Before the

National Telecommunications and Information Administration,
U.S. Department of Commerce
Washington, D.C. 20230

and

Rural Utilities Service,
U.S. Department of Agriculture
Washington, D.C. 20250

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

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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EXECUTIVE SUMMARY

NASUCA's comments should be considered in conjunction with its March 18, 2009 letter to the Agencies, which set forth NASUCA's broad perspectives and recommendations regarding implementation of the American Recovery and Reinvestment Act of 2009. Consistent with its March 18, 2009 submission, NASUCA has responded to most of the Agencies' questions set forth in their March 12, 2009 Joint Notice with the following recommendations (and supporting rationale):

NTIA Notice and Questions:

- Question 1: BTOP funds should not be apportioned to any category of purposes but rather grants should flow from the NTIA's evaluation of individual applications, in conjunction with States' reviews and recommendations regarding such applications.

- Question 2: States should play a central, critical role in assisting the NTIA in implementing the ARRA by: (1) identifying unserved and underserved areas; (2) reviewing and evaluating grant applications; (3) recommending approval or rejection of grant applications and funding awards; and (4) monitoring and auditing funded projects post-award.

- Question 3: The award of grants to entities other than those described in §§ 6001(e)(1)(A) and (B) should be deemed to be in the "public interest" only if: (1) the entity partners with an entity described in those sections; or (2) the entity certifies that it has made reasonable efforts to find a partnering entity in an "unserved" area but has been unsuccessful.

- Question 4: The NTIA should develop scoring criteria that prioritize "unserved" areas, ensure advance three broad considerations – broadband availability, affordability and accountability – and establish broad, flexible criteria for States to use to screen and rank grant applications before recommending them to the NTIA for funding.

- Question 6: Projects that support broadband adoption must be supported by considering several factors for grants applications to expand public computer center capacity.

- Question 7: The NTIA should adopt similar factors in awarding grants for innovative programs to encourage sustainable adoption of broadband services.

- Question 8: The "comprehensive nationwide inventory map of existing broadband service capability and availability in the United States" to be developed by the NTIA must be able to, among other things: (1) enable the public to determine the availability and capabilities of each retail broadband service offering in their local community; (2) enable broadband providers to determine wholesale broadband providers in a local community and the geographic location of "middle-mile" and "backbone" broadband facilities and infrastructure; and (3)

government to determine the retail price of broadband service offerings and subscription levels.

- Question 13: Critical terms should be defined as follows: (1) an "unserved" area is an area that is not served by any form of facilities-based broadband or where Internet connectivity is available only through dial-up service or satellite; (2) an "underserved" area should be defined based on consideration of several factors including available speeds, price and subscription levels; and (3) "broadband" means any service with information transfer rates equal to or greater than 768 kbps but less than 1.5 mbps, corresponding to "basic broadband tier 1 service" defined by the FCC. In addition, *all* successful grant applicants should be required to provide access to network facilities, at cost, to any provider of broadband service or content seeking to expand broadband to unserved or underserved populations. Finally, the Agencies should define "community anchor institution" broadly, consistent with the ARRA.

- Question 15: Among other things: (1) the Agencies should adopt a single application form for use by funding applicants and make it available online, in read/write format, for use and submission electronically to the Agencies; (2) the NTIA should reinstitute regular reporting on the progress of broadband in the United States; (3) the FCC's broadband reports should be refined to collect data at the census block level, at minimum; (4) the NTIA should formally and carefully examine the differences between reports on broadband deployment vs. adoption and reassess national average subscription rates in areas that currently have broadband service.

RUS Notice and Questions:

- Question 1: The RUS should consider utilizing loans and loan guarantees where sought or where such funding is feasible and will better leverage scarce funds appropriated to the RUS; the RUS should also review its other funding programs to determine whether they can be expanded to provide additional funds for projects under the ARRA.

- Question 2: The RUS and the NTIA should adopt the measures set forth in NASUCA's March 18, 2009 letter to the Agencies to align their broadband activities.

