

**Before the**  
**DEPARTMENT OF COMMERCE**  
**National Telecommunications and Information Administration**

**and the**  
**DEPARTMENT OF AGRICULTURE**  
**Rural Utilities Service**

<b>In the Matter of</b>	)	
	)	
<b>American Recovery and Reinvestment Act of 2009</b>	)	<b>Docket No. 0907141137-91375-05</b>
	)	
<b>Broadband Initiatives Program</b>	)	<b>RIN: 0572-ZA01</b>
	)	
<b>Broadband Technology Opportunities Program</b>	)	<b>RIN: 0660-ZA28</b>
	)	
	)	

**COMMENTS OF**  
**THE UNITED STATES TELECOM ASSOCIATION**

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## **EXECUTIVE SUMMARY**

USTelecom represents a broad spectrum of the companies that have built much of and continue to invest tens of billions of dollars annually in the nation's broadband infrastructure. Nonetheless the costs of providing service in some areas of the country will prevent the deployment of broadband comparable to that available to the majority of Americans, so broadband stimulus funds are needed for projects that will immediately stimulate economic activity and in the reasonably short term provide high-speed broadband service.

Unfortunately the rules for the first funding round did not encourage the widest pool of participants. The financial structure of the programs and particular rules placed the current and future broadband investments of existing providers at risk. The agencies should modify the rules relating to nondiscrimination and interconnection to not exceed the Commission's broadband Policy Statement and should clarify that vendors, suppliers providing inputs to stimulus projects and third parties leasing space or capacity on awardees' facilities are not subject to those rules. Other provisions that should be modified include the (1) RUS rural/remote distinction, (2) restriction on the sale of assets, (3) program income restriction, (4) problems with the mapping tool, (5) duration of the obligations incurred by receiving funding, and (6) failure of the scoring criteria to place a sufficiently high priority on broadband deployment in unserved areas, and the (7) class of entities eligible for Title II borrower priority status.

The agencies also have the responsibility to ensure that ARRA funding is spent properly and prudently, without duplicating existing investment. Although a system for commenting on the applications was instituted to afford the agencies access to information relevant and important to that review, that system was extraordinarily difficult to use. The agencies should reform and upgrade this process so that it yields more useful information which will allow the agencies to better pursue their responsibility for due diligence in awarding funding only to eligible projects under ARRA. Broadband projects are unlikely to be sustainable or offer any long-term public benefit if they result in the construction of broadband infrastructure where competing providers already offer broadband service. "Funding competition" makes little economic sense and is too costly to sustain. As added insurance, the agencies should develop a post-award process that would offer recourse in the case of improper awards.

In order to achieve the most public benefit from the finite federal funds dedicated to broadband, stimulus funds should be effectively targeted to bring broadband to areas that are currently unserved and to promote adoption in areas where broadband is available but customers do not subscribe. As their first priority, NTIA and RUS should direct broadband stimulus funds to projects designed to bring broadband facilities to unserved areas. These projects represent the best use of taxpayer dollars and are most consistent with Congress's goals in the Recovery Act. Focusing funds on unserved areas would best serve ARRA's goals of creating and preserving good jobs and stimulating economic activity both by broadband providers and new subscribers.

Finally, to ensure that taxpayer dollars are spent appropriately, RUS and NTIA should select experienced providers that have sustainable plans to reach unserved areas with broadband. Regardless of the type of entity that seeks funds, NTIA and RUS should require that applicants have the demonstrated capability and competence to carry out their proposed projects and to operate these projects in a sustainable manner following the funding period.

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**COMMENTS OF**  
**THE UNITED STATES TELECOM ASSOCIATION**

USTelecom<sup>1</sup> is pleased to submit its comments in response to the Joint Request for Information (“Request”)<sup>2</sup> from the National Telecommunications and Information Administration (“NTIA”), an agency in the U.S. Department of Commerce, and the Rural Utilities Service (“RUS”), an agency in the U.S. Department of Agriculture (collectively referred to as “the agencies”). The Request addresses issues intended to inform the second round of funding with respect to the broadband provisions of the American Recovery and Reinvestment

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<sup>1</sup> USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

<sup>2</sup> *Joint Request for Information*, 74 Fed. Reg. 58940 (Nov. 16, 2009) (*RFI*).

Act of 2009 (“ARRA”).<sup>3</sup>

USTelecom represents a broad spectrum of the companies that have built much of the nation’s broadband infrastructure. USTelecom member companies continue to invest tens of billions of dollars annually to deploy new broadband services and upgrade broadband facilities throughout their service areas. Nonetheless, it is widely recognized that there are areas of the country where the costs of providing service will – at least in the foreseeable term – prevent the deployment of broadband services comparable to those available to the majority of Americans. In order to meet the fiduciary duty placed on them by Congress, the President and the American public, the agencies must target broadband stimulus funds toward projects that will immediately stimulate economic activity and in the reasonably short term provide high-speed broadband service.

For NTIA and RUS, the broadband grant and loan provisions of the ARRA impose both a tremendous responsibility and present a momentous opportunity. The opportunity, of course, is to make significant progress toward the goal of ensuring that all Americans have access to high speed broadband services. The responsibility is to do so in a manner that fulfills the primary goal of the ARRA—the immediate stimulation of economic activity essential to re-invigorating the American economy.

Unfortunately the rules under which requests for the first round of funding were considered did not take full advantage of that opportunity. Many extraordinarily well-qualified and experienced existing providers with networks, employees and community ties in the areas in which Congress sought to establish and upgrade service did not apply for funding. They did not

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<sup>3</sup> *American Recovery and Reinvestment Act of 2009*, Pub. L. No. 111-5, 123 Stat. 115 (2009) (*ARRA*) (available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf)) (visited November 23, 2009).

apply because of the financial structure of the programs, particular rules which placed their current as well as future broadband network investments at risk, and ambiguous nature of many of the rules.

Rules for the first Notice of Funds Availability<sup>4</sup> were established during a period of administrative transition in each agency, and under a very aggressive schedule. Also the agencies did not have the benefit of prior experience with these new programs. Thus, it is understandable that these rules require revision to be fully optimized for the success of the BIP and BTOP programs.

Indeed, the need for modification of the rules is indicated by a disappointing level of participation by many of the most able and qualified providers that can quickly and efficiently construct broadband facilities and fulfill the twin goals of ARRA – job creation and broadband expansion. Moreover, while the agencies trumpet the fact they received 2,200 applications for several multiples of the available funding, the fact that there were 11,000 reply comments for those 2,200 applications, and that 80 percent of all applications received at least one reply comment, should raise serious concerns as to the quality of the applications received, particularly with respect to applicants' claims that proposed service areas are unserved and underserved.<sup>5</sup>

The agencies fortunately have an opportunity to learn from those problems and use the second round of funding to fulfill the promise of these important programs. Historically it has always been recognized that RUS loan programs are voluntary, and that participation by the most able providers leverages the government's capital with the expertise and boots on the ground

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<sup>4</sup> Notice of Funds Availability, 74 Fed. Reg. 33104, 33114 (July 9, 2009) (*First NoFA*).

<sup>5</sup> Bernie Arnason, *Progress Update for Broadband Stimulus Program Revealed*, Telecompetitor, November 13, 2009 (available at: <http://www.telecompetitor.com/progress-update-for-broadband-stimulus-program-revealed/>) (visited November 23, 2009) (discussing an industry panel where Mary Campanola, Outreach Coordinator for RUS, discussed the progress to date concerning BIP).

knowledge of local incumbent providers. A similar philosophy should apply to the BIP and BTOP.

The agencies also have the responsibility to ensure that the unprecedented, one-time funding is spent properly and prudently, without duplicating investment already in place. The agencies have the statutorily accorded obligation to diligently pursue the funding only of projects that meet ARRA and NoFA standards. Although a system for commenting on the applications was instituted to afford the agencies access to information relevant and important to that review, that system was extraordinarily difficult to use, and in some cases commenters found it impossible to fully and properly respond. The agencies should reform and upgrade this process so that it yields the maximum level of useful information which will allow the agencies to most efficiently and effectively pursue their responsibility for due diligence in awarding funding only to eligible projects under ARRA.

A significant amount of funding will remain for disbursement under this second (and presumably final) NoFA. Accordingly, the agencies have the opportunity to include more applicants and to improve the quality of applications, thereby maximizing the potential benefits of the programs in creating jobs and promoting of sustainable broadband availability.

