

Before the
DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration

and the
DEPARTMENT OF AGRICULTURE
Rural Utilities Service

In the Matter of)	
)	
American Recovery and Reinvestment)	Docket No. 090309298-9299-01
Act of 2009 Broadband Initiatives)	
)	

COMMENTS OF EMBARQ

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SUMMARY

Embarq submits that NTIA and RUS can best accomplish the objectives of the Recovery Act if they follow five key recommendations:

1. Direct the bulk of Recovery Act funds to the core mission of providing broadband service in areas that are currently unserved. This will have the greatest impact on job creation/preservation, and it will ensure that Recovery Act funds are used for projects that would not occur in the absence of such support.
2. Distribute the Recovery Act funds through grants directly to broadband providers rather than loans or other measures as this will have the greatest and quickest impact in bringing broadband to the hardest-to-serve areas.
3. Expedite the process through streamlined applications and immediate action to begin disbursing funds. The Recovery Act is about turning around our Nation's current economic crisis, so there is no time to wait for complete broadband maps or block grants to states for redistribution.
4. Define unserved areas as those as applicant-defined proposed service areas in which terrestrial broadband service with an advertised information transfer rate of 1.5 Mbps in one direction (commonly referred to as "1.5 Mbps service") is not generally available. And,
5. Place substantially greater weight on the statutory criteria of deploying new broadband service in unserved areas and providing higher broadband speeds than on any other proposed criteria as these will have the greatest impact on jobs and investment.

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**COMMENTS OF EMBARQ CORPORATION AND THE EMBARQ LOCAL
OPERATING COMPANIES**

Embarq Corporation and the Embarq local operating companies (“Embarq”) appreciate the opportunity to provide comments to the National Telecommunications and Information Administration (NTIA) and the Rural Utilities Service (RUS) in response to the Joint Request for Information (Request)¹ about the tremendous opportunity posed by the broadband provisions in the American Recovery and Reinvestment Act of 2009 (Recovery Act).² Embarq is an independent incumbent local exchange carrier (“ILEC”), providing voice, broadband, data, and resold satellite video services to businesses and residents in portions of eighteen states. Embarq is a rural telecommunications carrier, as defined by the Communications Act³ in all but one of those eighteen states. Embarq serves many low-density, high cost areas across the country, ranging from the Florida

¹ *Joint Request for Information and Notice of Public Meetings*, Docket No. 090303298-9299-01, 10716 Federal Register vol. 74, no. 47 (March 12, 2009).

² Pub. L. No. 111-5, 123 Stat. 115 (2009).

³ 47 USC § 151, *et seq.*

Everglades to Crater Lake, Oregon and from central Minnesota farm country to Texas ranchland. Accordingly, Embarq has considerable experience addressing the challenges associated with deploying and providing broadband services in high-cost, low-density, rural areas.

The NTIA and the RUS can accomplish the objectives of the Recovery Act and substantially improve the quality of life for all Americans if they follow five key recommendations:

1. Direct the bulk of Recovery Act funds to the core mission of providing broadband service in areas that are currently unserved. This will have the greatest impact on job creation/preservation, and it will ensure that Recovery Act funds are used for projects that would not occur in the absence of such support.
2. Distribute the Recovery Act funds through grants directly to broadband providers rather than loans or other measures as this will have the greatest and quickest impact in bringing broadband to the hardest-to-serve areas.
3. Expedite the process through streamlined applications and immediate action to begin disbursing funds. The Recovery Act is about turning around our Nation's current economic crisis, so there is no time to wait for complete broadband maps or block grants to states for redistribution.
4. Define unserved areas as those as applicant-defined proposed service areas in which terrestrial broadband service with an advertised information transfer

rate of 1.5 Mbps in one direction (commonly referred to as “1.5 Mbps service”) is not generally available. And,

5. Place substantially greater weight on the statutory criteria of deploying new broadband service in unserved areas and providing higher broadband speeds than on any other proposed criteria as these will have the greatest impact on jobs and investment.

These five themes are reflected throughout Embarq’s answers to the specific questions NTIA and RUS asked in the Joint Request for Information (Request), which are set forth in these Comments in the same order that they appear in the Request.