- Question 3: The RUS should utilize the scoring criteria and considerations recommended for use by the NTIA to determine whether a particular level of access is needed for economic development; the RUS should also consider the sorts of exceptional circumstances outlined by NASUCA in its comments to the NTIA that would support a request for funding of projects that cannot provide "broadband" service (speeds of 768 Kbps) in light of its focus on rural areas.

- Question 4: The RUS should use the same scoring criteria as those proposed for use by the NTIA; however, the RUS should assign minimum weight to the ARRA's requirement that priority be given to current or former borrowers under the Rural Electrification Act of 1936, in order to encourage applications from broadband providers who otherwise have never qualified for RUS.

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

The National Association of State Utility Consumer Advocates ("NASUCA")[1] hereby submits these comments for the record in response to the joint request for information and notice of public hearings ("Joint Notice") published by the National Telecommunications and Information Administration ("NTIA") and the Rural Utilities Service ("RUS") (jointly, the "Agencies") on March 12, 2009.[2] Just as the Agencies sought comment in one joint request, so NASUCA will submit its comments in one document responding to each of the Agencies' requests.[3]

At the outset, NASUCA notes that its comments follow its submission to the Agencies, and to the Federal Communications Commission ("FCC"), of its broad perspectives and recommendations regarding implementation of the goals and provisions of the American Recovery and Reinvestment Act of 2009 ("ARRA") on March 18, 2009. Many of the comments submitted herein were contained in NASUCA's March 18, 2009 submission and will therefore

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[1] NASUCA is a voluntary association of 44 advocate offices in 40 states (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming) and the District of Columbia. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g., Ohio. Rev. Code* Ch. 4911; 71 *Pa.Cons.Stat. Ann.* § 309-4(a); *Md. Pub.Util.Code Ann*. § 2-205; *Minn. Stat*. § 8.33; *D.C. Code Ann*. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers, with some separately established as advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General).

In addition, NASUCA has associate and affiliate members in California (Toward Utility Reform Network, Utility Consumer Action Network), Georgia (SERUCA), Massachusetts (National Consumer Law Center), and New York (The Public Law Project). Associate and affiliate members also serve utility consumers but either are not created by state law or do not have statewide authority. Finally, NASUCA has three associate members representing Canadian provincial governments (Alberta, British Columbia and Ontario) and a member representing the government of Barbados.

[2] 74 Fed. Reg. 10716-21 (March 12, 2009).

[3] Stylistically, NASUCA has set forth the Agencies' questions, including subparts, that it is responding to in **bold**. NASUCA's comments in response to those questions are set forth under "recommendation" and supporting "rationale" headings in ***bold italic*** font.

sound familiar. Many of the broader perspectives set forth in that submission, however, are outside the scope of the Agencies' Joint Notice but NASUCA refers the Agencies to those perspectives as a contextual framework within which NASUCA's comments, and those of other parties, should be considered.

I. THE NTIA REQUEST FOR INFORMATION.

Question 1. The Purposes of the BTOP[4] Grant Program.

In the Joint Notice, the NTIA noted the five purposes for which grant monies it administers under § 6001(b) of the ARRA may be awarded, namely to:

> (1) Provide access to broadband service to consumers residing in unserved areas of the United States;
>
> (2) Provide improved access to broadband service to consumers residing in underserved areas of the United States;
>
> (3) Provide broadband education, awareness, training, access, equipment, and support to —
>
> (A) Schools, libraries, medical and healthcare providers, community colleges, and other institutions of higher education, and other community support organizations and entities to facilitate greater use of broadband service by or through these organizations;
>
> (B) organizations and agencies that provide outreach, access, equipment, and support services to facilitate greater use of broadband service by low income, unemployed, aged, and otherwise vulnerable populations; and
>
> (C) job-creating strategic facilities located within a State-designated economic zone, Economic Development District designated by the Department of Commerce, Renewal Community or Empowerment Zone designated by the Department of Housing and Urban Development, or Enterprise Community designated by the Department of Agriculture;
>
> (4) Improve access to, and use, of broadband service by public safety agencies; and

[4] Broadband Technology and Opportunity Program.

(5) Stimulate the demand for broadband, economic growth, and job creation.

