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ASIAN
AMERICAN
JUSTICE
CENTER

July 14, 2009

Hon. Gary Locke
Secretary
United States Department of Commerce
1401 Constitution Ave., NW
Washington, D.C. 20230

Hon. Tom Vilsack
Secretary
United States Department of Agriculture
1401 Independence Avenue, S.W.
Washington, D.C. 20250

RE: Modification of the National Telecommunications and Information Administration's ("NTIA") and Rural Utilities Service's ("RUS") joint Notice of Funds Availability ("NOFA")

Dear Secretary Locke and Secretary Vilsack:

The Broadband Stimulus NOFA jointly released by NTIA and RUS on July 1, 2009 leads off a series of initiatives aimed at "facilitating the expansion of broadband communications services and infrastructure" established under the American Recovery and Reinvestment Act of 2009 ("Recovery Act"). We applaud and admire the immense coordination and cooperation that was required across a wide spectrum of specialties to complete this undertaking. However we are concerned that, as currently structured, the NOFA undermines Congressional intent to achieve participation by qualified socially and economically disadvantaged small business concerns, fails to strike at the core issue of affordability by vulnerable populations and may result in the exclusion of minority and small business participation in these and future broadband initiatives.

As further explained in Schedule I of this letter, the NOFA contains the following structural deficiencies that diminish Congress' intention to achieve universal broadband access and adoption:

1. Race, Poverty and Ethnicity Among Broadband Consumers. The NOFA ignores structural issues, including race, poverty, and ethnicity, in defining or tracking unserved or underserved broadband consumers and in formulating the point-scoring system for broadband deployment.
2. Small Disadvantaged Businesses (SDBs) and other Eligible Entity Scoring. RUS will give a **1% (one point out of 100)** weighting for SDBs applying under the Broadband Initiatives Program ("BIP"), and the relative weight of SDB scoring for the Broadband Technologies Opportunity Program ("BTOP") is unclear.
3. Project Purpose / Project Benefit Scoring. The scoring system and eligibility considerations may achieve no benefit for populations most impacted by the Recession. The NOFA discourages participation of SDBs in the stimulus, particularly in the portion of the funds administered by RUS, and it does not address recommendations designed to ensure that minority groups have access to robust and affordable

broadband services, and that minority-owned businesses participate fully in the buildout of broadband infrastructure in those areas.¹

The NOFA discusses affordability in very general terms and does not address how credit redlining and imposition of requirements such as upfront payments for equipment and the overall lack of custom-tailored service offerings affects broadband affordability.

The NOFA does not give sufficient consideration to Minority Colleges and Universities – including Historically Black Colleges and Universities (“HBCUs”), Native American Serving Institutions (“NASIs”), Hispanic Serving Institutions (“HSIs”) and Asian American Serving Institutions (“AASIs”) – community anchor institutions with a vital role and track record in connecting vulnerable populations with economic opportunities.

4. Provisions Erecting Market Barriers to Entry. The NOFA contains financial and structural scoring criteria (e.g. 20% matching funds, bonding requirement) that experts recognize as particularly burdensome to entrepreneurs, new entrants and small businesses. Available waivers under the NOFA would mitigate some of these hurdles but are made so inclusive as to be meaningless.

5. Diversity in the Review Process. Both the loan and grant application review process lack basic safeguards to reduce the incidence of unconscious bias in grant review and funding allocation and includes no mechanism for ensuring that expertise on market-entry barriers and sustainable adoption in vulnerable populations is represented in the panel.

6. Oversight Monitoring. The NOFA lacks the SDB oversight or accountability provisions recommended in connection with Recovery Act SBA objectives.

7. Infrastructure/Adoption Scoring Tie-in. The scoring system formulated under the broadband "infrastructure" category (last mile and middle mile) does not include any positive scoring for applications that will prioritize infrastructure applications that tie-in infrastructure projects with sustainable adoption projects (thereby avoiding concerns that Recovery Act funds will be used to build "bridges to nowhere" rather than to fulfill the purposes of the Act to serve the unserved and underserved).