A. THE MOST IMPORTANT PURPOSE IS TO PROVIDE BROADBAND TO CONSUMERS IN UNSERVED AREAS (NTIA QUESTION 1)

The Recovery Act establishes several purposes for the Broadband Technology Opportunities Program (BTOP). First, provide “broadband service to consumers residing in unserved areas of the United States.” This central objective is entirely appropriate, because the biggest benefit in terms of consumer impact and job creation/preservation will come from using the Recovery Act funding to bring broadband to consumers that currently are unable to subscribe to broadband service.

To further the goal of promoting broadband deployment areas that are currently unserved, NTIA should not allocate a certain percentage of funds to each category of priority enumerated in the statute. Rather, priority through scoring or eligibility criteria should be placed on delivering first-time broadband service to currently unserved areas. That objective will produce the greatest positive impact on jobs and the most overall public benefit where it would not otherwise be obtainable. If specific amounts are

allocated to each category, NTIA may sacrifice the potential economies of combining applications.

This approach is also most consistent with Congressional intent. Congress created three programs for NTIA to administer and provided funding levels for each. There should not be sub-allocations within those programs. Instead, the enumerated purposes should be commonly addressed within each of the programs that Congress created in the Recovery Act. This approach will facilitate broader and, ultimately, more successful use of Recovery Act funds for all purposes, because there are economies of scale, scope, and density in deploying broadband in rural areas.

The NTIA should convert the statutory considerations and mandates from Congress into objective scoring criteria, while placing the highest weight on the obviously most important Congressional criteria, namely incremental service to unserved areas, significant increases in broadband speed, and job preservation and creation. Provided that priority goes to applications delivering the most incremental service to currently unserved areas, this approach will take advantage of economies of scale, scope, and density. Under such a policy, projects that address multiple considerations could score higher than similar projects that only address a single need.

Conversely, NTIA should not attempt to award credit for projects that are directed at meeting other, less critical broadband-related portions of the Recovery Act. Those provisions will create additional broadband deployment, but mainly through improvements in networks where broadband service already is available. The BTOP should not duplicate those efforts. Rather, NTIA should recognize that Congress intentionally created the BTOP as a separate program with a separate mission—to

generate incremental broadband deployment in places where it would not be deployed absent such direct support. Therefore, while not permitting duplicate funding, the BTOP should focus on broadband projects that would not qualify for support under other programs.

The Recovery Act was designed to create and preserve jobs, and do so quickly. NTIA risks undermining the objectives of the statute if it devotes scarce resources and time to managing interactions with other Recovery Act programs. Rather, NTIA should focus its limited staff and management resources on meeting the aggressive funding deadlines for its specific programs in the statute. Congress provided NTIA and RUS relatively clear criteria which should be followed. Accordingly, NTIA should focus on creating a streamlined application process and fast, efficient review criteria so that the agency can issue grant awards in the fastest possible manner to promote employment and help speed economic recovery.

B. A STATE SHOULD PLAY A CONSULTATIVE ROLE ONLY WHERE IT IS NOT SEEKING RECOVERY ACT FUNDING ITSELF (NTIA QUESTION 2)

Although NTIA is required to give consideration to state priorities when awarding Recovery Act funds, NTIA is given the ultimate responsibility for selecting the best projects. In addition, NTIA must ensure that the state priorities are only given consideration where they are selected through a transparent and fair process. In any case, applicants should not be required to gain prior approval from a state to be eligible for funding under Recovery Act.

The best outcome for jobs and rural consumers is likely to come where a state acts in a consultative role by explicitly or publicly publishing its list of broadband

priorities quickly, and NTIA can consider those priorities in scoring applications from that state. In particular, a state should make clear which communities it designates for economic development where broadband would enhance such development. NTIA should not seek to resolve differences between competing interests. Rather, the agency should focus as much as possible on creating objective scoring criteria that will differentiate applications to the degree that they could successfully serve the criteria specified in the statute.

It is vitally important that the state role be clarified at the outset, and that NTIA treat the state appropriately depending on the role that it chooses. If a state chooses to apply for grants itself, then any priorities or other input it offers should be treated as being offered by a competing applicant. A state should not be able to confer any priority on its own application. In addition, NTIA should judge project viability and effectiveness under the same criteria used to judge all other applications. NTIA must also recognize that an overbuilder, including a state or municipal applicant proposing to deploy broadband is unlikely to create or preserve jobs on balance when the impact on other providers in the market is taken into account. Finally, post-award review (follow-up) must be applied equally to any state-run projects as it would to any private entity; there is not reason to believe that a state would be immune from the potential issues that are the target of such follow-up. Therefore, any state providing service must fully comply with all of the obligations, including any reporting requirements, that apply to private entities.