As a threshold matter, it is critically important for the Agencies to bear in mind the two overriding objectives of the ARRA legislation: first, to stimulate the economy; and second, to create infrastructure that benefits the public at large. The non-discrimination proviso of the BTOP program is an essential element toward achieving both objectives. On this point, the ARRA provides:

> 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, adopted August 5, 2005).[5]

The non-discrimination and interconnection obligations imposed on grant recipients both stimulate the economy (an open broadband network becomes an input in many other economic activities), and benefit society at large (*i.e.*, closing the digital divide, integrating online communications forums, enabling telemedicine, distance learning, etc.).

The ARRA further establishes eligibility, if not a preference, for municipal and non-profit groups to sponsor or build broadband projects.[6] Many communities have been building municipally-owned fiber, wireless or other broadband facilities and networks to serve their citizens. Such public sector efforts should be supported to the fullest extent possible, notwithstanding long-standing opposition to such "competition" from incumbent providers. Moreover, supporting such public broadband projects becomes especially important if incumbent providers are unwilling to build broadband networks consistent with the ARRA's non-discrimination, interconnection and reporting requirements. In order to achieve the ARRA's objectives, and comply with the non-discrimination, interconnection and reporting requirements of the law, there should be a preference for public or public-private undertakings that are willing and able to operate consistently with the ARRA's provisions.[7]

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[5] H.R. 1,Sec. 2, Div. B, § 6001(j) (emphasis added).

[6] *See id.*, § 6001(e).

[7] *See, e.g.,* Peterson, "Verizon, AT&T May Tell U.S. to Keep $7.2 Billion Stimulus Money," (*Bloomberg,*

a. Should a certain percentage of grant funds be apportioned to each category?

Recommendation.

No. NASUCA recommends against apportioning any set percentage of BTOP grant funds to any particular category of purposes enumerated in the ARRA and instead recommends that the award of grants should flow from the grant applications the NTIA receives and the evaluation of the merits of those applications – in conjunction with States' input, as discussed more fully below.

Rationale.

As we noted in our March 18, 2009 submission to the Agencies, as little as $3.75 billion may be left for broadband infrastructure projects administered by the NTIA under the ARRA (assuming full appropriation of amounts established for other purposes by the statute, such as broadband mapping). While hardly insubstantial, $3.75 billion is dwarfed by the amount of money needed to provide high-speed broadband service in areas of America that are unserved or underserved. Moreover, it is clear that Congress and the Obama Administration intended that the emphasis should be on economic stimulus first, and that a more comprehensive and considered analysis of broadband deployment and policies affecting broadband must proceed concurrently with funding efforts – and in all likelihood, subsequently as well. Holding back some percentage of the BTOP grant program's money in order to wait for projects that fall within one of the five categories noted above could result in delaying the injection of such stimulus funds into the economy. This strikes NASUCA as wholly inconsistent with Congress' and President Obama's objectives.

March 31, 2009).

Moreover, as discussed below, from what "pot" that is set aside for funding one of these five categories would BTOP funds be allocated in the case of projects that address more than one purpose? Throwing up a *cordon sanitaire* around funds set aside for one purpose may end up needlessly complicating the distribution of grant funds, which again seems inconsistent with the goals and objectives of the ARRA.

Finally, as Mr. Geoffrey Blackwell of the Chicasaw nation aptly stated during the March 19, 2009 public meeting conducted by the Agencies, in considering the varying broadband needs among, and within states, "one size fits none." Some States have significant areas that lack access to high-speed broadband, while in others there is access but limited subscription. Some States may have already built a high-speed broadband infrastructure for colleges, schools and libraries, while others have not.

Dividing BTOP grant funds among five categories across the country as a whole, at the program's outset, seems likely only to inhibit effectively funding the most urgently needed broadband projects in States and local areas. Congress has already set aside a minimum of one grant per state, and has further specifically allocated no less than $200 million for projects that expand public computer center capacity and at least another $250 million for projects that encourage sustainable broadband adoption.[8] This is enough.

b. Should applicants be encouraged to address more than one purpose?

Recommendation.

Yes. Projects that address more than one purpose enumerated by Congress should receive a scoring bonus in the selection process. *See* NASUCA's discussion of scoring criteria below.

[8] H.R. 1, Sec. 2, Div. A, Title I.

Rationale.

