

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

| | | |
|--|---|---------------------|
| In the Matter of |) | |
| |) | |
| Request for Comments on the |) | GN Docket No. 09-40 |
| Commission's Consultative Role in the |) | |
| Broadband Provisions of the Recovery Act |) | |

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”) hereby responds to the Commission’s request for comment on the Commission’s consultative role in implementing the broadband provisions of the American Recovery and Reinvestment Act of 2009 (“ARRA”).¹ NCTA is the principal trade association of the cable industry in the United States. NCTA represents cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks, as well as equipment suppliers and providers of other services to the cable industry. The cable industry is the nation’s largest provider of residential high-speed Internet service after investing more than \$145 billion since 1996 to build two-way, interactive networks with fiber optic technology, and has a keen interest in the Commission’s development of broadband strategy.

INTRODUCTION AND SUMMARY

While the ARRA gives the National Telecommunications and Information Administration (“NTIA”) the responsibility for administering the Broadband Technologies Opportunities Program (“BTOP”), Congress directs NTIA to consult with the Federal

¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (“ARRA”); *see* Public Notice, “Comment Procedures Established Regarding the Commission’s Consultative Role in the Broadband Provisions of the Recovery Act,” GN Docket No. 09-40, DA 09-668 (rel. Mar. 24, 2009).

Communications Commission (“FCC” or “Commission”) on certain key terms and policies – the definitions of “unserved,” “underserved,” and “broadband,” and the “non-discrimination” and “network interconnection” obligations imposed on recipients of BTOP grants.² As Congress recognized, the Commission has “considerable expertise” in these matters.³ The Commission should apply this expertise to ensure that the Congressional directives to expand broadband deployment are met in a competitively-neutral and technologically-neutral manner.

As NCTA recently explained to the Commission,⁴ those goals are best served by focusing first on extending broadband facilities to areas without any broadband service; second, on supporting programs that enable underserved populations to purchase and make effective use of broadband service where it is already available; and third, if funds remain, on enhancing broadband facilities in underserved areas, defined as areas without today’s current generation broadband services. The definitions that the FCC proposes to NTIA should embody these principles.

The nondiscrimination and interconnection obligations on BTOP grants should likewise be implemented in a manner that furthers the overall statutory goal of rapid deployment of those funds. Imposing new and untested nondiscrimination or interconnection requirements as a condition of stimulus funding risks injecting contentiousness, uncertainty, and delay into a process that should focus on creating new jobs and new broadband connections as quickly as

² ARRA § 6001(a) (“The [Assistant Secretary at NTIA], in consultation with the Federal Communications Commission . . . shall establish a national broadband service deployment and expansion program”); *id.* § 6001(j) (directing the Assistant Secretary, “in coordination with the Commission,” to “publish” the non-discrimination and interconnection obligations). NCTA is today submitting comments on related issues to NTIA and RUS in response the joint request by those agencies for information on a variety of topics. 74 Fed. Reg. 10716 (Mar. 12, 2009).

³ See H. CONF. REP. NO. 111–16, at 776 (2009) (directing NTIA to coordinate with the Commission so that “NTIA may benefit from the FCC’s considerable expertise in these matters”) (“Conference Report”).

⁴ Comments of National Cable & Telecommunications Assn., GN Docket No. 09-29 (filed Mar. 25, 2009) (“NCTA Rural Broadband Comments”).

possible. Consistent with these objectives, the nondiscrimination condition required by the ARRA should, as the statute permits, be limited to the FCC's Broadband Policy Statement adopted on August 5, 2005. Any entity receiving funds under ARRA should also be required to construct facilities that interconnect directly or indirectly with the public Internet under currently applicable rules and practices and otherwise comply with existing interconnection obligations applicable to networks that transmit voice as well as Internet traffic.

I. "BROADBAND," "UNSERVED," AND "UNDERSERVED" SHOULD BE DEFINED TO PROMOTE GOALS OF BROADBAND DEPLOYMENT AND ADOPTION

To ensure the highest and best use of BTOP funds, the Commission should propose definitions of "unserved," "underserved," and "broadband" that most effectively promote all of the goals of the program: improving broadband deployment where no broadband service is currently available; enhancing broadband adoption by underserved populations; and ensuring that support is technology-neutral. In defining "broadband," the Commission should also be mindful of Congress's warning that setting speeds too high will deter investments in unserved areas by establishing unrealistic requirements.⁵ To these ends, NCTA proposes the following definitions:

Broadband. The existing Commission definition of the term "broadband" should be used with respect to the implementation of the ARRA. That definition provides that broadband is "advanced communications systems capable of providing high-speed transmission of services such as data, voice, and video over the Internet and other networks. Transmission is provided by a wide range of technologies, including digital subscriber line and fiber optic cable, coaxial

⁵ See NCTA Rural Broadband Comments at 12-16.