* * * * *

In light of the above, we have outlined in Schedule II of this letter, some simple modifications that would more closely align the NOFA with these important objectives. We respectfully request that you incorporate these changes. If necessary, we are also available for meetings with each of you on the earliest possible date to discuss these proposals in sufficient time to have the corrections and clarifications apply in the first grant round.

¹ See Bringing Broadband to Rural America: Report on a Rural Broadband Strategy, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291012A1.pdf (June 8, 2009)

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Sincerely,²

Marc Morial
President and CEO
National Urban League

Janet Murguia
President and CEO
National Council of La Raza

Brent Wilkes
Executive Director,
League of United Latin American Citizens

Karen Narasaki
President and CEO
Asian American Justice Center

On behalf of the Broadband Opportunity Coalition (“BBOC”).³

² Each signator’s authorization has been verified. For additional information, please contact Joseph S. Miller, Esq., Earle K. Moore Fellow, Minority Media and Telecommunications Council, 3636 16th St., NW, Suite B-366, Washington, D.C. 20010; phone: (202) 580-8754; email: joseph_mmtc@verizon.net.

³ BBOC is a consortium of civil rights and policy organizations dedicated to advancing broadband opportunity in communities of color. Currently, BBOC is composed of the National Urban League, National Council of La Raza (“NCLR”), the Asian American Justice Center (“AAJC”), the League of United Latin American Citizens

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cc: Hon. Julius Genachowski, Chairman, Federal Communications Commission
Hon. Karen G. Mills, Administrator, Small Business Administration
Hon. Larry Strickling, Assistant Secretary for Communications and Information,
U.S. Department of Commerce
Hon. James R. Newby, Acting Administrator, Rural Utilities Service
Susan Crawford, Special Assistant to the President for Science, Technology and Innovation Policy
Adolfo Carrión, Jr, Director, White House Office of Urban Affairs Policy
David Washington, Associate Director, White House Office of Public Engagement
Hon. Mary L. Landrieu, Chairwoman, Committee on Small Business and Entrepreneurship
Hon. Henry A. Waxman, Chairman, Committee on Energy and Commerce

Enclosures: Schedule 1
Schedule 2

("LULAC"), the National Association for the Advancement of Colored People ("NAACP"), and the Joint Center for Political and Economic Studies, the leading minority research and public policy think tank.

SCHEDULE I
(List of NOFA Deficiencies)

Overview: Congressional Intent

The NOFA contains significant ambiguities and omissions that are inconsistent with, among others:

- Congressional intent to achieve maximum affordability and utilization of broadband and to facilitate greater use of broadband service by low-income, unemployed, aged, and otherwise vulnerable populations;
- Recovery Act and Small Business Act (SBA) 8(a) Business Development Program goals of facilitating the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;
- Section 15(k) of the SBA Act,⁴ which requires each federal agency with procurement power to establish an Office of Small and Disadvantaged Business Utilization (“OSBDU”) and to appoint an OSBDU Director to report directly to the Agency head, or deputy, regarding the fulfillment of the purposes of the SBA Act; and
- OMB Policy Guidelines for the Recovery Act relating to promoting local hiring, optimizing small businesses utilization in Recovery Act opportunities, supporting projects that provide the maximum practicable opportunity for small businesses, awarding agency contracts in a way that provides the maximum opportunity for small businesses to compete and participate as prime and subcontractors and ensuring that grant recipients comply with all existing anti-discrimination and equal opportunity statutes, regulations and executive orders that apply to the expenditure of funds under Federal grants, loans and other forms of Federal assistance.⁵

1. Race and Poverty among Broadband Consumers

Structural issues including poverty, race and ethnicity were ignored in defining or tracking unserved, underserved and rural areas. RUS and NTIA decline to define underserved areas according to particular pricing plans, median income, or demographic characteristics.

