

BROADBAND INITIATIVES UNDER

THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

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I. INTRODUCTION.

President Obama signed the American Recovery and Rehabilitation Act (ARRA) into law on February 17, 2009. The Act, also known as the "Economic Stimulus" legislation appropriates \$7.2 billion for two major broadband initiatives, an expansion of the RUS telecommunications loan program into broadband, and the creation of a new Broadband Technology Opportunity Program (BTOP). The Act also directs the FCC to establish a "national broadband plan" and submit to Congress by February 17, 2010. It is important to note that the ARRA did not grant the FCC any new rulemaking or other authority over information or telecommunications services.

II. EXPANDED RUS LOAN PROGRAM.

\$2.5 billion was appropriated to the Rural Utility Service (RUS) for grants, broadband loans and guarantees. The use of the RUS funds is subject to the following criteria:

- At least 75% of the area to be served by an RUS project must be in a rural area "without sufficient access to high speed broadband service to facilitate rural economic development."
- Priority shall be given to projects for broadband systems "that will deliver end users a choice of more than one service provider."
- Priority shall be given to projects that provide service to the highest proportion of rural residents that do not have access to broadband service.
- Priority shall be given to borrowers or former borrowers under existing RUS loan programs.
- Priority shall be given to fully funded projects.
- Priority shall be given to projects that can be completed if RUS funds are provided.
- Priority will be given to projects that can commence promptly following approval of application for RUS funding.
- RUS funded projects cannot overlap with the Broadband Technology Opportunities Program (discussed below).

III. BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM (BTOP).

\$4.7 billion was appropriated to a new Broadband Technology Opportunities Program (BTOP). \$200 million of these funds must be used for competitive grants to expand public computing centers. \$250 million must be used for competitive grants for "sustainable adoption of broadband service." \$10 million is allocated for program auditing and oversight. \$350 million is allocated for a nationwide broadband inventory map. \$3.5 billion of the funding is allocated to the National Telecommunications and Information Association (NTIA) for a "national broadband service development and expansion program." The purposes of the BTOP program are to:

- Provide access to broadband service to consumers residing in unserved areas of the U.S.
- Provide improved access to broadband service to consumers residing in underserved areas of the U.S.
- Provide broadband education, awareness, training, access, equipment and support to schools, libraries, healthcare providers, higher education institutions, other "community support organizations"; organizations that provide outreach, access, equipment, and support services to facilitate greater broadband use by low-income, unemployed, aged and "otherwise vulnerable populations"; and certain state and federal economic development programs (i.e. "Enterprise Zones")

The NTIA "may consult" states regarding identification of "unserved" or "underserved areas" and the allocation of funds within each state. It is unclear exactly how this "consulting relationship" will work. Each state must receive at least one BTOP grant. All grant awards must be made before the end of 2010. The NTIA must obtain assurances from grantees under the program that the projects supported by BTOP funds will be substantially completed within two (2) years after receiving a grant.

To be eligible for a BTOP grant, applicants must be:

- A state or political subdivision;
- A non-profit corporation; or
- Another entity, including a broadband service or infrastructure provider provided that the NTIA finds by rule that such eligibility is in the public interest. The NTIA has provided verbal assurances that it will rule that private sector eligibility is in the public interest.

Applications for BTOP money must:

- Explain in detail how funds will be used to carry out the purposes of the BTOP "in an efficient and expeditious manner," including a showing that the project would not have been implemented but for BTOP funding.
- Demonstrate that the applicant is capable of carrying out the project in a competent manner.

- Disclose all other sources of federal or state government funding.
- Commit to adherence with the rule that the federal share of funding for the project cannot exceed 80% without waiver of such rule by the NTIA.

In awarding grants under the BTOP, the NTIA shall consider whether the project:

- will increase the "affordability of, and subscribership to, service to the greatest population of users in the area";
- will provide the "greatest broadband speed possible to the greatest population of users in the area";
- will "enhance service for health care delivery, education, or children to the greatest population of users in the area";
- will "not result in unjust enrichment as a result of support for non-recurring costs through another federal program for service in the area."