cable, wireless technology, and satellite.”⁶

Any speed thresholds the Commission recommends should reflect the purpose for which the threshold will apply. Thus, for purposes of identifying unserved areas, “broadband” should be defined as a connection to the Internet with a transmission speed of at least 768 kilobits per second in at least one direction. For purposes of identifying underserved areas and specifying the types of investments that qualify for a grant, the term “broadband” should be defined as transmission facilities and switching and routing equipment (including equipment installed on subscribers’ premises to access or utilize service) purchased or installed by a provider primarily to provide broadband service with transmission speeds that meet or exceed the speeds typically experienced by consumers using current generation broadband service, *e.g.*, maximum transmission speeds of at least 3 megabits per second downstream and 768 kilobits per second upstream. This speed pairing is consistent with the midpoint of broadband speeds identified by the FCC for broadband reporting purposes.

Defining broadband by reference to current generation service appropriately balances Congress’s directive to promote the highest *practicable* transmission speeds. Establishing too a high a bar for eligibility could deter any investments in areas that do not currently have broadband networks available, depriving those areas of jobs in building out broadband and perpetuating the lack of broadband service. Congress recognized that a “specific speed threshold could have the unintended result of thwarting broadband deployment in certain areas.”⁷ While Congress hoped and intended that support for rural broadband efforts would “result in the greatest possible broadband speeds being delivered to consumers,” the objective of the BTOP program is to “seek to fund, *to the extent practicable*, projects that provide the highest possible,

⁶ www.fcc.gov/broadband.

⁷ Conference Report at 775.

next-generation broadband speeds to consumers.”⁸

Likewise, Congress emphasized its intent that, “consistent with the public interest and purposes of this section, as many entities as possible be eligible to apply for a competitive grant, including wireless carriers, wireline carriers, backhaul providers, satellite carriers, public-private partnerships, and tower companies.”⁹ It specifically refused to create a one-size-fits-all definition of broadband, instead leaving it to the implementing agencies to devise a definition that “take[s] into consideration the technical differences between wireless and wireline networks, and consider[s] the actual speeds that broadband networks are able to deliver to consumers under a variety of circumstances.”¹⁰ Adopting a broad and inclusive definition of broadband will ensure that the government does not unnecessarily or inadvertently favor a particular technology, whether via its definitions for eligibility, applications requirements or otherwise.

Unserved Area. An “unserved area” should be defined as an area where no provider offers Internet access service at transmission speeds of more than 768 kbps in at least one direction. Satellite broadband service, which is already available throughout the country, should not be considered in applying this definition. In choosing among projects in unserved areas, those areas where no provider offers Internet access service at transmission speeds of more than 200 kbps in at least one direction should receive funding first. This definition of “unserved” will ensure that BTOP funding goes first to those areas in greatest need of broadband.

This definition, as well as the definition of “underserved” which we discuss below, are premised on the assumption that an applicant will have the flexibility to define the specific area covered by the grant request. However, to the extent the agencies rely on *pre-defined areas*,

⁸ *Id.* (emphasis added).

⁹ *Id.*

¹⁰ *Id.* at 776.

such as census tracts, an area should be considered unserved (or underserved) if less than 25% of households have access to service at the threshold speed. Notwithstanding, all of the funds provided to serve the specified area should be targeted to the unserved portions, *i.e.*, funding should not be used to overbuild served areas.

As a bipartisan group of Senators recently noted, by “providing access to high-speed broadband to places that only have access to dial-up connections, many rural communities will experience the development that broadband allows. Broadband access will spur job creation in rural areas hardest hit by the recession. Broadband will also be central to improving educational opportunities and delivering health care more efficiently, important benefits that also contribute to economic growth.”¹¹ As these Senators and others recognize, giving top priority to these areas for ARRA support is the only way to remedy the disparities between those communities with broadband access and those where a market solution has not emerged.

Underserved Area. An “underserved area” should be defined as an area where no households have access to at least one provider of Internet access with current generation broadband transmission speeds, *e.g.*, at least 3 Mbps downstream and 768 kbps upstream. Satellite broadband service, which is already available throughout the country, should not be considered in applying this definition. Given the immediate need to bring broadband to areas that lack it entirely, an area where current generation broadband with these transmission speeds is available should not be considered “underserved.” As noted above, priority in deploying BTOP funds should be in unserved areas.

Funding broadband construction in underserved areas should also be secondary to using BTOP funds for demand-side programs that assist underserved *populations* (low-income,

¹¹ See *Senators Urge Unserved Priority For ARRA Broadband Funds*, TR DAILY (Mar. 11, 2009).

seniors) in any area to acquire and make use of broadband service before BTOP funds are used for broadband facilities construction in “underserved” areas. Many households do not subscribe to the broadband services that are available because they lack the necessary equipment, training, or educational opportunities to take advantage of the benefits of Internet use. Indeed, approximately 35 million households in the United States have access to broadband, but do not currently use it.¹² Demand-side stimulus investment programs that promote the use of broadband among these underserved populations could serve an important purpose. Such programs could include attempts to stimulate demand by, for example, making computers or laptops available at a discount to qualifying households, discounting monthly service, or other tailored means designed to stimulate adoption by targeted groups.