To achieve the most benefit from the finite federal funds dedicated to broadband, stimulus funds should be effectively targeted to bring broadband to areas that are currently unserved and to promote adoption in areas where broadband is available but customers do not subscribe. Deploying broadband to unserved areas and promoting broadband adoption will help overcome the two primary obstacles to achieving the nation's broadband goals.<sup>6</sup> In particular,

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<sup>6</sup> The workshops conducted by the FCC in connection with the development of the National Broadband Plan underscored the importance of addressing unserved areas and various demand-side issues that limit broadband adoption, particularly the lack of computers and lack of consumer experience with computers and the Internet. *See*,

projects designed to build broadband facilities to unserved areas and bring the residents and businesses in those areas online represent the best use of taxpayer dollars and are most consistent with Congress's goals in ARRA.<sup>7</sup> These projects best serve ARRA's goals of creating and preserving good jobs, while stimulating economic activity both by broadband providers and their new subscribers.<sup>8</sup> By contrast, achieving the nation's broadband goals will be unlikely if BIP or BTOP become mechanisms for funding projects intended to accomplish other objectives untethered to the broadband goals of the program – no matter how laudable – such as promoting “economic development” in areas “suffering exceptional economic hardship” or “high unemployment rates.”<sup>9</sup>

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*e.g.*, Craig E. Moffett, Sanford Bernstein, National Broadband Plan Workshop: Deployment – Wired, Transcript at 14-15 (Aug. 12, 2009) (noting that “the uncovered part of the country ... is perhaps about 8 or 9 percent”) (available at [http://www.broadband.gov/docs/ws\\_02\\_deploy\\_wired\\_transcript.doc](http://www.broadband.gov/docs/ws_02_deploy_wired_transcript.doc)); Raquel Noriega, Connected Nation, National Broadband Plan Workshop: Low Adoption and Utilization – Programmatic Efforts, Transcript at 39-40 (Aug. 19, 2009) (presenting survey data regarding key drivers to broadband adoption which indicate that computer ownership “is a huge barrier” as is a “lack of understanding how this technology can affect your life, can affect your business, can affect your children's lives”) (available at [http://www.broadband.gov/docs/ws\\_11\\_efforts\\_adoption.doc](http://www.broadband.gov/docs/ws_11_efforts_adoption.doc)); Susannah Fox, Pew Internet & American Life Project, National Broadband Plan Workshop: Building the Fact Base – The State of Broadband Adoption and Utilization, Transcript at 78-79 (Aug. 19, 2009) (available at [http://www.broadband.gov/docs/ws\\_09\\_adoption\\_utilization.doc](http://www.broadband.gov/docs/ws_09_adoption_utilization.doc)) (noting that computer ownership and literacy are obstacles to broadband adoption by “people who not only didn't grow up with computers and might not have even been in the workforce when computers were standard issue,” such as the elderly or those living in rural areas).

<sup>7</sup> Indeed, “provid[ing] access to broadband service to consumers residing in unserved areas of the United States” is at the top of the list of statutory “purposes” for NTIA's grant program. *ARRA* § 6001(b)(1). The RUS provision likewise states that “priority for awarding funds ... shall be given to projects that provide service to the highest proportion of rural residents that do not have access to broadband service.” *Id.* at Div. A, Title I; *see also* H. Rep. 111-16 at 774 (Feb. 12, 2009) (authorizing NTIA to select projects that “assist infrastructure investments that would not otherwise be made,” in addition to those that “best meet the broadband access needs of the area to be served”); *ARRA* § 6001(h)(2)(A) (directing NTIA to use BTOP funding to “increase the affordability of, and subscribership to, service to the greatest population of users in the area”).

<sup>8</sup> *See* Jeffrey Eisenach, “The Telecom Sector and the Economy: How U.S. Broadband Policies Are Working for America” (Sept. 2008) (noting that between April 2007 and April 2008, the information technology sector accounted for more than half of all jobs created in the United States, and the information technology jobs are among the highest paying jobs in the economy, with hourly earnings for telecommunications workers averaging 42% higher than manufacturing jobs); Robert D. Atkinson, Daniel Castro and Steven J. Izzell, “The Digital Road to Recovery: A Stimulus Plan to Create Jobs, Boost Productivity and Revitalize America,” The Information Technology & Innovation Fund (Jan. 2009) (noting the multiplier effect that broadband has on the economy, including the creation of additional jobs outside of the telecommunications industry as a result of increased availability of broadband).

<sup>9</sup> *See RFI*, 74 Fed. Reg. at 58943.

Moreover, a broadband project is unlikely to be sustainable or offer any long-term public benefit if it constructs broadband infrastructure where competing providers already offer broadband service. “Funding competition” makes little economic sense and is too costly to sustain, as the FCC has observed in the universal service context.<sup>10</sup> To ensure that limited federal dollars are not being used to subsidize the overbuilding of broadband infrastructure and “[c]onsistent with the Administration’s policy and ARRA’s objective to ensure greater transparency,”<sup>11</sup> the NTIA and RUS response process should provide complete information on proposed funded service areas.

For purposes of the second NoFA, NTIA should provide that the existing FCC broadband Policy Statement defines the sole nondiscrimination and interconnection obligation to be placed on grant recipients. More than three years of experience under that Policy Statement has demonstrated its successful balancing of interests among stakeholders – consumers, broadband service providers, application and content providers and technology companies. Implementing the ARRA should support, not hinder, the ability of providers to continue to expand and enhance services and speeds. Furthermore, consistent with general government procurement law, the agencies should confirm that the nondiscrimination and interconnection rules do not apply to vendors, suppliers or other contributors that merely provide facilities, service or equipment that are inputs to a project. Doing so would ensure that awardees are able to make the most efficient use of taxpayer funds and have the benefit of the widest possible set of vendors. Likewise, to ensure that the full capacity of funded facilities is used and to maximize the reach of broadband service, agencies should confirm that the nondiscrimination and interconnection rules do not

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<sup>10</sup> See *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, Order, 23 FCC Rcd. 8834, ¶ 1, 15 (2008).

<sup>11</sup> *RFI*, 74 Fed. Reg. at 58942

apply to third parties leasing space or capacity on awardees' facilities such as wireless towers or middle mile networks.

RUS should reclassify compliance with any nondiscrimination and interconnection obligations as a priority for funding, rather than a requirement for funding. There is nothing in the statute that permits RUS to add such a requirement, or that indicates that Congress intended what it clearly labeled a priority to be converted into a requirement. The NoFA should be modified to reflect the original intent and plain language of the statute with regard to this critical distinction. The desire to ensure consistency between the programs here does not trump clear BIP and BTOP language to the contrary. Consistency, instead, is best attained by limiting any nondiscrimination and interconnections obligations to the broadband Policy Statement.

Finally, to ensure that taxpayer dollars are spent appropriately, RUS and NTIA should select experienced providers that have sustainable plans to reach unserved areas with broadband. Regardless of the type of entity that seeks funding, NTIA and RUS should require that applicants have the demonstrated capability and competence to carry out their proposed projects and to operate them in a sustainable manner following the funding period. To ensure that taxpayer money is used wisely, NTIA and RUS should require each applicant to demonstrate the technical and financial ability to complete the proposed project and to sustain the project after funds have been awarded. Entities without the technical and financial competence either should not participate or should be required to partner with entities with such competence. Without such a requirement, stimulus funds are likely to be wasted on unsustainable or unrealistic projects with little long-term public benefit.

## **I. THE APPLICATION AND REVIEW PROCESS**

Improvements to the application and review process should focus on changes that enhance the agencies' ability to determine the accuracy and quality of applications for funding.

Any streamlining of these processes should assure that the funding made available under ARRA is spent properly, prudently and efficiently. It is particularly important that the agencies review of applications critically evaluate claims that an area is “unserved” or “underserved.”

Overbuilding existing providers in low-density areas would discourage further investment in the area, while undermining the long-term viability of both the incumbents’ investment and the applicants’ projects.

#### ***A. Streamlining the Applications***

Since applicants can apply to either or both agencies, it makes sense that a single application should continue to be used for the infrastructure programs. Because many applicants will seek broadband infrastructure funding from both RUS and NTIA, the two agencies should apply common scoring criteria for those types of projects to the extent permitted by the statute. These criteria must be as objective as possible, which will enable the two agencies to process and rank the applications efficiently and fairly.

Given the large proportion of applications that received comment in the first round of funding – and to discourage ineligible and frivolous applications that waste the time and resources of reviewers and commenters – the agencies should not reduce any needed information to determine whether the proposed funded service areas are properly classified as “unserved,” “underserved,” and for the BIP, at least 75% rural. For example, Question 17 in the broadband infrastructure application used in the first round of funding required the applicant to “describe the methodology, source of data, and analytical approaches used to determine whether the proposed funded service area are classified as ‘unserved,’ ‘underserved,’ or for BIP, at least 75% rural.” This information is critical for an existing service provider to submit relevant information to NTIA and RUS regarding the unserved or underserved status of the proposed funded service area.

Other portions of applications determined to not be of value in determining the eligibility and quality of applications should be eliminated. In particular, it makes no sense to require financial statements from affiliates of the applicant, if those affiliates are not themselves providing financial backing for the project. The first NoFA expected applicants to provide financial disclosures for affiliates of the applicant. Many broadband service providers, especially those that are publicly traded and particularly larger companies, utilize a holding company parent for financial reporting. They typically have many operating company subsidiaries and affiliates, which do not ordinarily have audited financial statements of their own. That requirement raised the cost of each application significantly and needlessly, particularly given the very limited time available to develop and submit applications. The requirement should be lifted in the second round, at least for applications that do not rely on affiliates' financial resources.

### **1. New Entities**

Given the lack of track record inherent in an applicant's status as a new entity, it is especially important to require financial information establishing the applicant's ability to construct and maintain a sustainable project. It is far more important to obtain information as to financing and expertise from new entities than from existing providers, since such providers have an evident history of building out facilities and providing service that can be examined by those making funding decisions. On the other hand, new entities have no demonstrated competence to build and manage a network. Naturally, new entities warrant especially close scrutiny, as they are at comparatively high risk of failure.

### **2. Consortiums and Public-Private Partnerships**

Presumably the participation of all participants in such partnerships is necessary for a successful result. The extent to which each partner brings financial, technical or operating expertise (or a combination of those) to the consortium cannot be fairly evaluated unless all

members of the consortium submit information. And if those critical elements are divided among the participants (which is presumably why they are part of the consortium), how can the agencies properly evaluate the ability of the entire consortium to successfully build out and manage a sustainable project if only one of the participants submits information? The agencies must secure information from all participants and ensure that the subsequent review is not improperly biased in favor of consortiums or public-private partnerships. Consortiums and public-private partnerships, as well as municipal systems, warrant the same scrutiny as other applicants. As a category, they have a mixed performance record, and they too often focus on areas already served by one or more private companies, discouraging private investment and undermining competition. In round one, many such applications received comments asserting that they covered areas that are not unserved or underserved.

