Comments of WCAI on the

Joint Request for Information

of the National Telecommunications and Information Administration and the Rural Utilities Service

Rural Utilities Service
RIN: 0572–ZA01

National Telecommunications and Information Administration
Docket Number: 0907141137–91375–05
RIN: 0660–ZA28

Wireless Communications Association International
1333 H Street, NW, Suite 700 West
Washington, DC 20005

November 30, 2009

The Wireless Communications Association International ("WCAI"), the trade association of the wireless broadband industry, submits these comments on the Joint Request for Information published in the Federal Register on November 16, 2009 (the "RFI").[1]

EXECUTIVE SUMMARY

WCAI members were generally pleased with the application processes established for the first round of funding pursuant to the American Recovery and Reinvestment Act of 2009 (the "Act").[2] However, WCAI believes that the improvements suggested below would better maximize the impact of the limited funds available and produce the greatest benefit for the public. Specifically, WCAI recommends that:

- the Rural Utilities Service ("RUS") make it clear that the collateral applicants must pledge as security for BIP loans or loan/grant combinations will be limited to those assets that the applicant acquires with BIP loan funds;
- the agencies require their approval of any sale or lease of award-funded facilities only where the transaction in question occurs within five years of the award's issuance date or, if longer, the term of any underlying loan or loan/grant award;
- the agencies abandon their reliance on advertised speeds in determining whether an area is unserved or underserved or establish a "safe harbor" for applicants seeking to demonstrate that their applications qualify for consideration;

[1] *See* Joint Request for Information, Department of Commerce *et al.*, 74 Fed. Reg. 58940 (rel. Nov. 16, 2009).

[2] *See* H.R. 1, 111th Cong. 1st Sess., § 6001.

- the National Telecommunications and Information Administration ("NTIA") accommodate applications that address specific statutory goals set forth in the Act that were left unaddressed in round one; and
- the agencies accord substantial weight to "cost effectiveness" in the application evaluation process.

These issues are discussed in greater detail below.

DISCUSSION

The "Shared Collateral" Rule

RUS should make it clear in the second NOFA that the collateral applicants must pledge as security for BIP loans or loan/grant combinations will be limited to those assets that the applicant acquires with BIP loan funds. It is neither necessary nor commercially reasonable to require that such collateral include the applicant's or any other party's existing or future assets that have been or will be acquired with funds from other sources. The rule as currently written played a key role in some WCAI members forgoing the first round of applications.

WCAI's concerns about this issue arise from Section IX.B.1.g.v of the first NOFA, which states in relevant part as follows:

> v. *Security.* The loan portion of the award must be adequately secured, as determined by RUS.
>
> (1) The loan and loan/grant combination must be secured by the assets purchased with the loan or loan/ grant funds, as well as all other assets of the applicant and any other signer of the loan documents that are available to be pledged to RUS.
>
> (2) RUS must be given an exclusive first lien, in form and substance satisfactory to RUS, on all of the assets purchased with the loan or loan/grant funds. RUS may share its first

> lien position with one or more lenders on a *pari passu* basis if security arrangements are acceptable to RUS.

WCAI takes no issue with RUS having an exclusive first lien on "assets purchased with the loan or loan/grant funds." Subsection v(1), however, goes much further: it requires that the applicant's BIP loan or loan/grant combination also be secured by "*all* other assets of the applicant and any other signer of the loan documents that are available to be pledged to RUS." As an initial matter, such assets are not "available to be pledged to RUS" if, as is often the case, those assets have already been pledged to other lenders.[3] More fundamentally, it is overreaching for RUS to force an applicant or other signatory to, in effect, encumber their *entire* business (or even some of it) as security for a BIP loan when the loan is already fully secured by any assets acquired with that loan's proceeds. Since RUS is already assured of being made whole in the event of default, extending the security requirement to assets not funded through BIP is regulatory overkill that imposes significant additional burdens on applicants without materially advancing the objectives of the BIP application process or the public's interest in ensuring selection of qualified applicants.