NASUCA supports efforts by the NTIA to encourage BTOP grant applicants to address more than one of the purposes enumerated in § 6001(b) of the ARRA. NASUCA believes that the NTIA can provide encouragement for multi-purpose broadband projects through the weighting factors the agency, or its designees, applies in evaluating and scoring among competing grant applications. Such weighting factors and criteria are discussed in more detail below.

c. How should the BTOP leverage or respond to the other broadband-related portions of the ARRA?

NASUCA has addressed this issue primarily in its discussion of scoring criteria for awarding grant applications. *See*, pp. 27 & 30, below,

Question 2. The Role of the States.

Recommendation.

States should play a central, critical role in assisting the NTIA in its efforts to implement the ARRA. *First*, the NTIA should rely primarily on State agencies and officials to identify unserved and underserved areas within their borders (based on definitions and criteria developed by the NTIA). *Second*, the NTIA should delegate to States the task of reviewing and evaluating grant applications against the statutory purposes set forth in the ARRA and any scoring or selection criteria developed by the NTIA. *Third*, the NTIA should delegate to States the task of recommending approval or rejection of grant applications, including funding awards and recommendations regarding federal funding levels and matching grant requirements. *Fourth*, in the event of a tie between two competing proposals to serve the same area or community, the NTIA should consult with the State to determine which project should be funded. *Finally*, States should be enlisted in the effort to monitor and audit funded projects to ensure against fraud or

waste and to assess how well such projects achieved the goals and purposes of the ARRA.

(a) States' review of grant applications and recommendations to the NTIA.

Recommendation.

While Congress intended that the NTIA "retains the sole authority to approve the [BTOP funding] awards,"[9] the agency should rely on States, in the first instance, to apply the selection criteria and scoring methodology it establishes, preferably in coordination with the RUS and the FCC (*see* below), in order to:

(1) Screen grant applications received by the NTIA and forwarded to the relevant State contact;[10]

(2) Obtain any necessary additional information or documentation related to the proposed project and/or application;

(3) Score proposed projects for which grant applications are submitted;

(4) Recommend whether the grant application should be approved or rejected by the NTIA, including a statement of grounds for rejection or approval of the proposed project;

(5) If the State recommends approval of a grant application, submit a recommendation regarding the level of federal funding that should be awarded to the proposed project, including any rationale and supporting information for providing less than 80% federal funding or for waiving the 20% matching funds requirement; and

(6) If the State recommends approval of a grant application, submit any case-specific conditions, obligations or limitations that the State recommends should be imposed on the grant applicant as a condition of federal funding.

States would be responsible for submitting to the NTIA all projects that have been screened, sorted by area type (unserved/underserved), scored, recommended for approval or rejection, assigned funding levels, etc. Moreover, in the event funds are unavailable for projects recommended for approval in the current round of funding, NASUCA recommends that such

[9] H. Conf. Rep. 111-16, p. 776.

[10] The submission of such applications and their status (pending State review, etc.) would be a matter of public record maintained on the NTIA's website.

projects be given priority over later-submitted applications in any succeeding round.

State recommendations regarding grant applications, together with supporting rationale, should be communicated electronically to the NTIA within 30 days of the State's initial receipt of a grant application from the NTIA, and a copy of the State's recommendation and rationale (including points awarded via the scoring criteria recommended below) should be communicated to the project applicant(s) simultaneously (preferably electronically). Grant applicants that wish to contest the State's recommendation should be afforded an opportunity to appeal that recommendation to the NTIA within a limited time frame – NASUCA suggests 10 days. Such appeals must set forth in specific detail any errors the applicant alleges the State committed in its recommendation and what relief the applicant seeks (*e.g.*, approve the application, waive the matching funds requirement, authorize higher funding, etc.). The NTIA should resolve any appeal within 14 days of its submission to the agency and communicate its decision to both the State and the grant applicant. All this information should be publicly available on the appropriate State's web site, as well as the NTIA's web site.