The NTIA will also give special consideration to "socially and economically disadvantaged" small businesses.

Finally, money is also allocated for the establishment of a national broadband plan that "shall seek to ensure that all people in the United States have access to broadband capability and shall establish benchmarks for meeting that goal." The plan must include:

- An analysis of the most effective and efficient mechanisms for ensuring broadband access by all people in the U.S.
- A detailed strategy for achieving affordability and maximum utilization of broadband infrastructure and service by the public;
- Status reports on the deployment of broadband service, including progress reports on BTOP projects;
- A plan for the use of broadband infrastructure and services in "advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth and other national purposes."

On March 9, 2009, the NTIA issued a "Joint Request for Information and Notice of Public Meetings" on behalf of the NTIA and RUS. NTIA and RUS began a series of meetings around the country on March 16, 2009 to hear from interested parties on how the NTIA and RUS should implement the ARRA broadband provisions. The FCC has also participated in these meetings. Written comments were due to the NTIA on April 13, 2009. The Notice posed many questions for discussion and written comment. The public meetings were held around key themes related to the RUS and BTOP broadband programs, such as (i) definition of terms (e.g. "unserved," "underserved," "high-speed"); (ii) the role of states in the granting process; (iii) the relationship between the BTOP and RUS program; (iv) grant criteria (including what exactly is meant by a "shovel ready" project); (v) the role of for-profit providers as potential grant recipients.

Though no written guidance has yet been issued by the deadline for submission of this paper to Minnesota CLE, the NTIA's final written rules for the BTOP program is expected any day. Nonetheless, a few details about the program can be discerned from the Joint Request for Information issued by the NTIA and from comments made at the public hearings and at other public meetings.

- It is expected there will be a common application form for the BTOP and the RUS programs.
- As mentioned earlier, it is expected the NTIA will rule that private sector firms are eligible for BTOP funding.
- There will be three rounds of grants under the BTOP program, with the first round of grants expected this Fall (2009).

IV. NATIONAL BROADBAND PLAN.

On April 8, 2009, the FCC released its Notice of Inquiry (NOI) regarding the national broadband plan required under the American Recovery and Reinvestment Act of 2009 (ARRA)(also known as the "economic stimulus" package). The FCC's plan is due to Congress by February 17, 2010. The ARRA requires the plan to "seek to ensure that all people of the United States have access to broadband capability and [to] establish benchmarks for meeting that goal." The ARRA requires the plan to address the following items:

- (A) an analysis of the most effective and efficient mechanisms for ensuring broadband access by all people of the United States;
- (B) a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public;
- (C) an evaluation of the status of deployment of broadband service, including progress of projects supported by the grants made pursuant to this section; and
- (D) a plan for use of broadband infrastructure and services in advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.

The NOI seeks comment on hundreds of wide ranging questions on the following topic areas:

- Definition of "broadband."
 - Should there be different definitions and standards for what constitutes "broadband" based on varying technologies?