### **3. Specification of Service Areas**

The requirement to define proposed funded service areas by census blocks, while burdensome, generally is a reasonable and technologically neutral methodology for delineating proposed funded service areas. The agencies, however, must be mindful of the fact that waivers of this requirement will be necessary in some instances. As recognized by the existing waiver procedure, census blocks do not match a company's service area, whether that is the state certificated area for an incumbent provider or license area for a wireless provider. The agencies also should recognize that the census block structure does not conform to how companies typically build out networks. Without waivers, the requirement to build out the entire census block would discourage otherwise feasible projects that could serve many currently unserved subscribers by rendering the project financially and operationally unrealistic.

Another problem that has arisen with respect to specification of service area is that some applicants have gerrymandered their proposed service areas to include some denser areas,

combined with other entirely unpopulated areas, such as national parks, in which they clearly do not intend to construct any facilities. Such gerrymandering leads to a misleadingly low overall density for the proposed funded service area, even though the inhabited areas have a relatively dense population. Depending on whether and how the definitions of rural and remote are modified and applied, this could lead to an area being wrongly classified as rural or remote, or provide an applicant an advantage over another applicant that has not gerrymandered their project area. The agencies should be on guard against such abuses, and should provide incumbents with the opportunity to help identify such instances, both within the specific response form available to commenters and even after any potential award.

An issue also has arisen with respect to the specification of service areas for middle-mile projects. The NoFA specifies that “[a] proposed funded service area may qualify as underserved for Middle Mile projects if one interconnection point terminates in a proposed funded service area that qualifies as unserved or underserved for Last Mile projects.”<sup>12</sup> “The BIP program will consider only those [middle mile] applications for loans and loan/grant combinations whose total proposed funded service area benefits at least 75 percent or more unserved or underserved rural areas, as defined herein and which have a termination point in an area that is unserved or underserved.”<sup>13</sup> Although these tests make it clear that termination points must be addressed when assessing whether middle-mile applications are eligible for funding, many applicants for middle mile projects failed to specify the interconnection points for the transport proposed, so it was impossible to determine whether the application met the necessary standards. Applications in the second round should be required to clearly specify the interconnection points of the middle

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<sup>12</sup> *First NoFA*, 74 Fed. Reg. at 33109.

<sup>13</sup> *First NoFA*, 74 Fed. Reg. at 33114.

mile projects or they should be rejected as ineligible. Information on middle-mile interconnection points also should be made readily available as a part of the response process.

#### **4. Relationship Between the BIP and BTOP**

Rural infrastructure applicants should be able to choose whether to apply to one or both agencies. There is no good reason for a rural applicant being required to submit an application to both the RUS and NTIA if only NTIA offers the funding required for a proposed project. The application process also should recognize that an applicant may have good cause for not wanting to apply to the RUS where loans may constitute a significant portion of the funding. Some applicants may have no need for a loan or may have difficulty accepting a loan due to current financing arrangements, and thus may wish to apply exclusively to the BTOP, while others may be in a different situation and wish to apply to the BIP. Rural applicants should not be penalized by having their choice of funding entity restricted, or having to go through a process involving examination of their application by both agencies, when other applicants are not subject to that handicap. If both programs are as oversubscribed as the agencies contend, there is no need to apportion applications between them in order to ensure that all the funding is used.

In any event, RUS should use the vast majority, if not all, of its ARRA funding for no less than 80 percent grants, and if necessary supplement that grant money with loan funds made available under the Broadband Loan program. USTelecom's small and mid-sized members, in particular, focus on serving rural areas and make broadband service available to between 85 percent and 95 percent of the customers in their service areas. That impressive achievement was financed through private investment and, to a much more limited degree, RUS loan funding. The remaining very high-cost portions of their service areas are not served today because they are very high-cost, low-density areas where it is not financially feasible to build out broadband facilities. That holds true under the loan model, and even under the 50/50 loan and grant model.

Congress clearly recognized this problem and authorized funding for *grants* at both agencies. RUS should use the vast majority, if not all of its ARRA funding for no less than 80 percent grants, and if necessary supplement that grant money with loan funds made available under the Broadband Loan program.

Most rural areas, whether or not they fall under the NoFA's definition of "remote," remain unserved not because of the absence or the price of credit, but due to the inability of broadband providers to demonstrate a feasible business case to bring service to very high-cost, low-density markets. Grants of 80 percent are capable of significantly changing this business case, because as the grants offset capital costs, broadband providers are able to recoup their investment and attain reasonable return. Grants topping out at 50 percent are insufficient to overcome this hurdle. It makes no economic sense for a company to borrow money, even at low rates, to fund projects that will not at least cover their costs. And of course, the lack of a clearly feasible business case either doesn't allow the government to make a loan at all or results in the government taking on excessive risk to its loan security.

Congress recognized the importance of grants for rural broadband deployment when it decided to create a new RUS broadband program, supplementing the preexisting RUS programs with a different financing model. The other RUS telecommunications programs are overwhelming based on a loan model (versus grants). But by allocating new funds that could be used for grants, ARRA recognized that the loan model is not sufficient to address the issue of the lack of broadband infrastructure in sizable portions of unserved rural America.

RUS is under no legal obligation to include loans as part of the BIP. ARRA establishment of the BIP provides \$2,500,000 "for the cost of broadband loans and loan guarantees, as authorized by the Rural Electrification Act of 1936 (7. U.S.C. 901 et seq.) and for

grants (including for technical assistance” and goes on to state that “this amount is available for grants, loans and loan guarantees for broadband infrastructure....”<sup>14</sup> This language in no way makes it mandatory that RUS use all of these financing options. Indeed, RUS itself recognized this fact when it did not include loan guarantees in its financing menu for the BIP.

Moreover RUS has another funding mechanism available for broadband loans; the Broadband Loan program which is authorized and funded by Congress. The agency has hundreds of millions of dollars in loan funds sitting idle. RUS should refrain from converting scarce grant funds into even more loan funds when it has yet to establish that demand for loan funds exceeds those available under the Broadband Loan program.

If RUS nevertheless decides to allocate some ARRA funding from provision of grants to funding loans, RUS should limit use of these loans to instances in which the prospective broadband provider requires financing above the 80 percent grant level to serve unserved areas. RUS should prioritize applications in which non-federal sources, and particularly the grantee’s own funds, make up the remaining 20 percent of required project funding. Then RUS should next fund applications that require the use of loans or loan guarantees for the remaining 20 percent. Finally, RUS should consider funding projects requiring 100 percent grants.

***B. Transparency and Confidentiality.***

It is important to strike an appropriate balance between transparency and confidentiality in the administration of the BIP and BTOP. USTelecom agrees with the tentative conclusion in the RFI<sup>15</sup> that each application’s executive summary should be made publicly available for the second round of funding. Continuing to ensure public access to the executive summaries will

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<sup>14</sup> ARRA, 123 Stat. 118.

<sup>15</sup> RFI, 74 Fed. Reg. at 58942 (noting the tentative conclusion of RUS and NTIA that the application’s executive summary should be made publicly available for the second round of funding).

enable commenters to provide more useful information for the agencies' due diligence review of applications. Respondents also should be afforded ready access to all information needed to determine whether applicants' proposed funded service areas are classified as "unserved," "underserved," and for BIP, at least 75 percent rural. Other competitively sensitive information should be kept completely confidential so as not to discourage able applicants from applying for funding.

Furthermore, information submitted by commenters should be accorded the highest level of confidentiality. These parties should not be penalized for voluntarily assisting the agencies in properly evaluating applications. Discouraging commenters by making comments more public would handicap the agencies efforts to perform their due diligence and assure that the funding is being properly and prudently distributed.

The public disclosure of proprietary information raises both competitive and security concerns. For example, granular information regarding the boundaries of service territories of particular providers, the exact locations and details of network infrastructure, the particular technology being used to provision service at specific locations, the available speed tiers (which could reveal technology), or prices may constitute information that should not be made publicly available. As the courts and the FCC have recognized, disclosure of such information is likely to cause competitive harm given the existing competition for broadband in most places.<sup>16</sup>

It is also worth noting that the agencies should allow reasonable time for comment on applications, access to all information required to assess whether the applications would address

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<sup>16</sup> See, e.g., *Center for Public Integrity v. FCC*, 505 F. Supp. 2d 106 (D.D.C. 2007); *Local Telephone Competition and Broadband Reporting*, Report and Order, 15 FCC Rcd. 7717 ¶ 88 (2000) (noting that broadband providers are harmed by the release of detailed broadband data, as competitors could "take the data submitted and tailor market strategies to quash nascent competition, protect areas that are being subjected to increased competition, or deploy facilities to defend strongholds").

“unserved” or “underserved” areas,<sup>17</sup> and reasonable time for review to consider the information provided. The programs will be unsuccessful, and the opportunities they represent will be wasted, if the agencies make hasty decisions. Having consolidated the second and third funding rounds, the agencies should lengthen the window in which incumbent providers may comment.

### ***C. Outreach and Support.***

USTelecom member companies appreciated the outreach and support provided by the agencies during the first round of funding. Both the workshops and seminars, as well as the Frequently Asked Questions posted on the broadbandusa.gov website were useful and informative. However, it would be helpful for the website to note the most recent postings on the home page. For example, when a new group of applications were added to the mapping tool database, that group of applicants was not immediately highlighted on the home page. It would also be useful for responses to Frequently Asked Questions to be posted on the website as soon as possible and highlighted on the home page, so applicants will have more time to consider the impact of this information in deciding whether and how to seek stimulus funds.