In requiring NTIA to allocate “*not less*” than \$250 million for programs “to encourage sustainable adoption of broadband service,”¹³ Congress recognized the value of closing the digital divide and encouraging the sustainable adoption of broadband service. To these ends, the goals of BTOP include “facilitat[ing] access to broadband service by low-income, unemployed, aged, and otherwise vulnerable populations,”¹⁴ “stimulat[ing] the demand for broadband,”¹⁵ and “increas[ing] the affordability of, and subscribership to, [broadband] service.”¹⁶ Consistent with these goals, a significant amount of BTOP funds should be made available to support such “demand-side” projects.

¹² *Moving the Needle on Broadband: Stimulus Strategies to Spur Adoption and Extend Access Across America*, National Cable and Telecommunications Assoc., at 2 (Mar. 17, 2009). Notably, of that number, only 30 percent have more than a high school education. *Id.*

¹³ Conference Report at 14(emphasis added).

¹⁴ ARRA, § 6001(b)(3)(B).

¹⁵ *Id.* at § 6001(b)(5).

¹⁶ *Id.* At § 6001(h)(2)(A).

II. NO NEW NON-DISCRIMINATION OR INTERCONNECTION OBLIGATIONS SHOULD BE IMPOSED IN CONNECTION WITH THE BTOP PROGRAM

BTOP funds are intended to expand the reach of broadband access and infrastructure across the nation. The rules developed for these new programs should therefore reflect the urgency and realities of our current economic situation. Indeed, the first two purposes of the stimulus package, spelled out in section 2(a) of ARRA, are even more critical today than when President Obama signed the legislation on February 17 – “[t]o preserve and create jobs and promote economic recovery” and “[t]o assist those most impacted by the recession.” These priorities are similarly echoed in section 2(b)’s “General Principles Concerning Use of Funds,” which direct agencies to “commenc[e] expenditures and activities as quickly as possible consistent with prudent management.” The nondiscrimination and network interconnection obligations on BTOP grants should be implemented in a manner that does not go beyond existing requirements in order to further the overall statutory goal of rapid deployment of those funds.

Consistent with these principles, NCTA proposes the following definitions of “non-discrimination” and “network interconnection” based on current law and principles:

Nondiscrimination. The nondiscrimination condition required by the ARRA should, as the statute permits, be limited to the applicant’s agreement to adhere to the FCC’s Broadband Policy Statement adopted on August 5, 2005.¹⁷ Imposing any new and untested nondiscrimination requirements as a condition of stimulus funding risks injecting contentiousness, uncertainty, and delay into a process that should focus on creating new jobs and new broadband connections as quickly as possible. Under such circumstances, the most skilled

¹⁷ ARRA § 6001(j) (“Concurrent with the issuance of the Request for Proposal for grant applications pursuant to this section, the Assistant Secretary shall, in coordination with the Commission, 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[1], adopted August 5, 2005).”).

and reliable providers could be deterred from even applying for the funds, much less deploying new broadband infrastructure to areas of the country that are already expensive and difficult to reach.

Interconnection. The value of the public Internet to all consumers increases as the number of consumers connected to it increases. Moreover, increased adoption of broadband creates demand for new content and applications. Health care, education, and economic development opportunities grow when more businesses, communities, and consumers have online access. The ARRA seeks to expand these opportunities. Any entity receiving funds under ARRA should therefore be required to construct facilities that interconnect directly or indirectly with other broadband networks under currently applicable regulations and practices and otherwise comply with existing interconnection obligations applicable to networks that transmit voice as well as Internet traffic.

In this regard, NCTA has urged that NTIA and RUS not impose requirements that are more onerous, or less onerous, than those that otherwise would apply in the absence of a grant. A carrier's receipt of funding from the federal Universal Service program does not trigger any change in interconnection obligations; similarly, receipt of a grant from NTIA or RUS should not result in imposition of new requirements or elimination of existing obligations.

CONCLUSION

The Commission should exercise its responsibilities with respect to implementation of the BTOP grant program to ensure that the program furthers Congress's broadband deployment directives. NCTA's members – the leading providers of broadband service in the United States –

look forward to continuing to work with the Commission at all stages of these processes so that all Americans can soon enjoy the benefits of broadband.

Respectfully submitted,

/s/ Neal M. Goldberg

Lisa W. Schoenthaler
Vice President, Association Affairs and
Office of Rural/Small Systems

Neal M. Goldberg
Steven F. Morris
National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431

April 13, 2009