C. PRIVATE SECTOR BROADBAND PROVIDERS, PARTICULARLY THOSE ALREADY PROVIDING SERVICE, SHOULD BE DEEMED TO BE ELIGIBLE GRANT RECIPIENTS (NTIA QUESTION 3)

NTIA should ensure that current broadband providers are eligible for grant awards as they will, in many cases, be the applicants most able to meet the goals of the statute, particularly the objective of promoting rapid broadband deployment in unserved areas while creating and preserving jobs. Existing broadband providers have the expertise and resources on hand to make broadband projects “shovel ready.” In addition, the most efficient and effective broadband deployment will often be an extension of an existing broadband network. Therefore, consumers will be best served by making current providers eligible for grant awards.

NTIA needs to include current broadband providers in the pool of eligible entities. But NTIA should not discriminate among eligible entities. The statute does not suggest that the agency prioritize among applications from the eligible entities specified in Section 6001(e). Therefore, applications from any eligible entity should be considered on their merits, how it achieves the goals of the statute and how it adheres to the criteria in the statute. Experience, the financial and technical ability to complete projects, the ability to quickly create and preserve jobs are all relevant scoring and award considerations.

It is important to note that not all applicants will have the same impact on the creation and preservation of jobs. Indeed, a grant to an overbuilder may not have a positive effect on the total number of jobs in an area served by the two networks. Overbuilding will compel the pre-existing network operator to reduce the number of

people it employs in order to maintain the same economies of scale, particularly as the new network grows.

D. NTIA SHOULD FOCUS ON SUPPORTING PROJECTS THAT WILL DEPLOY BROADBAND IN CURRENTLY UNSERVED AREAS (NTIA QUESTION 4)

Give the Highest Priority to New Service in Unserved Areas. First and foremost, NTIA should focus on supporting projects to deploy broadband in areas that are currently unserved. Congress was very clear that unserved areas are a high priority for NTIA and RUS, and this is the purpose that will produce the greatest impact on jobs and the most public benefit. By focusing early funding rounds on unserved areas or unserved needs first, NTIA can minimize the risk of displacing private investment, since an area or institution that lacks access to high-speed services has thus far been unable to attract private investment. The economics of unserved areas are such that the agency can conclude with reasonable confidence that the project would not be developed in the absence of Recovery Act funding.

Give High Priority to Projects Delivering the Highest Speeds. The speed proposed in the project application should also be an important consideration, second only to bringing incremental service to an unserved area. Congress expressed a clear preference for NTIA to direct Recovery Act funding to projects that, all things being equal, deliver the highest speed. This criterion should also be given a strong weighting in any scoring mechanism. It is particularly important that cost per subscriber not be given priority over bringing service to currently unserved areas or delivering greater speed as this will undermine the clear statutory preference for serving unserved areas and delivering greater speeds.

Do Not Give Extra Credit to New, Untested Technologies and Business Models.

Both NTIA and RUS should avoid the temptation to devote substantial Recovery Act funding to new and untested technologies and/or business models. While innovation ordinarily may seem desirable, “proof-of-concept” and “test bed” projects (unlike basic research) are addressed effectively today by venture capital and other financial markets. Therefore, Recovery Act funding for these kinds of projects would merely displace other funding for projects that would happen in the absence of Recovery Act support.

Accordingly, the agency should require applicants to demonstrate how the proposed project, if awarded, is part of a sustainable business plan. The agency should avoid overly burdensome capital or equity requirements that the Rural Utilities Service (RUS) has historically imposed on its broadband loan program. Applicants should not be forced to lock up capital in advance of being awarded a grant under BTOP or as a condition of drawing down on a BTOP grant award.

Permit Both Mobile and Fixed Broadband Services to Claim a Priority in the Same Area for Providing New Service to an Unserved Area. Different technologies may provide distinctly different kinds of broadband service and therefore should not be considered duplicative. For example, the presence of a mobile broadband service meeting the minimum broadband performance required under the BTOP program should not preclude consideration of a BTOP grant application for fixed broadband service in a particular area and vice versa. Mobile broadband and fixed broadband services are very distinct services and will address different needs in any given community. Technological neutrality requires NTIA and the RUS to accept different technology solutions as not duplicative when considering applications.