### ***D. NTIA Expert Review Process.***

If either agency chooses to use expert reviewers, it is important for the agency to truly confirm reviewers’ expertise and independence, as well as ensure that use of independent reviewers does not compromise the confidentiality of applications.

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<sup>17</sup> Information required to assess applications was lacking in the first round. The database truncated the list of census blocks implicated by an application at 7500 so commenters could not discern all of the census blocks at issue in large-scale proposals. Moreover, information provided on census blocks and states was incomplete. A complete census block code includes 15 digits, but the database posted for the first round of applications did not in all cases provide the complete code, omitting the 2-digit state and/or 3-digit county component of the code. The mapping tool did not consistently link applications to all states covered by the proposed funded service areas. Some applications were linked to only one state in the search tool when these applications actually addressed multiple states.

## II. POLICY ISSUES ADDRESSED IN THE NOFA

### *A. Funding Priorities and Objectives.*

The agencies should strive to select the best, most sustainable projects that fund construction of facilities to provide broadband service in unserved areas. At the conclusion of the funding pursuant to the second NoFA, if funds remain from the national reserves or for other reasons, applicants should not be required to file a new application in order to be eligible to receive a portion of those funds.

The following factors should be considered by both agencies in reviewing infrastructure projects:

- *Providing service to unserved and underserved consumers*

Priority should be awarded to applications proposing to deploy broadband to unserved and underserved consumers, with the value of this priority corresponding to the degree to which consumers lack broadband access. The highest value should be given to projects for areas that lack access to terrestrial (non-satellite) broadband services offering advertised speeds at or greater than 768 kbps in one direction. This is the low end of the range of services that the FCC defines as “basic broadband tier 1.” The second highest value should be given to projects for areas that lack access to terrestrial broadband service offering advertised speeds at or greater than 1.5 Mbps in one direction. This is the high end of the range of services that the FCC defines as “basic broadband tier 1.” The third highest value should be given to projects for areas that lack access to terrestrial broadband service offering advertised speeds at or greater than 3 Mbps in one direction. At three Mbps, broadband service would be capable of supporting certain applications (particularly standard definition video) that can have significant positive economic effects, such as supporting work-at-home and distance education.

- *Sustainability*

Sustainability is the likelihood that a project will be accomplished as proposed and that it will remain economically and operationally viable after completion of the grant period. This factor involves scrutiny of an applicant's broadband experience and its financial commitment to the project. The incumbent providers, which were effectively discouraged from applying in the first round of funding because of the financial structure of the BIP and obligations imposed on awardees are most likely to be able to develop sustainable projects. The more incumbents are encouraged to participate in the BIP and BTOP, the better the sustainability goal will be met. This can be accomplished by reducing onerous regulatory requirements, such as the nondiscrimination and interconnection requirements as implemented in the first NoFA, and by increasing the grant portion of project funding to a uniform 80 percent.

- *Timeliness of construction*

Projects that commence earlier and bring service to consumers sooner should score higher than those that begin later and bring service to consumers later. Timely construction also best promotes the ARRA's goal of accelerating economic recovery and job creation. Incumbent providers are uniquely well-positioned to quickly design and construct facilities, as their new facilities are usually just extensions from current facilities.

- *Broadband speed*

The agencies should consider the broadband speed made possible by the project. This criterion should be technology neutral. The BIP scoring system adopted in the initial NoFA is improperly and unreasonably biased in favor of wireless deployments by skewing performance

requirements by a factor of ten.<sup>18</sup>

- *Affordability*

Affordability is a relative term based on both the demographics of the area to be served by the project and the costs inherent in providing service to extremely rural and remote areas. Applicants that commit to offer service at prices that are comparable to similar service offerings in areas with comparable characteristics should score higher than applicants that do not make such a commitment. Evaluation of affordability should include not just a low income individual's ability to purchase the service, but also that individual's ability assume other consumer costs, such as an equipment purchase or lease, that add to the total amount the customer must pay to receive the service.

- *Impact on job creation and preservation and economic development*

As between projects of comparable size, projects that save or create more jobs and/or increase the level of economic activity in an area should score higher than projects that save or create fewer jobs or stimulate a lower level of economic activity.

- *Project cost*

Projects that cost less per potential customer should score higher than those that cost more. Adjustments to the scoring (for example, adding a mileage or customer density component) are warranted to ensure that this factor does not work to the disadvantage of areas with geographic or topographic challenges.

- *Public interest projects*

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<sup>18</sup> *First NoFA*, 74 Fed. Reg. at 33119 (awarding ten points for wireline projects constructed to deliver a minimum of 20 megabits per second while wireless projects get the same number of points for delivering only 2 megabits per second.)

Projects that include service to (i) schools, libraries, hospitals, public safety, and similar entities or (ii) consumers who reside in sparsely populated regions where broadband typically offers the only means of ready access to public interest institutions should score higher than projects that do not.

#### **5. Middle Mile “Comprehensive Community” Projects**

Middle mile projects must be examined no less carefully than any other type of project funded under the ARRA. It is especially important to scrutinize whether a middle mile applicant would serve truly unserved or underserved areas. And just like last mile projects, the agencies should not waste scarce funds approving applications that would overlap with existing service providers.

#### **6. Economic Development**

USTelecom has no comment on a regional economic development approach to broadband deployment.

#### **7. Targeted Populations**

USTelecom has no comment on allocating a portion of the remaining funds to specific population groups.

#### **8. Other changes**

The scoring system for both the NTIA and RUS should be significantly revamped to place far greater priority on last-mile projects in unserved areas. These projects represent the best use of taxpayer dollars and are most consistent with Congress’s goals of creating and preserving good jobs, while stimulating economic activity both the broadband providers and their new subscribers.

BIP also discriminates against small entities, whether they are new entities or small existing broadband providers. Points are awarded for “every 10,000 unserved households that

will receive broadband service....”<sup>19</sup> The license areas or certificated areas of many small providers may include in total significantly less than 10,000 households, and the area without broadband availability much less than that. The rules should not discriminate against small providers and their customers by according worthwhile projects which they may propose a lower priority through no fault of their own. Alternatively, if this provision is retained, it should be interpreted as an assessment of households to which broadband service is made available, not households that actually subscribe to such service.

### ***B. Program Definitions***

As the RFI noted, Section III of the NoFA describes several key definitions applicable to the BIP and BTOP, including “unserved area,” “underserved area,” and “broadband.”<sup>20</sup> Another critically important definition is that of “rural” in the BIP context.<sup>21</sup>

- *Unserved, underserved and broadband*

In this context, the terms “unserved,” “underserved,” and “broadband” should be viewed by the agencies within the relative continuums within which they currently exist in this country, and the agencies will need to consider the benefits of each application along a spectrum of availability levels, speeds to be offered, population densities and costs. While each of these criteria is important, these criteria also involve tradeoffs that will require the agencies to establish policy priorities for the limited funds. With this in mind, the agencies should set priorities that are focused on bringing areas and communities most lacking in broadband infrastructure up to levels reasonably available to the majority of Americans. By doing so, the

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<sup>19</sup> *First NoFA*, 74 Fed. Reg. at 33118.

<sup>20</sup> *RFI*, 74 Fed. Reg. at 58943.

<sup>21</sup> *First NoFA*, 74 Fed. Reg. at 33109.

agencies can ensure that these unserved and underserved communities can realize the economic and social advantages created by broadband connectivity, while furthering Congress' primary goal of job creation.

The agencies should continue to use advertised speeds in measuring broadband. In the absence of any common methodology for assessing actual speeds, it is a reasonable approach that is tempered by customer experience, and does not have the inherent inconsistencies that could result from actual speeds differing based on particular customer location, time of day, website visited, or other potential variables that could yield results that are not meaningful.

As noted above, USTelecom recommends that the agencies establish the following relative priorities when assessing funding applications:

1. Current Broadband availability:
  - a. The highest value should be given to projects for areas that lack access to terrestrial (non-satellite) broadband services offering advertised speeds at or greater than 768 kbps in one direction. This is the low end of the range of services that the FCC defines as "basic broadband tier 1."
  - b. The next value should be given to projects for areas that lack access to terrestrial broadband service offering advertised speeds at or greater than 1.5 Mbps in one direction. This is the high end of the range of services that the FCC defines as "basic broadband tier 1."
  - c. The lowest value should be given to projects for areas that lack access to terrestrial broadband service offering advertised speeds at or greater than 3 Mbps in one direction. At that level, certain applications

(particularly standard definition video) that can have significant positive economic effects, such as supporting work-at-home and distance education, become usable.

2. Strategic Institutions: The agencies should also separately examine and give weight to targeted deployment to strategic institutions with potentially higher broadband needs than discussed above, where it can be reasonably shown that such projects are likely to stimulate significant economic benefits to their community. Infrastructure projects that result in new or significantly improved broadband services to strategic institutions such as community colleges, regional hospital networks may contribute to job creation, meet rural education or medical needs, and in other ways satisfy the economic goals identified by Congress.

