to include room for projects that do not meet the traditional cash flow-based definition of "sustainability" in order to make some of the ARRA funds available to projects that seek to meet needs in the most needy of

unserved and underserved areas. Non-profit and government applicants should be afforded the option of demonstrating sustainability in alternative ways, including by projecting grant funding, demonstrating public commitments to funding operations, and demonstrating that operating costs will be kept low through volunteer labor and donated equipment.

VI. TECHNICAL AND PRACTICAL PROBLEMS WITH APPLICATION PROCESS

A number of the members of Commenters have expressed their frustrations with some of the technical and practical problems with the application process. Some of the most common problems that applicants had in the last round were:

- The web portal was slow and took a long time to upload.
- The character limits for essays and questions were stricter in the web portal than what the application stated.
- The essay questions stripped out formatting and sometimes did not save changes and edits despite repeated attempts to edit an essay.
- The web portal repeatedly kicked you out of the system during the upload or essay process.
- The application only allowed three supplemental uploads – which was insufficient for some applicants in the due diligence process.
- Restrictions on file size made it very difficult to upload maps and other *required* data.
- It was difficult for applicants to tell if the upload process was successful. The system would not tell an applicant what was missing to an application "incomplete."
- It should be required that all applicants first convert all files to pdf before upload. The File conversion process would corrupt some files that were uploaded in excel (which was an acceptable format).

  In the due diligence phase, an applicant was required to submit different data twice through the web portal. After the first submission, the portal deemed the "due diligence" phase completed and did not allow the applicant to continue to use the portal as a means to submit subsequent responses.
- The application forms on the Web portal differed from what had been previously issued to the applicant.

- The word count limits and location of information on the Web portal application differed from what the application provided earlier.

- The Web portal was very slow and at first not able to keep up with the volume of use – it would lock up or crash during the process of entering data or attempting to save entered data.

- The Web portal application only allowed for simple text and did not allow for certain characters or formatting – this required additional manual entry of information. There was no ability to use subsets or emphasis within the text.

- It was extremely difficult to upload required attachments or maps to the Web portal, and many times it was not possible to see if the upload had been successful until many hours later.

- The Web portal sign-in would lock a user out of the system requiring calls to many numbers for help. The instructions for assistance were not clear and the help desk personnel were not always available to assist. Several times applicants were bounced back and forth between agencies and help desks for assistance in completing sections of the online application.

Commenters urge the Agencies to address these technical and practical problems before the start of the next round of the application process.

VII. CONCLUSION

Commenters and supporters of these comments urge NTIA and RUS to implement Section 6001 of the American Recovery and Reinvestment Act of 2009 in a manner consistent with the intent of the Act and that preserves the Act's public interest principles.

Respectfully submitted,

The National Association of Telecommunications Officers and Advisors

The United States Conference of Mayors

The Benton Foundation

The Open Technology Initiative of the New America Foundation

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APPENDIX 1

Letter from Greg Nickels, President of USCM and John Hickenlooper, Chair of USCM's Transportation and Communications Committee to The Honorable Gary Locke, Secretary of Commerce (Aug. 17, 2009)

THE UNITED STATES CONFERENCE OF MAYORS

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Mayor of St. Louis
SCOTT SMITH
Mayor of Mesa
BRIAN C. WAHLER
Mayor of Piscataway

CEO and Executive Director:
TOM COCHRAN

August 17, 2009

The Honorable Gary Locke
Secretary
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Dear Secretary Locke:

On behalf of The United States Conference of Mayors, we write to urge you to give careful attention to reconsidering the restrictive criteria that requires public safety and anchor institutions meet an underserved or unserved test before being eligible for broadband funding in the first round of the Broadband Technology and Opportunities Program (BTOP) in the American Recovery and Reinvestment Act of 2009 (ARRA).

The U.S. Conference of Mayors believes that Congress intended to give public safety and anchor institutions such as schools, libraries, and medical and healthcare providers the highest funding priority in the BTOP. Section 6001 of the ARRA specifically lists public safety and anchor institutions as two of the five priorities for funding. Under the ARRA, the unserved and underserved test only applies to residential consumers. In addition, the underserved test to determine the availability of broadband by census block depends on data that the U.S. Census does not gather. Unless amended, these critical institutions, which in many cases serve our most vulnerable populations, will not meet ARRA requirements for funding under the BTOP.

Cities and their metropolitan areas are where 84 percent of our people live and more than 90 percent of future economic growth will occur. The nation's mayors do not believe Congress or the Obama Administration intended to deny these anchor institutions, and the vulnerable populations they serve in our cities, the ability to compete for the broadband funding, in effect excluding large portions of the population from receiving the benefits of the BTOP funding.

We are committed to working with the Administration to correct this issue through an addendum to the Notice of Funds Availability (NOFA) that would waive the underserved prerequisite for public safety and anchor institutions. We also intend to work with the Administration to ensure the second and third rounds better reflect what we believe the goals of Congress and the Administration to be. Please contact our CEO and Executive Director Tom Cochran or Assistant Executive Director for Communications Policy Ron Thaniel at (202) 293-7330 to discuss this further.

Sincerely,

Greg Nickels
Mayor of Seattle
President

John Hickenlooper
Mayor of Denver
Chair, Transportation and Communications Committee

Cc: Thomas Power