Technological neutrality requires, however, that the agency avoid establishing definitions or other terms that would differ from one technology to another -- at least among technologies that meet the same basic performance established by the agency for the BTOP program. This is important, for example, when considering minimum broadband speeds and defining “unserved” and “underserved.” Instead of attempting to balance technologies, NTIA should focus on the goals in the statute, particularly delivering broadband service to unserved areas and promoting availability of higher broadband speeds.

Look at Affordability on a Case-by-Case Basis. The agency should not impose a hard and fast rule regarding affordability. Rather, the agency should take into consideration the full compliment of factors – including but not limited to the cost of providing service and income or poverty factors. Moreover, no one factor should unduly affect the agency’s definition of affordability. Nor should NTIA establish prices in grant or loan agreements; rather NTIA should rely on market forces to establish pricing. The agency surely will make mistakes with prices, particularly if it attempts to set prices that should remain in place over time. There is simply too much uncertainty — technological change, market evolution, and take rates — for prices to be dictated in advance. Instead, NTIA could use its ability to address demand stimulation to develop a program like the Lifeline program for telecommunications service that would ensure affordable service.

Do Not Give Priority to Proposals that Leverage Other Recovery Act Projects. NTIA should not attempt to give priority to proposals that leverage other Recovery Act projects. Doing so could seriously impair the agency’s ability to issue grant awards in a

timely manner. Moreover, NTIA should not attempt to condition or score a BTOP application based on decisions of other agencies. The only exception to this is the statutory requirement that NTIA and the RUS coordinate and prevent any double dipping. Further, NTIA is required under Section 6001(h)(2)(D) to prevent unjust enrichment. Suggesting that NTIA should provide favorable treatment towards an applicant that may have received funding through other federal programs could run afoul of this requirement. Finally, such criteria would create unfairness in the BTOP process, providing favorability for applicants simply because they managed to win other federal grants or loans, when other applicants may not even have been eligible.

Both agencies should be careful not to unwittingly block the ability of the other to make a worthy grant. Previous USDA grant and loan awards should not be permitted to trump or prevent NTIA from awarding a BTOP grant in the same area, or in an area that may have some overlap with a previous USDA grant or loan, provided that the BTOP application is for new broadband service that is not currently being provided or planned to be provided under a previous USDA grant or loan.

E. NTIA SHOULD ADOPT A NEW, STREAMLINED PROGRAM FOR DISTRIBUTING BTOP GRANTS (NTIA QUESTION 5)

NTIA -- indeed, both agencies -- should establish a new program for distributing Recovery Act funds rather than use an existing mechanism. In the case of NTIA, this appears to be required by the statute. NTIA should implement this new program, the BTOP, using a competitive grant process for distribution. Recovery Act funds should not be awarded through block grants to States or other political subdivisions. That will only delay distribution of funding and frustrate the goal of promoting economic recovery.

Moreover, distributing broadband funding through states or other political bodies inevitably will inject uncertainty and inefficiency into the process, further undermining the goals of the Recovery Act.

All eligible entities should be allowed to compete for the grants and loans from both agencies. It is particularly important that current broadband providers be permitted to apply. Indeed, their experience and ability to quickly deploy broadband in unserved areas suggests that a priority should be given to applicants that currently provide broadband on a scale commensurate with the project for which funding is sought.

Processing time has been the most significant shortcoming of traditional grant and loan application consideration. For example, the process to consider an RUS broadband loan since the program was established has been riddled with delays and inconsistencies. Addressing these problems and establishing a streamlined application process and shorter decision making period for the RUS unquestionably should be among the top priorities of the USDA for distributing ARRA funds.

Both agencies should adopt a streamlined application process that permits quick review by the agencies and allows for early decision making on the application. A streamlined, pre-approval process can allow the agency to make fast determinations of the most feasible applications, while still allowing the agency to obtain the full complement of information necessary to make a final determination on the application. The process would require that the applicant, following a temporary approval, later provide additional information. Similarly, clarity in rules and scoring criteria is essential. Both RUS and NTIA should also explicitly state in the Notice of Funding Availability award size limits (both ceilings and floors) when opening a grant competition. Similarly,

any geographic diversity considerations used by the awarding agency should also be disclosed up front.