- *Remote area*

The BIP and BTOP should be harmonized by deleting the concept of “remote,” which was not included in the statute – thereby making all rural applications eligible for grants equivalent to 80% of project costs. Funding limitations based on the NoFA’s remote/non-remote definitions greatly limit the usefulness of the BIP in reaching unserved and underserved households and greatly add to the complexity of the application process. Large areas of rural America are excluded from a higher level of grant funding by the NoFA’s definition of “remote” as being farther than 50 miles from a non-rural area. This leaves a maximum of 50 percent grants for the thousands of square miles of unserved “non-remote” areas, which differ little from “remote” areas in their need for higher levels of support. For those companies that still choose to apply for ARRA funding, it creates a disincentive to serving unserved rural areas. A rural, non-

remote application to RUS qualifies for a maximum of 50 percent in grant funds, while an application serving a less rural area qualifies for up to 80 percent in NTIA grant funding.

Presumably the distinction between “rural” and “rural-remote” is supposed to reflect a cost differential between high-cost and extraordinarily high-cost areas. Although it is somewhat questionable if it is worthwhile to make this distinction (given that NTIA can make 80 percent grants for low-cost areas), using distance from the limits of a non-rural area is not the best proxy for such a cost distinction. Many factors can impact cost, including density, topography, terrain, vegetation and weather. The Federal Communications Commission spent considerable time and effort developing a cost proxy model with many variables for use by non-rural companies to determine universal service support for such companies in their rural areas. Such factors are reflected in the market – that is, areas that remain unserved have that unfortunate distinction because potential providers cannot economically serve them.

Accordingly, RUS grants equal to 80 percent of project costs should be available for all unserved areas. Most rural areas, whether or not they fall under the NoFA’s definition of “remote,” remain unserved not because of the absence or the price of credit, but due to the inability of broadband providers to develop a feasible business case for constructing facilities to bring service to these very high-cost, low density markets. Grants of 80 percent could significantly improve that business case, because as the grants offset capital costs, broadband providers are able to recoup their investment and attain a reasonable return. Grants capped at 50 percent are insufficient to overcome this hurdle. It makes no economic sense for a company to borrow money, even at low rates, to fund projects that will not at least cover their costs. And of course, the lack of a clearly feasible business case either precludes the agency from making a loan at all or results in the government taking an unreasonable risk to its loan security.

Congress recognized the value of grants for rural broadband deployment in uneconomic areas when it decided to create a new RUS broadband program that supplements the preexisting RUS programs with a different financing model. The other RUS telecommunications programs are overwhelmingly based on a loan model (versus grants). But by allocating new funds that could be used for grants, the ARRA recognized that the loan model is not sufficient to address the significant economic barriers to deploying broadband infrastructure in much of unserved rural America.

If RUS insists on making a distinction between types of areas eligible for different proportions of grant versus loan funding, it should take its cue from the last action taken by Congress with regard to the RUS broadband loan program. In the Farm Bill, Congress clearly defined rural and non-rural areas. Since the BIP allows funding in both types of areas,<sup>22</sup> RUS could rely on these Farm Bill definitions and limit grant funds to 50 percent of the project cost in non-rural areas, while permitting 80 percent grants in “rural” areas.<sup>23</sup>

If RUS makes a further distinction between types of areas characterized as rural in under the Farm Bill, it could limit eligibility to 80 percent grants based upon population density. The Federal Communications Commission used a density criterion in its CALLS plan for determining different interstate access rates,<sup>24</sup> and RUS itself has a density criterion for eligibility in its hardship infrastructure loan program. Consistent with these criteria, project areas with a

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<sup>22</sup> ARRA, 123 Stat. 118 (stating that “at least 75 percent of the area to be served by a project receiving funds from such grants, loans or loan guarantees shall be in a rural area.”).

<sup>23</sup> Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, §6110 (2008) (*Farm Bill*).

<sup>24</sup> The FCC uses 19 access lines per square mile as a benchmark to identify “very low density” providers. See *Access Charge Reform: Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board On Universal Service*, 15 FCC Rcd 12962, 13029 ¶ 162 (2000) (“For purposes of applying the 0.95-cent target rate, a very low-density price cap LEC is one with a holding company average of less than 19 End User Common Line charge lines per square mile served.”)

genuine population density at or below 20 households per square mile should qualify for the higher level of grant funding.

### ***C. Public Notice of Service Areas***

Section VII.B of the NoFA for round one allows for existing broadband service providers to comment on the applicants' assertion that their proposed funded service areas are unserved or underserved. Contrary to the suggestion of "[s]ome stakeholders," this practice does not produce "the risk that ... applications may be disqualified from funding on the basis of information submitted by existing broadband service providers that [applicants] have no means to substantiate or rebut."<sup>25</sup> This claim mischaracterizes the division of responsibilities between the agencies and the commenters. Commenters have no ability or authority to "disqualify" applications from funding. Only the agencies can do that.

Instead, the role of commenters is to inform and supplement the due diligence that the agencies should already be undertaking to ensure that the applications meet the requirements of the statute and the NoFA prior to funding. The agencies should actively encourage comment from existing broadband providers. Consideration of these comments can help ensure ARRA funds are not wasted in areas not qualifying as unserved or underserved, or by overbuilding that can render both the project and incumbent service nonviable.

Indeed, the agencies should be using all available information to determine whether and how intensively to examine the accuracy of statements made by applicants. This information includes data like that produced twice yearly by the FCC from the information gathered through the Form 477 reports, any data available through the State Broadband Data and Development Grant Program and any other publicly available data. RUS also has field staff throughout the

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<sup>25</sup> *RFI*, 74 Fed. Reg. at 58943 – 58944.

country who should be acting to verify information whenever any of the above data sources calls the accuracy of an application into question.

USTelecom members have identified many applications to RUS and NTIA that claim project areas are unserved, but where there is at least one existing provider of broadband service. The agencies should carefully and thoroughly consider all information provided by incumbent broadband service providers in reviewing these applications. For example, the agencies must realize that ILECs' exchanges and cable operators' franchise boundaries do not sync up with applicants' proposed serving areas. The first NoFA directed applicants to identify proposed serving areas by census block, while incumbent broadband providers' serving areas are not based on census blocks. In fact, incumbent broadband providers -- including ILECs and cable system operators -- typically do not utilize census blocks in their records.

One of our members determined it would take 10 hours per application just to estimate penetration rates for an applicant's proposed serving area at a census block level -- longer if more than a few exchanges are involved. Of course, there are many hundreds of applications at issue, commonly with multiple service areas overlapping with many exchanges. Moreover, many applications overlap more than one incumbent broadband service provider, so the effort for all incumbent broadband providers to fashion penetration data by census block, would be huge, and unreasonable, when they already have exchange or franchise level data.

An RUS representative has contacted some members about penetration rates by census block, and suggested that any comment or challenge that does not provide penetration rates at the census block level might not be considered. The agencies should not ignore the data that has been provided. Given the short time allowed to review and comment on applications -- and given the very large number of applications that mistakenly or falsely claim an area is unserved

or underserved -- it would be unreasonable and counter to the ARRA's broadband deployment goals if the agencies were to ignore data incumbent broadband providers submit, simply because they are unable to provide some information down to the census block level. The second NoFA should make it clear that the agencies will consider all information about existing broadband service in an applicants' proposed service area.

#### ***D. Interconnection and Nondiscrimination Requirements***

Congress intended ARRA "to preserve and create jobs and promote economic recovery" and to do so "as quickly as possible." The funds provided to NTIA and RUS are intended to accomplish these goals through improving broadband access and adoption in order to "stimulate demand for broadband, economic growth and job creation."

##### *Substance and Status of the Obligations*

Within this framework, the statute requires NTIA to publish nondiscrimination and network interconnection obligations including, "at a minimum, adherence to the principles contained in the Commission's broadband policy statement." The FCC broadband Policy Statement referred to in the NTIA portion of ARRA defines key FCC policies designed to "encourage broadband deployment" and to "preserve and promote the open and interconnected nature of the public Internet." The four principles, all subject to reasonable network management, provide that consumers are entitled to (1) access the lawful content of their choice, (2) run applications and use services of their choice, (3) connect any legal device that does not harm the network; and (4) competition among network providers, applications and service providers and content providers.<sup>26</sup> This FCC policy statement explicitly builds on Congress's

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<sup>26</sup> Policy Statement, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986, ¶ 4 (2005) (*FCC Policy Statement*).

determination that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet.”<sup>27</sup>

Although the RUS portion of ARRA has no such requirement, it does state that “*priority* for awarding such funds shall be given to project applications for broadband systems that will deliver end users a choice of more than one service provider.”<sup>28</sup> The purpose of this language can be fairly and reasonably addressed by awarding a priority to those applicants for RUS funding that agree to adhere to the Commission’s established broadband Policy Statement.

RUS went far beyond the statute by converting this priority into a requirement for funding. There is nothing in the statute that permits RUS to add such a requirement, or that indicates that Congress intended what it clearly labeled a priority to be converted into a requirement. The NoFA should be modified to reflect the original intent and plain language of the statute with regard to this critical distinction. The desire to ensure consistency between the programs here does not trump clear BIP and BTOP statutory language to the contrary. For purposes of the second NoFA, NTIA should provide that the existing FCC Policy Statement defines the sole nondiscrimination and interconnection obligation to be placed on grant recipients. More than three years of experience under that Policy Statement has demonstrated its successful balancing of interests among stakeholders – consumers, broadband service providers, application and content providers and technology companies. Implementing the ARRA should support, not hinder, the ability of providers to continue to expand and enhance services and speeds.

The broadband ecosystem under the Policy Statement has been thriving – providing high-

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<sup>27</sup> Communications Act of 1934, as amended, 47 U.S.C. §230(b)(2).