Relaxation of the Ten-Year Holding Requirement

Section IX.C.2 of the first NOFA generally prohibits the sale or lease of award-funded broadband facilities unless, *inter alia*, the sale or lease transaction occurs more than ten years after the issuance date of the underlying award. And, even then, the

[3] If in fact this is what NTIA and RUS intended to say in the first NOFA, then WCAI asks that they confirm this in the second NOFA to eliminate any potential confusion on this point. Likewise, NTIA and RUS should clarify that a "signer" of the underlying loan documents is the entity that is agreeing to be bound by those documents, not the individual who is signing the documents on that entity's behalf.

parties cannot consummate the transaction without a waiver from NTIA or RUS.[4] WCAI agrees with those stakeholders who believe that the ten-year rule is too restrictive – particularly in the current economic climate, it is difficult for an applicant to secure private investment when the applicant must wait at least a decade to sell or lease award-funded facilities (without, incidentally, absolute assurance that NTIA or RUS will issue the required waiver after the ten-year period has passed). WCAI is aware of situations where the ten-year rule has dissuaded otherwise qualified entities from submitting applications to BTOP and/or BIP, which plainly is not the desired objective here.

WCAI therefore submits that the agencies can and should adopt a middle ground under which any sale or lease of award-funded facilities will be subject to agency review and approval only where the transaction in question occurs within five years of the award's issuance date or, if longer, the term of any underlying loan or loan/grant award. Any sale or transfer occurring thereafter should be exempt from the review and approval process *if* the buyer certifies in writing to the agencies that it is assuming all of the seller's award-related obligations and that it is fully qualified to execute those obligations as required under the relevant rules. Since award-funded projects must be completed within three years, a five-year holding period will give the agencies assurance that the seller has constructed and operated the award-funded facilities for a reasonable period of time before entertaining a sale or lease of the project assets.

Safe Harbor Presumption for Incumbent Challenges

In the grant guidelines established for the first round of BIP and BTOP applications, the agencies established a multi-part test for determining whether a

[4] *See* RFI at 8.

proposed funded service area ("PFSA") qualifies as "unserved" or "underserved" for purposes of a last mile infrastructure application. Specifically, the agencies determined that a PFSA may qualify as unserved if no more than 90 percent of the households in the PFSA have access to facilities based, terrestrial broadband of at least 768 kbps downstream and at least 200 kbps upstream. In addition, a PFSA is underserved if at least one of the following factors is met: 1) no more than 50 percent of the households in the PFSA have access to facilities based, terrestrial broadband of at least 768 kbps downstream and at least 200 kbps upstream as set forth in the definition of broadband; 2) no fixed or mobile broadband service provider advertises broadband transmission speeds of at least 3 mbps downstream in the PFSA; or 3) the rate of broadband subscribership for the PFSA is 40% of households or less.

Unfortunately, although it is not entirely clear whether the first prong of the test for identifying underserved areas is based on advertised or actual speeds, it appears from the subsequently-released application form that the agencies are indeed looking solely at advertised speeds in evaluating available broadband speeds. However, evaluations based on advertised speeds potentially exclude PFSAs that are, in fact, unserved or underserved. For example, wireless carriers often use regional or national advertising that may theoretically cover a PFSA where qualifying speeds are in fact not available. In addition, because reliable broadband adoption statistics are not generally available for a specific PFSA, the third prong of the underserved test is also difficult to satisfy.

WCAI believes that the agencies' reliance on advertised service speeds and the lack of reliable data regarding broadband adoption unfairly excludes potential last mile

projects where population groups are truly unserved or underserved and tips the scales in favor of incumbent providers. WCAI recommends that the agencies abandon their reliance on advertised speeds in setting its criteria for round two and only exclude from consideration proposed PFSAs that are actually served. In addition, WCAI submits that the agencies should consider establishing a "safe harbor" for applicants seeking to demonstrate that their applications qualify for consideration. For example, RUS/NTIA could determine that an applicant has met its burden of proving that the PFSA qualifies by conducting an independent survey to establish that a PFSA is unserved or underserved based on either the speed tests or the rate of broadband adoption. To ensure that the survey is reliable, the agencies could require that a statistical sampling survey meet specific criteria such as a statistically valid sample size and/or a 95% confidence rating as certified by a professional survey research firm.