F. NTIA SHOULD BE FLEXIBLE WITH ITS REQUIREMENTS FOR FINANCIAL CONTRIBUTIONS BY GRANT APPLICANTS (NTIA QUESTION 9)

As an initial matter, the Recovery Act limits the Federal share of funding for any BTOP proposal to no more than eighty percent of the total grant amount. Under the statute, this limit can be waived, allowing NTIA to fund up to one hundred percent of the total amount if the applicant petitions NTIA and demonstrates financial need. This would permit NTIA to take account of the economics in the highest-cost communities, as is currently the case with several universal service programs administered by the Universal Service Administration Company (USAC).

NTIA should consider waiving the twenty-percent match for projects that bring first time broadband to a community. Many of these communities are in very rural areas, with extremely high costs. It is likely that even an eighty-percent grant will be insufficient to cover the costs of providing broadband in some of these communities, which is how “financial need” should be evaluated. Financial need should not refer to the circumstances of any particular applicant but, rather, the financial need of the community when it comes to supporting broadband.

If an applicant is willing to provide broadband in a community with less than an eighty-percent Federal grant, then NTIA may grant a priority to that proposal over other proposals for the same community. NTIA should not prioritize proposals with lower Federal shares generally, however, as this will only serve to divert much-needed support for rural broadband deployment away from the places with the most need and

send it to the places where market forces are more likely to produce broadband deployment in the absence of Recovery Act support. Such an approach would run counter to the express objectives of the statute.

Proposals in Unserved Areas Should Automatically Satisfy the Requirement that They Would Not Have Been Built Absent Recovery Act Funding. The statutory criteria that Recovery Act funds go only to projects that would not have been implemented without Federal assistance is important to the overall success of the Act. Recovery Act funds will do the most to promote incremental broadband deployment and create/preserve jobs if they are directed to projects that would not be possible through market forces or existing programs. To this end, each applicant should attest that the project it proposes could not be deployed economically in the near term without Recovery Act funding.

It is important to note that grants to unserved areas do not raise the same concerns about the Recovery Act funds going to pre-existing projects or ones that would have happened even without support. Both NTIA and RUS can take comfort that grants to unserved areas are producing additional broadband deployment and creating/preserving jobs. Broadband providers have been investing in and deploying networks for over a decade and consumers have been searching for and paying for high-quality, high-speed broadband services for most of that time. Market forces, therefore, have already worked to deploy broadband in most of the areas where it is feasible to provide service in the absence of support, or with the support available through existing programs. Therefore, NTIA, and RUS, should focus their efforts on

funding projects that will provide new broadband in unserved areas as this will best fulfill this and other Recovery Act priorities.

G. NTIA SHOULD ADOPT A STREAMLINED APPLICATION PROCESS TO PROMOTE TIMELY COMPLETION OF PROPOSALS (NTIA QUESTION 10)

As explained in the Request, the Recovery Act states that NTIA must move quickly with the BTOP, awarding all grants by the end of fiscal year 2010, with project completion no more than two years after funding is received. To accomplish this, NTIA should establish a streamlined application process that permits the minimal information necessary for the agencies to make quick decisions and later require the applicant to provide more comprehensive information later (RUS should do the same with its Recovery Act program).

Second, the NTIA program criteria should be limited to what is specified in the statute and the agency should not seek to impose additional criteria. This will only delay the process, create uncertainty (which is harmful to investment), and potentially divert funding away from Recovery Act priorities.

NTIA should also consider applications covering more than one community. One serious limitation of the RUS Community Connect programs, for example, is that the agency only considers a separate application for each community. This should be changed and both agencies should accept applications that cover multiple communities.

Applications should be presented to the agencies in the context of an overall business plan for the applicant that shows build out within the required time frames. The agencies should establish manageable post-award reporting requirements that demonstrate that the applicant is deploying the promised service. In addition, any

partnerships claimed in the application should be supported with necessary documentation and made available to the agencies upon request.

H. NTIA SHOULD ADOPT MEANINGFUL YET FAIR AND NOT UNDULY BURDENSOME REPORTING AND DEOBLIGATION TERMS (NTIA QUESTION 11)

As set out in the Request, the Recovery Act requires that grant recipients report quarterly on their use of grant funds and progress in fulfilling the terms of their grant. NTIA may, and indeed should in some circumstance de-obligate funds for grant awards that demonstrate an insufficient level of performance, or wasteful or fraudulent spending (as defined by NTIA in advance), and award these funds to new or existing applicants.