<sup>28</sup> ARRA, 123 Stat. 118 (emphasis added).

quality jobs and investment. About one million people are directly employed in telecommunications, and the information technology sector provides more than 5.5 million jobs. All sectors of the broadband ecosystem – network providers, content and application providers and technology companies are investing in new and improved services, applications and content to higher and higher levels. Last year alone, carriers invested almost \$70 billion to improve their broadband networks and the entire information technology sector invested over \$450 billion in technology and new applications and services.

Altering this virtuous cycle – high-quality jobs, investment and innovation – by expanding the reach of the Policy Statement or imposing new obligations as conditions for grants and loans would be unwise. Threats to the cycle that has characterized the Internet under the Policy Statement could produce harm that would easily outweigh the potential benefits of the program at issue here. Creating additional obligations will add cost, complexity and risk to the broad array of potential projects including the construction and operation of broadband networks. Given that these projects and networks are likely to serve the most challenging areas of the country, where no current business case may exist to build and operate a broadband service, every effort should be made to minimize the costs and difficulty of undertaking these projects and building and operating these networks. Given the pressing need to translate program dollars into jobs, broadband infrastructure and connections and the proven success of the FCC’s current Policy Statement at “promoting the open and interconnected nature of the public Internet,” NTIA should make the FCC Policy Statement, without any expansion, the sole criterion for nondiscrimination and network interconnection obligations.

The agencies’ interpretation of ARRA particularly discourages existing providers who are most able to develop sustainable projects from applying for funding. Even though the NoFA

applies the nondiscrimination and interconnection requirements only to funded facilities, segregating network facilities for disparate treatment according to the source of their financing is difficult, if not impossible. On the one hand, these obligations mean existing providers are placing the entirety of their investment at stake, not just the portion funded through ARRA. On the other hand, new entities have nothing to lose as the nondiscrimination and interconnection requirements would apply to only future investment since there is no prior investment made with their own capital and therefore no further risk involved. In essence, new entities are playing with the house's money, while existing providers are risking their own funds.

#### *Duration of the Obligations*

The nondiscrimination and interconnection obligations should be applied for a term no longer than the earlier of (1) two years from the end date authorized for project completion or (2) the effective date of any federal legislation or regulation that substantially addresses network neutrality obligations of broadband Internet providers, including, but not limited to, any legislation or regulation that substantially addresses the privileging, degradation, or prioritization of broadband Internet access traffic. Imposing nondiscrimination and interconnection obligations for any duration longer than two years would require companies to make commitments for a time span that far exceeds any that can be reasonably predicted for services offered in the evolving and advancing communications marketplace. Moreover, specifying this sunset date would be more consistent with FCC precedent. The NoFA's explanation of the interconnection and nondiscrimination requirements notes that "[t]he standard used here is a more general version of the one the FCC imposed in the AT&T/BellSouth merger conditions, which specified no differential treatment of packets based on source, destination, or

ownership.”<sup>29</sup> This is certainly an instance that confirms the old bromide that “the devil is in the details.” The “more general version” applying these obligations to the “life of the facilities,” seems to ignore the detail that the AT&T/BellSouth merger conditions would sunset at the duration of a term no longer than two years.<sup>30</sup>

NTIA and RUS also should be cognizant of the fact that the FCC is now examining whether and how to further define the policies necessary to preserve an open Internet. The agencies should not preempt that process already underway at the expert agency through *ad hoc* application of their own policies, subject to minimal public comment, and applied to entities which seek to fulfill the important public policy goal of expanding broadband availability. The agencies’ ability to assure compliance has significant and needless added complexity when providers must follow both the FCC’s principles and different rules from RUS and NTIA.

The NoFA itself seems to argue for deference to the FCC in this context. In the explanation of the thinking behind the implementation of the interconnection and nondiscrimination requirements, the NoFA states “To the extent that the FCC takes action in this area, such as by modifying its Internet Policy Statement or by adopting additional or different rules or policies, awardees will become subject to FCC rules and policies in lieu of the conditions set forth only to the extent that the FCC rules or policies effectively supersede the conditions set forth above.”<sup>31</sup> This statement sensibly reflects the view that the FCC is the expert agency in this area, and that having a requirement different from that of the FCC would be difficult to administer and enforce. To clarify that indeed is the case, USTelecom recommends that the NoFA declare that the nondiscrimination and interconnection obligations will sunset on a date no

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<sup>29</sup> *First NoFA*, 74 Fed. Reg. at 33133.

<sup>30</sup> *First NOFA*, 74 Fed. Reg. at 33134.

<sup>31</sup> *First NoFA*, 74 Fed. Reg. at 33134.

later than the effective date of any federal legislation or regulation that substantially addresses network neutrality obligations of broadband Internet providers, including, but not limited to, any legislation or regulation that substantially addresses the privileging, degradation, or prioritization of broadband Internet access traffic. This language is consistent with FCC precedent regarding the duration of the AT&T/BellSouth merger conditions.

*Application of the Obligations to Contractors or Subcontractors*

To ensure that projects are rolled out in an efficient manner, are sustainable and maximize the possible bang for the buck in extending the reach of broadband, NTIA and RUS should clarify that the nondiscrimination and network interconnection requirements do not apply to (1) vendors, suppliers or other contributors providing facilities, service or equipment that are inputs to projects, or (2) third parties leasing space or capacity on awardees' facilities. The clarifications outlined below will further the underlying goals of the broadband stimulus programs and ensure that projects are implemented in a manner that yields maximum public benefit.

First, to ensure the widest possible range of choices for awardees and efficient use of taxpayer funds, NTIA and RUS should clarify that the nondiscrimination and interconnection requirements do not apply to vendors, suppliers or contractors that may provide goods, services, or equipment used in connection with a broadband infrastructure project. ARRA plainly contemplates that the nondiscrimination and interconnection requirements should apply to the recipient that is awarded broadband stimulus funding and that operates that project.<sup>32</sup> Yet, in the first funding round, both RUS and NTIA suggested that the nondiscrimination and

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<sup>32</sup> See ARRA, § 6001(j) (requiring 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)”).

interconnection requirements they adopted apply to not only the recipient of broadband stimulus funding, but also to “any contractors or subcontractors” that a recipient employs “to deploy or operate the network facilities for the infrastructure project.”<sup>33</sup>

The scope of the entities that RUS and NTIA intended to capture as “contractors or subcontractors” – terms nowhere defined – is unclear. The Common Grant Rules (as codified by Commerce at 15 C.F.R. Part 14) and Department of Commerce Standard Terms and Conditions identify clauses which are to be flowed down to “*contracts*” and “*subcontracts*” awarded by grant recipients. For purposes of these flowdown requirements, a “*contract*” or “*subcontract*” is defined as “a procurement contract under an award or subaward, and . . . procurement subcontract under a recipient’s or subrecipient’s contract.”<sup>34</sup> However, under the Common Grant Rules, a “vendor” is not responsible for complying with the program requirements applicable to recipients.<sup>35</sup> Indeed, by definition, a vendor is an entity that “[i]s not subject to compliance requirements of the Federal program.”<sup>36</sup> In any event, in order to promote the most efficient and effective use of taxpayer money, NTIA and RUS should clarify that vendors, suppliers and other contractors are not subject to nondiscrimination and interconnection requirements that otherwise may apply to awardees under BIP or BTOP.

To do otherwise would harm the sustainability of BIP and BTOP-funded broadband projects by potentially constraining awardees’ choice of vendors, thus preventing the most

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<sup>33</sup> See *First NoFA*, 74 Fed. Reg. at 33111.

<sup>34</sup> 15 C.F.R. § 14.2(i) (implementing OMB Circular A-110, § \_\_.2(h)).

<sup>35</sup> See OMB Circular A-133, § \_\_.210(f) (providing that “[p]rogram compliance requirements normally do not pass through to vendors”). In general, a “vendor” is defined as follows: “Vendor means a dealer, distributor, merchant, or other seller providing goods or services that are required for the conduct of a Federal program. These goods or services may be for an organization’s own use or for the use of beneficiaries of the Federal program.” OMB Circular A-133, § \_\_.105.

<sup>36</sup> OMB Circular A-133, § \_\_.210(c)(5).

efficient use of stimulus funds. Clarifying that the requirements do not apply to vendors, suppliers or contractors will encourage a wider variety of parties to work with BIP and BTOP awardees. And as a result, the clarification will help support the goals of the programs. Awardees may be left with less competition for the inputs they need to accomplish the goals of their projects and have more and better access to the vendors potentially best-positioned to deploy broadband efficiently and effectively.

Second, to encourage sustainability of projects and to further the interests of expanding the reach of broadband in unserved and underserved areas, RUS and NTIA should also clarify that the nondiscrimination and interconnection requirements do not apply to third parties leasing space or capacity on awardees' facilities constructed with BIP or BTOP funds. Broadband infrastructure funded by taxpayer dollars will only further national broadband goals to the extent that it is used. In the case of middle-mile facilities, it is only useful if last-mile providers are present and make use of the middle-mile capacity to better serve end-users. Likewise, wireless towers are only useful if wireless providers take advantage of their presence. It presumably is not RUS's or NTIA's intent to saddle a lessee or purchaser of capacity with such requirements, which would run counter to the entire purpose of the BIP and BTOP programs. For example, some applicants in the first round of funding are applying for funds to construct wireless towers on which the applicant intends to lease space to commercial wireless carriers that could offer wireless broadband service to end user customers. Although there is no reason why a wireless carrier leasing space on a tower financed with funds under BIP or BTOP should be subject the regulatory strings attached to stimulus funds, the initial NOFA could be read to suggest

otherwise.<sup>37</sup> Similarly, some applicants seek to build middle-mile facilities, and the agencies should make clear that the attachment of regulatory strings does not apply could encourage last-mile providers to utilize that capacity once built.