Finally, the NTIA's rules should permit States to request funding for projects to provide service that does not meet the definition of "broadband" proposed by NASUCA herein (*i.e.*, 768 Kbps and above) in exceptional cases. Such exceptional cases could include projects to serve rural areas that are characterized by extremely rough terrain, low population density or other environmental or weather conditions that make it unfeasible to attain minimal "broadband" speeds, but where a lower grade of service would nonetheless provide a substantial benefit for citizens and communities in such areas.

(b) Designation of a single point of contact for each State.

Recommendation.

Further, each State's Governor should be required to designate a single point of contact to whom the NTIA would forward grant applications or with whom it could otherwise communicate regarding grant applications or State recommendations regarding proposed BTOP projects. Examples of officials that reasonably would be expected to be designated as the State's point of contact could be the chairman of the State utility commission, a cabinet level secretary or officer, the chair of a broadband or economic development council established by State law, etc. Governors should be given 30 days to advise the NTIA of identity of the designated point of contact and to provide the NTIA with all pertinent contact information for such official. The NTIA would not be obliged to act on any grant applications until the State has designated its point of contact. Once the State has designated its point of contact, the NTIA should post the contact's identity and contact details on its website.

(c) Compensation for State administrative costs.

Recommendation.

Finally, to compensate them for the use of State resources and staffs to assist the NTIA in implementing the BTOP grant program, States should be entitled to a *pro rata* share of a small portion (10% for example) of the 3% set aside from funds appropriated for the NTIA's administrative costs of implementing the program under Division A, Title II of the ARRA. NASUCA recommends that States' *pro rata* share should be based upon their percentage of the national population, according to the most recent Census. Such compensation would be capped at $500,000 annually and would be paid to the agency(ies) designated by the State's governor at the beginning of the next fiscal year.

Rationale for (a) – (c).

As we have made clear in our correspondence regarding broadband infrastructure investments to the Agencies, as well to Congress and the Obama Administration,[11] States – and particularly State regulators most familiar with the communications industry and communications needs within their borders – have a critical role to play in ensuring that the goals and objectives of the ARRA are met.

Just as the notion that "one size fits none" militates against allocating BTOP funds according to some federally-set dictates, so "one size fits none" is particularly apt in describing the variety of conditions and approaches to broadband investment found across the States. State officials, rather than federal agency employees, are more likely to be familiar with and able to accommodate this variety in implementing the ARRA's goals and objectives, allowing them to target grant funds more efficiently, expeditiously and effectively than their federal counterparts. Moreover, as public officials who are much closer to the citizens they serve, State officials have every incentive to make certain that stimulus funds are not wasted or misused.

Congress made it clear that it appreciated the reality that the goals and objectives of the ARRA cannot be met without the States' participation and input. Section 6001(c) of the ARRA expressly provides that the NTIA "may consult a State . . . with respect to (1) the identification of [unserved and underserved] areas . . . located in that State; and (2) the allocation of grant funds within that State for projects in or affecting the State." Moreover, the Conferees emphasized Congress' expectation that States would play a central role in implementing the ARRA's provisions, noting:

> Section 6001(c) directs the NTIA to consult with States on: (1) the identification of unserved and underserved areas within their borders; and (2) the allocation of

[11] NASUCA's correspondence to Congress and the Agencies is available on NASUCA's website at www.nasuca.org.

> grants funds to projects affecting each such State. The conferees recognize that States have resources and a familiarity with local economic, demographic, and market conditions that could contribute to the success of the broadband grant program. *States are encouraged to coalesce stakeholders and partners, assess community needs, aggregate demand for services, and evaluate demand for technical assistance*. *The Conferees therefore expect and intend that the NTIA*, at its discretion, *will seek advice and assistance from the States in reviewing grant applications*, as long as the NTIA retains the sole authority to approve the awards. *The Conferees further intend that the NTIA will, in its discretion, assist the States in post-grant monitoring to ensure that recipients comply fully with the terms and conditions of their grants*.[12]

In light of Congress' explicit directives and intent, comments and proposals that minimize or even ignore the central role States must play in implementing the ARRA are clearly misguided. For example, in their March 9, 2009 proposed rules implementing the BTOP's provisions, XO Communications and Nextlink left States with little role to play unless they took advantage of "the opportunity" extended by the NTIA notice to identify unserved or underserved areas and to provide their "preferences on the allocation of grants" that the NTIA would "consider" in awarding grants.[13]