In issuing a BTOP grant, NTIA should specify what purchases are allowed with the grant funds. Applicants should be required to maintain records to demonstrate, upon demand from NTIA, that funds have been used appropriately. Grant recipients should be required to certify that they have used grant funds only for eligible purposes and be able to provide documentation should the agency desire to see such documentation.

The insufficient level of performance standard should simply be that the grant recipient has not fulfilled its promised build out in the application. The agency should consider all situations on a case by case basis and take into consideration factors that would be out of the control of the grant recipient – e.g., weather, vendor delays, or rights of way restrictions that were not anticipated in the grant application.

NTIA should distinguish between mistakes and deliberate attempts to defy the rules of the program. When unauthorized or ineligible spending is determined by NTIA, the agency should determine the seriousness of the violation. In cases where the errors

are not serious, grant recipients should be required to rectify the problem and demonstrate compliance within a reasonable period of time. In the case of serious errors, the agency should de-obligate any remaining funds under the grant and immediately consider new applications for grants to serve the area that was covered by the violating grant recipient.

I. NTIA AND RUS MUST CAREFULLY DEFINE UNSERVED, UNDERSERVED, BROADBAND, NONDISCRIMINATION AND INTERCONNECTION OBLIGATIONS SO AS TO PROMOTE BROADBAND INVESTMENT AND DEPLOYMENT (NTIA QUESTION 13)

As the Recovery Act requires, NTIA should consult with the Federal Communications Commission on several key definitions in the Act, starting with the definition of broadband. The definition(s) of broadband is critical to much of the FCC's work, and the FCC's current tiered approach is sensible. Broadband is also an evolving concept, with changing technology and customer expectations. Therefore, NTIA should follow the FCC's guidance and harmonize its definition of broadband in the BTOP. This can best be accomplished by limiting the scope of the question of what is "broadband" to the purposes of the Recovery Act. The primary purpose of defining broadband in the Recovery Act is to identify areas that are unserved, so NTIA should focus on the definition of unserved rather than attempting to define broadband per se. Another purpose of defining broadband is to establish what network facilities can be supported. In this regard, the facilities used to provide Recovery Act-supported broadband should be defined to include transport trunks and feeder plant used to provide the supported broadband service.

At the outset, it is vitally important that each applicant be able to define its proposed service area, including aggregating both adjacent and non-contiguous clusters of unserved homes. In addition, each applicant's proposed service area as opposed to some larger unit of geography should be used when measuring whether an applicant is meeting criteria related to unserved areas. In both cases, this approach will increase focus on unserved homes and maximize incremental broadband deployment.

Unserved and underserved areas should be defined by reference to available Internet access speed levels. The facilities used to provide supported broadband service should be eligible for support without regard to whether those facilities are physically located in the proposed service area (indeed they generally must be at least partially outside areas defined as unserved). The speed threshold should be the same for all providers, regardless of the technology used. Any other approach would conflict with the agency's technological neutrality principles. The presence of a mobile wireless broadband provider at the chosen service threshold, however, should not preclude funding eligibility for a wireline applicant, and vice versa.

Unserved Areas. NTIA should define an unserved area as a proposed service area in which terrestrial broadband service with an advertised information transfer rate of 1.5 Mbps in one direction (commonly referred to as "1.5 Mbps service") is not generally available. The presence of a few households in the proposed service area with access to such service should not preclude an application from being deemed to propose service in an unserved area. This speed threshold is consistent with current market behavior, where offerings of 1.5 Mbps service and up are becoming (and likely have become) the most common offerings. It also is consistent with an emphasis on

economic development and jobs as many important applications, such as video conferencing are arguably possible only with 1.5 Mbps service and above. Any higher speed threshold, however, would risk defining as unserved the large number of satisfied customers of 1.5 Mbps service, which seems implausible.

Underserved Areas. The definition of underserved that is most consistent with the statutory emphasis on delivering faster broadband to more customers is one based on a higher service threshold. NTIA should define an underserved area as one in which terrestrial broadband service with an advertised downstream speed of 5 Mbps is not generally available (again subject to a clarification that the presence of a few households having such an option cannot preclude an application). As with unserved areas, the relevant geographic area for measuring whether an area is underserved should be the proposed service area defined by the applicant, including both adjacent and non-contiguous clusters of underserved homes. The agencies should not allow any difficulties defining underserved areas to get in the way of rapidly funding projects that will deploy broadband in unserved areas.