WCAI acknowledges that undertaking statistically accurate and robust survey research is a costly, time consuming endeavor. It therefore urges the agencies to not only permit applicants to use valid survey results to establish that a PFSA qualifies for consideration, but also to insulate this determination from challenge by incumbents except to the extent that incumbents allege that the survey itself is flawed. This result is warranted because, under the rules established for round one, applicants are not given access to the data provided by existing service providers challenging their applications. Applicants, therefore, have no way of reviewing the validity of a challenge, or otherwise proving how or why that data is potentially misleading, or otherwise an inaccurate demonstration of the service offered in the PFSA. Development of a "safe harbor" that allows for the submission of a statistical surveys with a 95% confidence rating as

certified by a professional survey research firm would remedy this flaw in the rules while also requiring applicants to meet an extremely robust standard. A survey conducted with this level of accuracy would provide the agencies with reliable evidence that a PFSA indeed falls within the definitions of unserved and/or underserved.[5]

Statutory Purposes

Under the Act, Congress intended that the BTOP program address five distinct broadband deficiencies that included: 1) broadband access to "unserved areas"; 2) broadband access to "underserved areas"; 3) broadband education, training, access, equipment and support to community anchor institutions, vulnerable populations and job-training facilities located in specific economic development districts; 4) broadband access and use by public safety; and 5) stimulate the demand for broadband, economic growth and job creation. Although the statutory list of the goals for the BTOP program is clearly intended to address a wide range of broadband needs, the rules governing round-one applications were narrowly drawn to focus on a subset of the statutory purposes. Specifically, the rules limited "last mile" and "middle mile" infrastructure projects to unserved and underserved areas. In addition, NTIA permitted specific applications for only two other purposes – public computing centers and sustainable adoption – and remained silent regarding the other statutory goals enumerated in the Act.

In round two, WCAI urges NTIA to revise the rules to accommodate applications that address the other specific statutory goals set forth in the Act that were left unaddressed in round one. Specific applications should be developed that support

[5] *See* http://www.osra.org/itlpj/bartlettkotrlikhiggins.pdf.

projects such as broadband education, training, access equipment and support to schools, libraries, medical, healthcare providers and community support entities. In addition, a specific application is warranted to accommodate projects proposing job-creating facilities located in the specific economic development districts enumerated in the Act. As it did with the public computing center application, NTIA should design rules for these specific purposes that also permit applicants to propose a limited infrastructure build to support the project.[6] WCAI believes that these rule changes for round two will result in the BTOP program more closely adhering to the statutory purposes set for in the Act.

Cost-Effectiveness Scoring

WCAI also urges RUS to add "cost effectiveness" to its scoring criteria and suggests that both agencies accord it substantial weight in their evaluation processes. Although applicants under the BTOP are required to provide information regarding the average cost per subscriber, that information is not given substantial weight in the BTOP scoring process, and does not appear to taken into account at all in the BIP process. Given that the funds available through the Act are insufficient to support the total amount sought by round-one applicants, WCAI recommends that the agencies emphasize this important factor in scoring the second round.

[6] In the Public Computing Centers submission, applicants could propose local area networks or small wide-area networks to support their projects.

CONCLUSION

WCAI requests that the agencies modify the second-round application process as recommended in these comments, and offers its assistance should the agencies have any questions regarding the experience of WCAI members in the first round.

Respectfully submitted,

Wireless Communications Association
International, Inc.

By: /s/ Fred B. Campbell, Jr.
President & CEO

1333 H Street, NW, Suite 700 West
Washington, DC 20005
202.452.7823