There will be no socioeconomic component to RUS’s assessment of rural areas - *i.e.*, poverty, ethnicity and race (including the greater impact of the recession on communities of color) will not be considered. The sole inquiry is whether the proposed service area is 75 percent rural. There is no scoring or priority implement to “address the unique issues presented in Tribal areas.”

2. Small Disadvantaged Businesses (SDBs) and other Eligible Entity Scoring

RUS will give a **1% (one point out of 100)** weighting for SDBs applying under the Broadband Initiatives Program (“BIP”) - the smallest amount of credit given for any criterion, and a smaller quantitative SDB credit than that given by any administration since and including the Reagan administration. That weight is easily trumped by the 5% weight RUS will give to current or former RUS borrowers (*i.e.*, incumbents).

⁴ See *id.* at 42-43 (citing 15 U.S.C. §644(k) (2009)).

⁵ See Office of Management and Budget, OMB Memorandum M-09-15 “Updated Implementing Guidance for The American Recovery Act of 2009” Sections 1.6-1.7 (April 3, 2009) avail. at <http://www.recovery.gov/sites/default/files/m09-15.pdf>.

The priority for BIP is to provide and improve broadband service to the highest proportion of rural residents who do not have adequate access to broadband service for rural development, without taking into account vulnerable populations.

The NOFA states that NTIA will "take into consideration" whether an applicant is an SDB and that it will consider "[t]o the extent applicable" evidence of collaboration with an SDB. It is not clear how much weight Minority Business Enterprises ("MBEs") and SDBs will be afforded in the selection process for BTOP funding.

See NOFA, pp. 8, 10, 11, 13-15, 17, 19, 33-34, 40-41, 43, 46-47, 50-51, 53-54, 60, 62, 64, 70-74, 97.

3. Project Purpose / Project Benefit Scoring

The NOFA discusses affordability issues in very general terms and does not specifically mention the ways in which credit redlining, inability to make an upfront payment for equipment, inability to afford a deposit, and lack of custom-tailored service offerings affect affordability.

Reports will be submitted to an internal government database that is not automatically available to the public. The NOFA contains no mention of documents being presented in a searchable format.

There is no mention of awardees being required to provide subscribership data containing demographic information.

See id., pp. 8-9, 13, 16, 29, 37, 43, 45, 52, 54-55, 64, 66-69, 72, 82-86, 110.

4. Provisions Erecting Market Barriers to Entry

Not only is negligible pro-active consideration being afforded SDBs, the NOFA erects several market entry barriers that will discourage SDB participation by giving applicants credit for feats SDBs cannot match. For example:

- RUS favors those able to accept loans rather than grants.
- SDBs' potential eligibility for relief
- from the 20% match requirement based on financial need may be outweighed by the preferential treatment to be given to applicants that propose to provide matching funds above 20% and the corresponding requirement that matching funds be obtained before disbursements can be made. Eligibility for the matching fund waiver may be so inclusive as to be ineffective.
- The NOFA, including its discussion of de-obligation, contains no discussion of an alternative dispute process or a means for remediating rejected applications.

See id., pp. 8-9, 17, 24-25, 34, 41, 50, 53, 60, 64, 90.

5. Diversity in the Review Process.

Moreover, both the loan and grant application review process lacks provisions to reduce the potential for bias and conflict of interest. Bias among reviewers would likely result in suboptimal public policy outcomes, with potential blindness to the needs of disadvantaged and under-represented populations in unserved and underserved areas. There is currently no guidance addressing the standard of review undertaken by the panel.