Likewise, XO/Nextlink would leave the burden on State officials to submit comments or endorsements to grants and post-grant reports, which in turn would be "considered" in the award of grants. Finally, the proposed rules submitted by XO/Nextlink make it clear that, contrary to Congress' intent and practical considerations of staffing resources and familiarity with local conditions, NTIA employees (or consultants hired by the NTIA) would perform all the essential

[12] H. Conf. Rep. 111-16, p. 776 (emphasis added). Similarly, States play a central role in designating entities that should receive grants to carry out the broadband mapping provisions of the Broadband Data Improvement Act ("BDIA"), since the NTIA is directed to refrain from giving any entity funds unless it is "the single eligible entity in the State that has been *designated by the State to receive a grant under this section*." Pub. L. No. 110-385, 122 Stat. 4096, § 106(i) (emphasis added); *see also* H.R. 1, Sec. 1, Div. A, Title II.

[13] XO/Nextlink, "Proposed Rules for Implementation of NTIA's Broadband Technology Opportunities Program," p. 8 (March 9, 2009) ("XO/Nextlink Proposal").

functions related to screening, scoring and ranking grant applications.[14]

Given the short time-frames and pressing need for processing a multitude of grant applications expeditiously and for monitoring approved projects rigorously thereafter, it simply is not possible or sensible for the NTIA to hire staff or consultants to perform these tasks itself. Such tasks should be performed by existing State agencies whose staffs know the "lay of the land" intimately, and who do not have to be contracted and paid for by the federal government to perform these tasks.

(d) Conflict of interest safeguards.

Recommendation.

NASUCA recommends that the Agencies establish the following guidelines with respect to the involvement of any State officials, representatives or appointees in the solicitation, review, evaluation and submission to the Agencies of projects for funding under the ARRA:

(1) Ex Parte – Full Disclosure: The State entity responsible for evaluating and/or ranking projects shall disclose all contacts between its staff, executives, and boards with applicants for broadband stimulus funding. "Contacts" includes telephone calls, e-mails and personal conversations with any representative of an applicant, whether initiated by the State or the applicant for broadband stimulus funding, or their agents or employees.

(2) No individual appointed at the behest of a provider of communications service serving more than 5% of the State's population should be involved in the evaluation or ranking of applications.

(3) No individual who is employed by or represents an applicant for broadband funding pursuant to the ARRA, or whose close family relative (spouse, child, parent, sibling or first cousin) is employed by or represents an applicant for such funding, should be involved in the evaluation or ranking of grant applications.

(4) Any agency designated by a State's Governor to formally assist the Agencies in evaluation of grant applications, and whose officers, directors or employees are employees, officers or directors of any communications provider eligible to apply for broadband stimulus funding under the ARRA must be required to demonstrate to the Agencies that it has delegated such evaluations to staff that shall conduct an arms-length evaluation of grant applications.

[14] *Id*. at 11-12.

(5) All grant applications, together with the State's evaluation and recommendation regarding approval or rejection of the application for funding under the ARRA, should be forwarded to the Agencies for review and both the application as well as the State's evaluation and recommendation should be posted on the Agencies' relevant websites for such State.

(6) Institute a process for receiving and investigating reports and allegations of fraud, conflicts of interest, unreasonable or unfair discrimination in the evaluation process or other allegations of illegal or unethical conduct.

Rationale for (d).

As discussed above and in NASUCA's letters to the Agencies, State agencies should play a key role in evaluating grant applications under the BTOP. However, the NTIA must design conflict of interest safeguards to protect the evaluation/selection process from being subverted by industry interests, tainted by conflicts of interest, or adversely impacted by the unfair and unequal treatment that may result when established interests wield influence or power over State decision-makers.

There are good reasons to assign the task of identifying and evaluating applications to existing state entities; however, State citizens deserve a process and a program untainted by conflicts of interest or discriminatory treatment of applications, real or perceived. For example, in California, the Governor's designee, The State Information Officer, has tasked two entities, the California Emerging Technologies Fund ("CETF") and the California Public Utilities Commission ("CPUC"), to take responsibility for "gathering and prioritizing" applications for federal broadband stimulus funds under the ARRA.