Clarification that the nondiscrimination and interconnection obligations do not apply to entities that seek to make use of award-funded broadband facilities supports the economic viability and public benefit of such projects. First, such a clarification would encourage a wider range of broadband providers to utilize the middle-mile capacity and towers built with stimulus funds, which in turn will increase the range of areas where broadband will be available. As a consequence, projects that are relying upon revenue from the lease of facilities or capacity may obtain additional revenues, thereby increasing the likelihood that the project will be sustainable in the long run. Likewise, encouraging last-mile broadband providers to use stimulus-funded facilities makes it more likely that federal funds will successfully extend the reach and capabilities of broadband in areas that are currently unserved or underserved. RUS and NTIA would thus improve the efficiency, sustainability and public benefit by clarifying that the nondiscrimination and interconnection requirements do not extend to lessees.

***E. Sale of Project Assets.***

USTelecom and its members share the government’s concern about speculators benefitting from government funding. However, barring the sale or lease of ARRA funded facilities for ten years is an overly broad response to this concern. It would not only discourage legitimate rural providers from applying for needed funding, but it needlessly would limit the discretion of the agencies themselves to approve beneficial transactions. The

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<sup>37</sup> *First NoFA*, 74 Fed. Reg. at 33123 (authorizing the lease of award-funded broadband facilities if the “lessee agrees to fulfill the terms and conditions relating to the project after such . . . lease”).

telecommunications industry is very dynamic and is in the midst of an enormous investment in broadband build out. Companies are rationalizing their footprints, seeking economies of scale, and developing market niches in which they can be more efficient and successful. All of these strategies enhance the ability of providers to improve and extend broadband availability. It makes no sense for the agencies that are administering programs designed to encourage build out of broadband facilities to adopt a policy that discourages transactions that ultimately promote efficient network investment and greater build out.

The [broadbandusa.gov](http://broadbandusa.gov) website offers some clarification of the restriction on sale or lease of ARRA financed facilities.<sup>38</sup> Question 3 of the Frequently Asked Questions notes that “the award terms do not restrict a transfer of control of the awardee (*e.g.*, via sale of the awardee’s stock), provided that title to the property does not change.” This clarification should apply in all circumstances in which the title to the property does not change, including but not limited to where an operating entity is wholly acquired and maintained as a subsidiary or affiliate of another corporate entity.

In instances where title to the property does change, while a restriction on the sale or lease of ARRA financed facilities is appropriate to avoid unjust enrichment, such a restriction should be structured so that it can be overcome by a reasonable showing that the transaction does not yield such a result, is consistent with program goals and is therefore in the public interest. An unqualified ten-year restriction bears no relation to avoiding unjust enrichment. Instead of using ten years as an ineffective proxy for unjust enrichment, the ten year rule should be revised and replaced by the direct application of the unjust enrichment standard suggested above.

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<sup>38</sup> See [broadbandusa.gov](http://broadbandusa.gov) (last visited November 25, 2009), Section VI, B, question 3. “Do the restrictions on the sale or lease of award-funded facilities restrict a sale or transfer of ownership in the awardee itself? For example, if the awardee is a subsidiary, can the awardee’s parent company sell the awardee?”

***F. Cost Effectiveness.***

The RFI correctly lists the factors that should be taken into account to measure cost effectiveness. At a minimum, any measure of cost effectiveness should consider the ratio of unserved and underserved homes passed per public dollar spent, viewed in conjunction with the degree to which an area is challenging to serve. One possible approach for how to score this provision is as follows:

Average Amount of Public Funding Requested to Deploy New or Enhanced Broadband Service to an Unserved or Underserved Household in the Project Area	Project Area Where 95%+ of the Households Lack Access to Terrestrial Broadband at Advertised Speeds of 768 Kbps in One Direction	Project Area Where 95%+ of the Households Lack Access to Terrestrial Broadband at Advertised Speeds of 1.5 Mbps in One Direction	Project Area Where 95%+ of the Households Lack Access to Terrestrial Broadband at Advertised Speeds of 3 Mbps in One Direction
\$0-499	<i>(highest possible points)</i>		
\$500-999			
\$1,000-1,499			
\$1,500-1,999			
\$2,000-2,499			
\$2,500+			<i>(no points assigned)</i>

Consistent with USTelecom’s recommendations as to how to define “remote,” another approach would be to consider population density when determining the degree of difficulty in serving an area.

The agencies should also be cognizant of the fact that the cost effectiveness of a project is only relevant if the project meets the other necessary requirements such as sustainability, timeliness of construction, quality of service (including robust speed) and affordability. A

project that appears to be cost effective but results in an unsustainable network is really not cost effective at all, since the funding would be essentially wasted. So while cost effectiveness is an important consideration, the overall quality of the project as measured by the other applicable standards must not be underemphasized.

***G. Other.***

There are several other modifications that should be made to the NoFA for round two in order to ensure that the public's scarce resources are prudently spent. Among those changes are: (1) clarification of the program income restriction, (2) improvements to the mapping tool, (3) development of a post-award process that would offer recourse in the case of improper awards, (4) clarification of the duration of the obligations incurred by virtue of receiving funding, and (5) clarification of the class of entities eligible for Title II borrower priority status.

- *Clarification of the program income restriction*

Section V, Subsection E. Use of Program Income, should be eliminated.<sup>39</sup> USTelecom is concerned that the first round definition of program income could be construed to mean all receipts from a customer-provided broadband service as a result of investment funded by the BIP or BTOP. Since the restriction on the use of program income applies for the funding or project period, and that period can be as long as three years, funding recipients might be forced to provide service to customers for up to 36 months and receive no compensation for the ongoing costs of providing that service as well as the recovery of any capital costs not covered by a BIP

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<sup>39</sup> *First NoFA*, 74 Fed. Reg. at 33113. Subsection E states in part that “[f]or purposes of BIP and BTOP, any program income generated by a proposed project during the grant period shall be retained by the grant recipient and shall be added to the funds committed to the project by RUS or NTIA and the recipient.” [Emphasis added.] The subsection goes on to further define program income “*gross income* earned by the recipient that is either directly generated by a supported activity, or earned as a result of the award during the funding period.” [Emphasis added.]

or BTOP grant.<sup>40</sup> Since the NoFA specifically excludes operating costs from BIP or BTOP funding, costs must be covered by the broadband provider. This policy creates a hardship for the provider and actually discourages the prompt connection of subscribers because upon connection, the broadband provider will incur costs that will not be recoverable during the project period.

If the agencies decline to eliminate this provision, NTIA and RUS should at least clarify that the program income restriction applies solely to profits generated by a proposed project, not to all income from the project. Subsection E states in part “For purposes of BIP and BTOP, *any* program income generated by a proposed project during the grant period shall be retained by the grant recipient and shall be added to the funds committed to the project by RUS or NTIA and the recipient.” [Emphasis added.] USTelecom members are concerned that this definition of program income could be interpreted to mean all receipts from a customer provided broadband service as a result of investment funded by the BIP or BTOP. In contrast, program income should be defined as the revenue from subscribers connected by virtue of the construction of project facilities minus the costs of operating those facilities, demand stimulation expenses (e.g., computer discounts), stimulus compliance costs, and the capital costs of financing the construction of those facilities, to the extent such costs are not covered by BIP or BTOP grants.

- *Improvements to the mapping tool*

The mapping tool provides data informing potential commenters about applications submitted for the broadband infrastructure programs, thereby facilitating the gathering of information regarding accuracy of representations made by applicants with respect to the

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<sup>40</sup> The *First NoFA* specifically excludes operating costs from BIP or BTOP funding, so such costs must be covered by the broadband provider.

unserved or underserved nature of potential project areas. Such information can be extraordinarily valuable in assisting the agencies in performing their due diligence prior to making funding decisions, so the ability of commenters to reasonably access and use the mapping tool is highly beneficial to the agencies. The current mapping tool, however, suffers from numerous constraints that make it very difficult and unduly resource intensive, and in some cases impossible to use. These constraints prevent incumbent providers from fully informing the agencies about the extent of current broadband availability and compromises the integrity of the BIP and BTOP. USTelecom members have identified many problems with the mapping tool:

1. *The database displays only up to 7500 census blocks for a large proposed funded service area* – Many applications cross multiple counties or states and include potentially thousands of census blocks. The 7500 census block limit thus may mean that some census blocks proposed to be funded are not listed. Obviously it is impossible to inform the agencies about the extent of incumbents' broadband deployment in a census block when the commenter is unable to determine whether that census block is part of a proposed project. All the census blocks included in a proposed project must be listed.

2. *Information describing implicated census blocks and states was incomplete* – A complete census block code includes 15 digits, but the database posted for the first round of applications did not in all cases provide the complete code, omitting the 2-digit state and/or 3-digit county component of the code. The identity of the state can usually be discerned relatively easily from the application, but the identity of the county (or counties) is often difficult to discern. Moreover, the mapping tool did not link applications to all states covered by the proposed funded service areas. Some applications were linked only to one state in the search tool when these applications actually address multiple states. Complete census

block codes and state map links should be provided so that all of the areas states covered by a proposed project can be readily discerned.