6. **Oversight/Monitoring**

The NOFA contains no SDB oversight or accountability provisions:

- The NOFA does not mention congressional oversight, outside of the boilerplate statement of compliance with the Congressional Review Act.
- While NTIA and RUS will follow up with every other criterion that was initially included in the application phase, the NOFA announces no effort to follow up with awardees, post-award, to assess SDB engagement.
- The NOFA does not address the joint proposals of our organizations and 30 other organizations (the Broadband Diversity Supporters) to ensure that reviewers will have SDB experience. The call for volunteers, just issued, does not call for any such background or expertise. Nor does the NOFA address our proposals for a Diversity Advisory Committee, for the use of national intermediary organizations, or for the creation of a National Minority Broadband Training and Technical Council.

See id., pp. 10, 14, 75, 82-86, 90.

7. **Infrastructure/Adoption ScoringTie-in**

The scoring system formulated under the broadband "infrastructure" category (last mile and middle mile) does not include any positive scoring for applications that will prioritize infrastructure applications that tie-in infrastructure projects with sustainable adoption projects (thereby avoiding concerns that Recovery Act funds will be used to build "bridges to nowhere" rather than to fulfill the purposes of the Act to serve the unserved and underserved). This can be accomplished by making it clear, as has been represented in the NOFA and in the Training Workshops, that infrastructure project applications that include a sustainable adoption plan will receive additional credit.

SCHEDULE II
(Proposed Modifications to NOFA)

1. Race and Poverty among Broadband Consumers

NTIA/RUS should amend the definition of underserved to include any geographic area in which broadband is offered at prohibitive prices or with undesirable service offerings.

Proposed funded service areas with large percentages of low-income households or addressing rural deployment and adoption specifically on tribal lands should receive higher priority than projects targeted in other rural areas.

2. Small Disadvantaged Businesses (SDBs) and other Eligible Entity Scoring

BIP (Infrastructure)

Applicants should not be eligible for funding unless they have received at least one point in the following areas (unless the requirement is not necessary or feasible):

- Applicant is a socially and economically disadvantaged small business concern (SDB) as defined under section 8(a) of the SBA; or
- Applicant has partnered with and included in application, genuine and substantial first tier MBE or SDB participation beyond the minimum federal Section 8(a) guidelines for MBE or SDB participation; or
- Applicant has sub-contracted genuine and substantial aspects of the project to a small business, an SDBs, an MBEs, a Tribal government; or
- Applicant is a Title II incumbent with a prior record of, or a demonstrated ability and commitment to, building infrastructure or providing affordable service in vulnerable communities.

BTOP Scoring (All Areas)

Applicants should not be eligible for funding unless they received positive scoring for at least one of the following (unless the requirement is not necessary or feasible):

- Applicant is a socially and economically disadvantaged small business concern (SDB) as defined under section 8(a) of the SBA; or
- Applicant has sub-contracted genuine and substantial aspects of the project to a small businesses, SDBs or community anchor institutions (including MBE, HBCU , NASIs, HSIs, AASIs or similarly convened learning institutions); or
- Applicant is a community anchor institution or other organizations or non-profit or private sector groups with established connections in low-income and other vulnerable communities in the proposed funded service area, including a Historically Black Colleges and Universities, Hispanic Serving Institutions, Native American Serving Institutions, and Asian American Serving Institutions; or
- Applicant has partnered with community anchor institutions (MBE, HBCU , NASIs, HSIs, AASIs or similarly convened learning institutions) or other organizations or non-profit or private sector groups with established connections in low-income and other vulnerable populations in the proposed funded service area, including a Historically Black Colleges and Universities, Hispanic Serving Institutions, Native American Serving Institutions, and Asian American Serving Institutions; or
- Applicant is a Title II incumbent with a demonstrated commitment, ability and experience to meet the needs of vulnerable populations in the proposed funded service area; or

- Applicant is expertise with creating culturally specific niche content that appeals to vulnerable populations in the proposed funded service area; or
- Applicant is a non-profit or private sector organization or group with expertise in creating culturally specific niche content that appeals to vulnerable populations in the proposed funded service area.