- Should terms such as “advanced telecommunications capability,” “high speed internet,” and “broadband be unified into a single definition?
- Definition of "access" [to broadband].
 - Should access be defined with respect to the end user (i.e. residential, business, schools, libraries, community technology centers, wi-fi hot spots?). In other words, what constitutes “access”? The FCC specifically inquires whether a separate rulemaking is necessary to address these question.
 - Should “access” be defined with reference to price or the level of competition for broadband services? If so, how should such competitive distinctions be made among differing technologies with varying qualities and functionality (differences in latency, upload and download speeds, and mobility).
- Speed standards.
 - Should the definition of broadband be defined with reference to some speed standard?
 - How should speed be measured? (Actual vs. advertised speeds).
 - Should a national broadband plan be designed around speed “tiers” that differ based on the type of technology deployed, or based on class of service (business vs. residential), or based on different needs among geographic areas.
 - Are there “middle mile” issues that need to be addressed in order to improve access to broadband in certain areas?
- What goals should be set, how to set them, and how to measure progress.
- How should “market analysis” be conducted with respect to broadband services?
- What role should regulation play in developing access to broadband?
- Should there be a goal to serve 100% of the country?
- Does the FCC need to better understand the costs of deploying broadband infrastructure in underserved and unserved areas?
- Most effective mechanisms for attaining broadband goals (i.e. market forces, subsidies such as USF, mix of technologies).
 - How will the national broadband plan effect the existing federal universal service program?
 - Should the existing federal USF program be modified to include broadband as a supported service?
 - Who should be required to contribute to such a modified fund?
 - Should competition be subsidized?
 - Do current regulations regarding tower siting, pole attachments, backhaul costs, cable franchising, and right-of-way access impede deployment of broadband?
- What changes in wireless policy need to be made as part of a national broadband plan?
 - Should changes be made to achieve more efficient use of wireless spectrum?

- What role should unlicensed wireless technologies play as part of a national broadband plan?
- How to make broadband more affordable.
 - How should “affordability” be measured and defined?
 - Would government subsidies for broadband help make broadband more affordable?
- How to increase demand and utilization of broadband.
 - How is broadband currently being utilized by residential, business, and institutional consumers?
 - How would improving “digital literacy” or computer ownership create more demand for broadband?
 - What role do consumer training and education programs play in increasing demand for broadband?
 - Should there be a “centralized clearinghouse” for computer and broadband training be created?
- Applications for broadband in meeting specific public policy goals specified in ARRA.
 - Civic participation – How can broadband improve access to local and national news, information, direct communication between constituents and government, and civic participation?
 - Public safety and Homeland Security.
 - Which broadband applications are most important to advancing public safety and homeland security?
 - Should the FCC’s national broadband plan address issues such as cybersecurity, network diversity and redundancy? Should the FCC track the level of network redundancy and diversity with respect to commercial networks?
 - Community Development – How can broadband help resolve local community problems, develop local resources to address local community needs, and increase volunteerism?
 - Health care.
 - How can broadband be used to improve efficient, effective, and secure access to medical records?
 - How can broadband be used to improve the quality of medical care provided to unserved and underserved parts of the country?
 - Energy Independence.
 - What broadband applications can improve energy production, distribution, or consumption?
 - How can broadband help achieve implementation of “smart grid” technology?
 - How would telecommuting programs made possible by broadband technology improve energy independence?
 - Education.
 - How can broadband improve the quality of the nation’s schools?

- What has been the effect of broadband on distance learning?
 - Worker Training. How can broadband be used to increase workplace effectiveness and improve worker training?
 - Private sector investment.
 - What is the best way to continue attracting private capital devoted to broadband infrastructure investments?
 - Do municipal broadband projects that compete with private enterprise encourage or discourage private investment?
- Privacy.
 - What are current consumer expectations regarding privacy when using broadband?
 - What impact do these expectations have on broadband adoption and use?
 - Are CPNI rules appropriately applied to broadband services?
 - What impact do practices such as “deep packet inspection (DPI)” and behavioral advertising have on consumer willingness to utilize broadband? If there is a negative impact, what should the FCC do about it?
 - How should the FCC balance “network management practices” with “consumer rights”?
 - How have advances in technology improved privacy protection?
 - Is further regulation required in this area?
- Net neutrality and "open network" principles.
 - How should the term “open network” be defined?
 - In terms of “access”?
 - Interconnection?
 - Non-discrimination? What does non-discrimination mean when applied to the varying broadband platforms available today and in the future?
 - What is the current status of access, interconnection, and non-discrimination in the broadband market today?
 - Is the FCC’s current Internet Policy Statement sufficient to ensure principles of open access for the future? Is further regulation required in this area?
- The relationship between ARRA provisions and other federal statutes governing information and telecommunications services.

Initial comments responding to the NOI were due on June 8, 2009. Reply comments were due on July 7, 2009.