The CETF's existing industry affiliations are such that they raise serious concerns about potential conflicts of interest. As DSL Prime recently reported, four of the CETF's 12 board

members – one-third – are appointed by AT&T (three) and Verizon (one).[15] These industry appointees are also involved in determining four additional appointments to the CETF board – in other words, another one-third of the body. Thus, two-thirds of the CETF board are appointed by two of the largest broadband providers – and likely grant applicants – in California.

The CETF itself has indicated that it is considering applying for ARRA funding and is willing to engage grant writers and to act as a fiscal agent. The CETF is a worthy program administered by dedicated individuals, but any organization with similar ties to large telecommunications corporations and other likely recipients of federal funding raises very real conflict of interest concerns that can be eliminated only if the organization is not delegated responsibility for soliciting, evaluating or prioritizing grant applications.

The ARRA is an enormous undertaking, but the amount of funding allotted to broadband is relatively small compared with the costs of providing broadband to currently unserved and underserved communities. Many applicants will be competing for limited and insufficient funding. The funding process must be as transparent as possible. When funds are awarded, it must be demonstrable that the selection process was fair, reasonable and devoid of any real or perceived conflicts of interest. Thus, in addition to following the foregoing conflict of interest rules, the States should make their constituents aware of the process for seeking, submitting and evaluating funding requests, through use of the Internet and other public notification processes.

Question 3. Eligible Grant Recipients.

Recommendation.

The award of grants to entities – other than those described in §§ 6001(e)(1)(A) and (B) – should be deemed to be in the "public interest" if, and only if:

[15] "AT&T/Verizon Influence Over $B California Stimulus," DSL Prime (March 30, 2009); available at http://fastnetnews.com/stimulus-info/179-s/1413-att-verizon-influence-over-b-california-stimulus.

(1) The entity is partnering with one of the types of entity described in §§ 6001(e)(1)(A) and (B) to construct or operate the proposed project; or

(2) The area that is the subject of the grant application is "unserved" (as defined by the NTIA) and the entity certifies that it has made reasonable efforts to find a partnering entity described in §§ 6001(e)(1)(A) and (B) but has been unsuccessful.

Rationale.

In considering parties' comments on this question, the NTIA should keep uppermost in its mind the simple fact that it is the private sector's failure to deploy adequate broadband service and infrastructure throughout the United States that has contributed to our country's steadily declining position among developed nations in terms of broadband access, capability and subscription. It is this failure of the private sector to adequately invest in broadband that has necessitated Congress, and many states, to take action to dedicate public funding to do what the private sector has been unable or unwilling to do: Provide all Americans with reasonable access to modern broadband service, even in areas or among populations that are less profitable to serve.

Congress recognized the private sector's failure to deliver the promise of broadband to all Americans, as originally contemplated when it added Section 706 to the Federal Communications Act ("FCA") in 1996,[16] by making it clear that private entities would not be eligible to receive grants unless such awards were determined, "by rule," to be in the public interest. The private sector having failed to address the problem of unserved and underserved areas and populations, Congress shifted the burden to private entities to make the case to the Assistant Secretary that they should receive grants to provide broadband service that they

[16] 47 U.S.C. § 706.

hitherto have declined to provide.[17]

Despite the private sector's failings, a number of industry representatives have suggested that this burden of demonstrating the "public interest" is served by awarding them grants of public funds should be exceedingly light or non-existent. For example, the Independent Telephone and Telecommunications Alliance's ("ITTA") representative urged that:

> [The NTIA adopt] a rule which finds that direct grants to private sector providers is in the public interest. . . . NTIA should extend eligibility to any existing entity that holds an FCC license, state certificate of public convenience and necessity, cable franchise, or similar government authorization, or who is otherwise providing broadband service under applicable federal, state, and local law.[18]

Such proposals essentially read the requirement that grants to private entities must be in the "public interest" out of the statute, particularly in light of the fact that it is no great feat for a provider of service to obtain a license, permit or certificate from a local, state or federal agency. Indeed, some broadband service providers may not have to obtain a license at all, and the regulatory muddle that the FCC has created with regard to what is or is not a regulated telecommunications service, has not helped. Moreover, a number of the entities that Congress clearly anticipated could be eligible to receive grants would not benefit from the communications industry's proposal since some of them (tower companies, backhaul providers, satellite carriers) may not have a "license, permit, or certificate" in any event.