3. **Project Purpose / Project Benefit Scoring**

BIP Underserved Areas

Affordability should receive equal weight to speed. Comparative advantage should be assigned to applicants that plan to provide:

- low cost broadband networks;
- access for those who have poor credit scores or no credit scores;
- access not contingent on large deposits requirements;
- access not contingent on large up-front payments for equipment; or
- attractive “value” packages commensurate with low-income households’ needs, discretionary income and usage patterns.

4. **Provisions Erecting Market-Entry Barriers**

The criteria for obtaining a waiver of matching fund requirements should include the ability to demonstrate that the applicant serves a vital role in the proposed funded service area (*e.g.* but for the proposed application, the community (or communities) would not receive the benefits contemplated by the project)) and should include a *per se* waiver for community anchor institution (including MBE, HBCU , NASIs, HSIs, AASIs or similarly convened learning institutions) or other organizations with a mission to serve vulnerable populations, provided they have demonstrated the hardship criterion set forth in the NOFA.

With respect to BIP, SDB applicants should be scored within the 25% to 50% funding category, rather than being penalized for below 25% funding.

Further, SDB applicants should not receive negative scoring for being unable to apply for loans.

5. **Review Process**

The loan and grant application review process should be administered with maximum diversity in the composition of grant reviewers, decision makers, and funding outcomes to avoid bias in grant/loan application review and funding:

- The outcomes of each application review stage should be carefully evaluated with the greatest degree of sensitivity to serving diverse segments of the American population.
- To ensure the greatest integrity in the application review and decision-making process a Diversity Advisory Committee (“DAC”) appointed by both Secretaries should be tasked with providing guidance to the administrators of both programs on grant application review and decision-making process.
- Among other things, DAC should be given the opportunity to review in advance the composition of internal or external reviewers to identify any deficits that may result in unintended racial, gender, religious, ethnic, or geographic bias.
- DAC should be tasked with advising the Secretaries on the best means to implement Section 6001(h)(3), regarding opportunities for SDBs and to review initial funding decisions for consistency with the Recovery Act.
- The administration of these programs would be enhanced by such diverse input, especially if the DAC is comprised of representatives from the widest range of social and economic backgrounds.

6. **Oversight/Monitoring**

Reporting should be publicly available and presented in a searchable format. Reporting with respect to broadband infrastructure should track affordability and demographic subscribership data.

Ongoing project monitoring should be reported to Congress and should specifically address SDB and MBE participation in the loan/grant programs.

Ongoing project oversight should include mediation of good faith non-compliance issues prior to de-obligation.

7. **Infrastructure/Adoption ScoringTie-in**

Despite the intention, the scoring system formulated under the broadband "infrastructure" category (last mile and middle mile) does not include any positive scoring for applications that will prioritize infrastructure applications that tie-in infrastructure projects with sustainable adoption projects (thereby avoiding concerns that Recovery Act funds will be used to build "bridges to nowhere" rather than to fulfill the purposes of the Act to serve the unserved and underserved).

This can be corrected by making it clear, as has been represented in the NOFA and in the Training Workshops, that infrastructure project applications that include a sustainable adoption plan will receive additional credit:

- See page 64 of the NOFA, which says: "Additional consideration will also be given to applicants that address more than one statutory purpose and project category (e.g., Broadband Infrastructure, Public Computer Centers, or Sustainable Broadband Adoption) in a convincing manner."
- But see Question 10 of Guidelines at page 25: "In Question #10, you must explain how your project relates to BTOP's statutory purposes (these purposes are listed in Questions #9 above). Applications that substantially address multiple statutory purposes will receive additional consideration, **but it is not necessary to address multiple purposes in order to receive a high score for this criterion.** If you are coordinating this project with one or more other projects, including projects in another category (e.g., Public Computer Center or Sustainable Broadband Adoption), you should explain how the projects fit together to serve BTOP's multiple statutory purposes." (Hence, the NOFA says additional consideration will be given, but the Guidelines seem to suggest that additional credit may not be given).