3. *The format of the database requires burdensome manual search and project-by-project responses* – Instead of being able to search by census block to compare applicants’ proposed funded service areas to census blocks already served by commenters, commenters must search by proposed funded service areas, and then use the agencies’ broadband mapping tool to manually draw maps demonstrating where they provide service. As noted by the agencies, separate maps must be submitted for each proposed funded service area, and many applications have multiple proposed funded service areas. To streamline this process, search should be enabled by census block as well as project, and the agencies should allow commenters to produce a single submission that addresses all implicated census blocks at once, rather than require project-by-project responses. Moreover, because census blocks do not necessarily correspond to incumbents’ service areas, including ILEC exchanges and wireless license areas, the use of census blocks makes it difficult to review and comment on applications, and also makes it difficult for the agencies to determine whether an application is in fact eligible. When existing broadband providers submit related exchange area information, the agencies should also consider that information in their review.

4. *The agencies should only request comment on applications that have been prescreened* – As part of the agencies’ initial screening process, the agencies should post only those project applications that meet at least the minimum eligibility requirements. That would allow commenters to focus on those applications, instead of spending valuable resources providing unnecessary information on applications that already have no chance of receiving funding regardless of the level of broadband service available in the project areas.

5. *Irrelevant data are requested* – The response form instructs incumbents to indicate the information on pricing, speed tiers (other than 3 Mbps and 768 Kbps), and subscribership counts parsed apart for customer segments at various speed tiers above 768 Kbps. It also asks commenters to specify whether the subscribers are residential households or business establishments. This information is not needed to determine whether an applicant accurately represented an area as “unserved” or “underserved.” In addition, many providers may not necessarily maintain records this way, particularly if the proposed funded service area covers only a portion the service territory in which the commenter provides broadband. Requests for this unnecessary information should be deleted, or if the agencies insist upon retaining these provisions, the instructions should at least expressly permit commenters to use reasonable factors reflecting their overall residential/business split to respond.

6. *It is difficult to demonstrate that thresholds are met when an individual commenter does not serve the entire project area* – Several criteria for demonstrating that a project area is unserved or underserved involve meeting or exceeding certain percentage availability or subscribership thresholds. For example, one criterion for demonstrating that an area is underserved is a showing that there is 40 percent or less subscribership in the project area. The agencies should be cognizant of the fact that sometimes no single commenter may have subscribership data that refute the claim that an area is “underserved,” as this showing can be made only after aggregating subscribership data from multiple incumbents. The same may be true for data on availability of service.

7. *Timeline for commenting on applications* – Many incumbent service providers were unable to complete their reviews of potential applications in the short, 30-day window allowed, despite allocating significant resources to this effort. The list of projects

available for comment was removed shortly after the expiration of the 30-day comment period. While it is certainly reasonable for the agencies to establish a deadline for comments on applications, the agencies should not ignore or inhibit submission of relevant information provided after the deadline. Often because of the difficulty in using the mapping tool, many commenters were unable to complete their work within the 30-day comment period, despite devoting extensive resources to responses. If such commenters produce information after the deadline but prior to a funding decision being made, the agencies should take the information into account as part of their obligation to perform due diligence. The list of project areas should also be maintained as long as such projects are being considered for funding.<sup>41</sup>

8. *Listing new projects on the broadbandusa.gov home page* – In round one, commenters found they had to constantly peruse the mapping tool portion of the website to determine whether any new applications had been posted. The home page, which purports to highlight new information, should note on a real-time basis when new projects have been posted to the mapping tool database.

- *Recourse for improper awards*

Even with the highest possible level of due diligence in examining the accuracy of representations made by applicants, the agencies recognize that some ineligible projects may be funded. Section X I., Deobligation, reads as follows: “The RUS and NTIA reserve the right to deobligate awards to recipients under this NoFA that demonstrate an insufficient level of performance, or wasteful or fraudulent spending, and award these funds competitively to new or

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<sup>41</sup> It appears that Section VII B, Notice of Proposed Funded Service Areas, contemplates such a process. *First NoFA*, 74 Fed. Reg. at 33122. It states in part “If an existing service provider submits a response outside the timeframe specified in this NoFA, it will not be considered an existing service provider for determining whether the applicant’s service area is eligible, but will still be considered with respect to the agencies’ other applicable eligibility requirements.” *Id.*

existing applicants.” Spending that is contrary to eligibility standards would clearly qualify as wasteful if not fraudulent. To guard against such spending, the agencies should provide a process by which incumbents or other members of the public can provide information to help identify awards that are contrary to eligibility standards prior to or after the obligation process.

- *Clarification of the duration of obligations*

Many of the obligations established in the NoFA apply for the “life of the facilities.”<sup>42</sup> In addition to being draconian, requirements with this duration may not be technologically neutral. For example, fiber facilities may have a much greater life than a satellite, so funding recipients constructing projects with fiber may have a substantially greater obligation than ones involving satellite facilities. The “life” of facilities like fiber can span decades, an extraordinarily long period for regulatory type obligations, and an unreasonably long duration for government oversight. Imposing requirements for this duration may result in a competitive disadvantage enduring for years. To ensure no funding recipients are placed at a significant competitive advantage, the agencies should clarify that the “life” of the facilities implicated by the NoFA should not extend beyond two years from the end date authorized to fully complete the project in the proposed funded service area.

- *Clarification of the class of entities eligible for Title II borrower status*

The statute authorizing BIP states “[t]hat priority shall be given for project applications from borrowers or former borrowers under title II of the Rural Electrification Act of 1936 and for project applications that include such borrowers or former borrowers....” RUS, however, has taken a very narrow view of the definition of “applications that include...borrowers or former

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<sup>42</sup> The *First NoFA* states that any awardee obligations under an awarded grant and/or loan “shall extend for the life of the award-funded facilities. *First NoFA*, 74 Fed. Reg. at 33123.

borrowers,” by failing to afford priority to applications submitted by parent companies, subsidiaries and affiliates of borrowers. Congress clearly intended a much more expansive view since the statute mandated that the priority be accorded not only to project applications *from* borrowers or former borrowers, but project applications *including* borrowers or former borrowers. [Emphasis added.] Use of the word “including” clearly indicates that to receive the priority a project applicant need not be made up exclusively of borrowers or former borrowers, but could also include others. Consistent with the legislation, the definition of former borrower, therefore, should be clarified to apply to any entity that participated in any of the RUS Title lending programs, including but not limited to, its parent companies, subsidiaries, and affiliates. “Affiliate” in this instance should mean any entity that is directly or indirectly controlling, controlled by, or under common control with the applicant. In order to be deemed in control, be controlled by, or under common control, more than 50 percent equity ownership would need to be established.

### **III. CONCLUSION**

USTelecom recommends that NTIA and RUS modify the NoFA so that the second round of funding takes full advantage of the momentous opportunity offered by the broadband infrastructure provisions of the ARRA. Properly administered, the BIP and BTOP can make significant progress toward the goal of ensuring that all Americans have access to high speed broadband services. With the funds remaining available under the second NoFA the agencies have the opportunity to include more applicants and to improve the quality of applications, thereby maximizing the potential benefits of the programs in creating jobs and promoting of sustainable broadband availability.

Unfortunately the rules under which requests for the first round of funding were considered did not take full advantage of that opportunity. Indeed, the need for modification of

the rules is indicated by a disappointing level of participation by many of the most able and qualified providers that can quickly and efficiently construct broadband facilities and fulfill the twin goals of ARRA – job creation and broadband expansion.

The agencies fortunately have an opportunity to learn from those problems and use the second round of funding to fulfill the promise of these important programs. Historically it has always been recognized that RUS loan programs are voluntary, and that participation by the most able providers leverages the government’s capital with the expertise and boots on the ground knowledge of local incumbent providers. A similar philosophy should apply to the BIP and BTOP.

The agencies also have the responsibility to ensure that the unprecedented, one-time funding is spent properly and prudently, without duplicating investment already in place. The agencies have the statutorily accorded obligation to diligently pursue the funding only of projects that meet ARRA and NoFA standards. Although a system for commenting on the applications was instituted to afford the agencies access to information relevant and important to that review, that system was extraordinarily difficult to use, and in some cases commenters found it impossible to fully and properly respond. The agencies should reform and upgrade that process so that it yields the maximum level of useful information which will allow the agencies to most efficiently and effectively pursue their responsibility for due diligence in awarding funding only to eligible projects under ARRA.

To achieve the most public benefit from the finite federal funds dedicated to broadband, stimulus funds should be effectively targeted to bring broadband to areas that are currently unserved and to promote adoption in areas where broadband is available but customers do not subscribe. In particular, directing broadband stimulus funds to unserved areas and promoting

broadband adoption will help overcome the two primary obstacles to achieving the nation's broadband goals.

NTIA and RUS should direct broadband stimulus funds to projects designed to build broadband facilities to unserved areas and bring the residents and businesses in those areas online, which represent the best use of taxpayer dollars and are most consistent with Congress's goals in the Recovery Act. Doing so would best serve the Recovery Act's goals of creating and preserving good jobs, while stimulating economic activity both by broadband providers and their new subscribers.

Moreover, a broadband project is unlikely to be sustainable or offer any long-term public benefit if it constructs broadband infrastructure where competing providers already offer broadband service. "Funding competition" makes no economic sense and is too costly to sustain, as the FCC has observed in the universal service context. To ensure that limited federal dollars are not being used to subsidize the overbuilding of broadband infrastructure and, "[c]onsistent with the Administration's policy and the Recovery Act's objective to ensure greater transparency," the NTIA and RUS response process should provide complete information on proposed funded service areas.

Finally, to ensure that taxpayer dollars are spent appropriately, RUS and NTIA should select experienced providers that have sustainable plans to reach unserved areas with broadband. Regardless of the type of entity that seeks funding, NTIA and RUS should require that applicants have the demonstrated capability and competence to carry out their proposed projects and to sustain their operations following the funding period.

Respectfully submitted,

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