Non-Discrimination and Network Interconnection Obligations. NTIA should not impose any new non-discrimination and/or network interconnection requirements beyond existing statutory and regulatory obligations and principles. The BTOP should be and, indeed, can only be rationally implemented by adhering to current and evolving non-discrimination policies as those policies will always apply far more broadly than Recovery Act funding. Moreover, the purpose of the Recovery Act is to promote investment and job creation/preservation, both of which would be deeply threatened by excessive non-discrimination and/or network interconnection requirements. In addition,

NTIA should note that the FCC retains Title I jurisdiction over the supported facilities and services, permitting case-by-case resolution of any public policy harms that might arise.

The FCC's Broadband Policy Statement (also known as its "Net Neutrality Principles") provides an effective standard protecting consumers effectively through case-by-case resolution. This approach avoids stifling innovation and letting rules become obsolete. In addition, the economics of rural areas—the very same unserved places to which Recovery Act funding is to be directed in significant measure—increase the harms from premature and unnecessary additional obligations in rural areas, further damaging deployment and jobs. This is why the Recovery Act does not even impose the Broadband Policy Statement obligations under the program to be administered by RUS.

J. THE RUS SHOULD CREATE A SEPARATE RECOVERY ACT PROGRAM PROVIDING PREDOMINATELY GRANTS TO APPLICANTS OFFERING TO PROVIDE BROADBAND IN UNSERVED AREAS. (RUS QUESTION 1)

RUS has struggled to find an effective way to use the Agency's current broadband loan program to provide broadband access to rural residents that lack such access. Embarq agrees with RUS's assessment that the authority to provide grants as well as loans will give it the tools necessary to achieve that goal. While loans can help some attract and support some projects, they will not be effective at facilitating broadband deployment in the places that remain unserved to this day. In those places, the business case is simply not viable because the high-cost of service is spread over only a few subscribers in the low-density areas that comprise the bulk of unserved America.

The RUS should direct a substantial majority of the Recovery Act funding to grants, because that will have the biggest positive impact on rural broadband deployment and job creation and preservation. Grants, rather than loans, will provide the best results because grants can fundamentally change the business case for an investment, whereas loans generally have far less benefit. There are circumstances where both funding options can work together, for example, where a truly unserved area requires support in the form of a grant and a neighboring underserved area could benefit from a loan to facilitate a broadband upgrade.

The RUS has broad statutory authority to streamline the existing criteria for broadband loans and grants through Recovery Act funds. In particular, the Recovery Act provides RUS with sufficient authority to make most any adjustment to existing rules and criteria under the broadband loan and Community Connect programs that will facilitate faster consideration.

An RUS applicant should be allowed to bundle a loan and grant application, provided the applicant distinguishes which areas are subject to the loan request and which are subject to a grant request. However, the RUS should retain the flexibility to award the loans and grants independently (disaggregated from larger applications) if the agency determines this will improve efficiency and facilitate faster disbursement of Recovery Act funds. The agency should place a premium on making timely decisions to issue awards and overcome the long delays that have plagued the agency over the past several years.

The Recovery Act does not require matching for RUS funding, unlike the requirement that applies to BTOP grants. This distinction should be presumed to be

based on a clear policy difference—Congress recognized that the predominately rural areas that RUS must address will often require grants providing greater than eighty percent of the demonstrated cost to deploy broadband. Accordingly, no matching funds should be required for RUS applications to serve unserved areas.

K. RUS AND NTIA CAN AND SHOULD ALIGN THEIR RECOVERY ACT BROADBAND ACTIVITIES BY FOCUSING ON UNSERVED AREAS AND UTILIZING COMPARABLE DEFINITIONS (RUS QUESTION 2)

RUS should recognize at the outset that an area without sufficient access needed for economic development is “unserved,” and that this definition of unserved is very similar to the one that NTIA must apply in the BTOP. Accordingly, RUS and NTIA should use the same analysis and arrive at comparable lists of high-priority project areas where Recovery Act-supported broadband deployment can make a real difference for unserved customers.

From an economic development perspective, it seems likely that many customers would consider themselves to be unserved, as opposed to underserved, if they do not have access to *both* fixed and mobile broadband services. Therefore, the RUS should not consider mobile broadband service and fixed landline broadband service duplicative for the purpose of Recovery Act funding. This determination should be retroactive with respect to how unserved and underserved are considered as it relates to previous RUS loans and grants.

The agencies should also adopt common standards on the fundamental criteria such as what constitutes unserved and underserved. Second, there should be no restriction on applications seeking funding from both agencies. Agencies should

coordinate to prevent double dipping by applicants and ensure that one agency does not unwittingly block the other agency from making a worthy grant or loan.

L. THE RUS SHOULD DIRECT THE BULK OF ITS RECOVERY ACT FUNDING TO PROJECTS BRINGING BROADBAND TO UNSERVED CUSTOMERS FOR THE FIRST TIME. (RUS QUESTIONS 3 AND 4).

As noted, seventy-five percent of an area to be funded through RUS must be in an area that is determined to lack sufficient “high speed broadband service to facilitate rural economic development.” Rural economic development should be defined broadly and include factors such as job growth, benefits provided by the deployment of new broadband service to key entities such as public safety, education, and health care institutions and end users. The RUS should fulfill this statutory requirement by focusing on supporting projects to deploy broadband in areas that are currently unserved, using same definition as adopted by NTIA. This is the clear meaning of the statutory language regarding RUS’s obligation to disperse funding to rural areas that lack sufficient high-speed broadband to facilitate rural economic development.

Congress was also very clear that unserved areas are a high priority for RUS (as well as NTIA), and this is the purpose that will produce the greatest impact on jobs and the most public benefit. By focusing early funding rounds on unserved areas or unserved needs first, the RUS can minimize the risk of displacing private investment, since an area or institution that lacks access to high-speed services has thus far been unable to attract private investment. The economics of unserved areas are such that the agency can conclude with reasonable confidence that the project would not be developed in the absence of Recovery Act funding.

The RUS can also best serve the public by interpreting the statutory priority for multiple service providers as a preference for projects that result in both fixed and mobile broadband availability (at the same speed) in an area (e.g., adding a fixed provider to an area currently served by mobile broadband, and vice versa) as they will fulfill the statutory requirement to prioritize projects that result in a choice of service providers. Different technologies may provide very distinctly different kinds of broadband service and therefore should not be considered duplicative. Mobile broadband and fixed broadband services are very distinct services and will address different needs in any given community.

It is important as well that all providers, including both fixed and mobile broadband services, be subject to the same requirements and funding criteria, including the same speed-based definitions of unserved, underserved, etc. Technological neutrality requires that the agency avoid establishing definitions or other terms that would differ from one technology to another -- at least among technologies that meet the same basic performance established by the agency for the BTOP program. This is important, for example, when considering minimum broadband speeds and defining “unserved” and “underserved.” Nor should the RUS impose a hard and fast rule regarding affordability. Rather, the agency should take into consideration the full complement of factors – including but not limited to the cost of providing service and income or poverty factors. Moreover, no one factor should unduly affect the agency’s definition of affordability. should RUS attempt to establish service prices in grant or loan agreements. There is simply too much uncertainty — technological change, market evolution, and take rates — for prices to be dictated in advance.

Finally, the RUS should limit its analysis to the priorities set forth in the Recovery Act rather than create additional priorities. In particular, the RUS should resist importing criteria from other broadband or telecommunications grant and loan programs. The other programs are designed to meet other purposes and, importantly, the Recovery Act is supposed to fund projects that would not be built through support from those other programs. The best public policy approach is to limit analysis of Recovery Act proposals to the specific criteria Congress adopted for the RUS-administered program in that Act.

M. CONCLUSION

The NTIA and the RUS can best accomplish the objectives of the Recovery Act if they follow five key recommendations: (1) direct the bulk of Recovery Act funds to the core mission of providing broadband service in areas that are current unserved; (2) distribute the Recovery Act funds through grants directly to broadband providers rather than loans or other measures; (3) expedite the process through streamlined applications and immediate action to begin disbursing funds; (4) define unserved areas as those as applicant-defined proposed service areas in which terrestrial broadband service with an advertised information transfer rate of 1.5 Mbps in one direction (commonly referred to as "1.5 Mbps service") is not generally available; and (5) place substantially greater weight on the statutory criteria of deploying incremental broadband service in unserved areas and providing higher broadband speeds than on any other proposed criteria.

Respectfully submitted,

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