Furthermore, requiring private entities to partner with public bodies or non-profit corporations should not present insurmountable impediments to their ability to obtain

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[17] NASUCA's contentions are not inconsistent with the Conference Report addressing this point, which noted:

Eligible Entities. The Conference substitute creates a new, broad definition of entities that are eligible to receive grants. It is the intent of the Conferees 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.

H. Conf. Rep. 111-16, p. 775 (emphasis added).

[18] Comments of Curt Stamp, Public Meeting: Panel 1 (March 16, 2009).

competitive grants from the NTIA. Certainly there are many, many public bodies and non-profit corporations that are motivated to partner with private entities to roll broadband out to unserved or underserved areas or populations – it should not be difficult for a private entity to find such a body or corporation. And requiring public bodies or non-profits to be equal partners in a funded project should provide a degree of self-monitoring and accountability that might have otherwise been lacking, which will help ensure that public moneys are properly spent and accounted for.

Finally, these partners will often have much more detailed knowledge and information regarding local broadband needs than corporate giants making profit-driven decisions in boardrooms located far from the communities to be served.

Question 4. Establishing Selection Criteria for Grant Awards.

a. Factors to consider in establishing grant selection criteria.

Recommendation:

As NASUCA previously indicated in its comments to Congress and the Agencies, extending broadband service to areas and populations that are currently unserved should be the first priority of the NTIA in issuing BTOP grants under the ARRA and should therefore be a paramount consideration in developing selection criteria for grant awards.[19] In addition, any selection criteria adopted by the NTIA must advance the following three broad considerations: Availability, affordability and accountability.

Finally, rather than trying to establish precise mathematical formulae for ranking grant applications, the NTIA rather should establish relatively broad, flexible criteria that States will use, in the first instance, to screen and rank grant applications before forwarding them to the

[19] NASUCA Letter to Agencies, pp. 27-28 (March 18, 2009); available at http://www.nasuca.org/ARRA%20letter%203-18-2009.pdf. NASUCA notes that the NTIA website entry for March 18, 2009 includes what appears to be a link to NASUCA's letter but fails to actually link to the letter.

NTIA with funding recommendations.

Rationale:

As an initial matter, NASUCA agrees with President Obama's caution to Congress, in urging passage of the ARRA, that "we can't afford to make perfect the enemy of the absolutely necessary."[20] To state the obvious, the NTIA simply does not have the luxury of time to develop a thorough, comprehensive mathematical formula for developing scoring criteria for grant applications under the time frames established by the ARRA. Moreover, delaying the award of grants while the NTIA attempts to establish such formulae runs counter to Congress' intention that the broadband funding in the ARRA should, first and foremost, provide an immediate economic boost to the economy, part of which should also begin to address the broadband deficiencies that have developed over the past several years.

Rather than attempting to establish a mathematically "pristine" formula for scoring grant applications, the NTIA should develop fairly broad criteria that States would apply in the first instance, subject to review by the NTIA. In this respect, NASUCA agrees with the observations of Free Press' Derek Turner that the scoring criteria adopted by the NTIA need only be sufficient to allow the agency to defend its decisions regarding the issuance of grants.[21] While some objective scoring criteria are necessary to properly implement BTOP grants across the country, Congress' objectives will be frustrated by too much "hemming and hawing" over mathematical scores and formulae. Instead, the NTIA should be focused, as a panelist at the March 16 public meeting put it, on the ARRA's "Three A's"[22] (altered somewhat by NASUCA): (1) Availability,

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[20] "Remarks of President Barack Obama," Weekly Radio Address (Feb. 7, 2009); available at http://www.whitehouse.gov/blog_post/compromise1/. President Obama, of course, was paraphrasing Voltaire's famous saying that "[t]he perfect is the enemy of the good."

[21] Comments of Derek Turner, Public Meeting: Panel 2, p. 94 (March 24, 2009).

[22] Comments of Rey Ramsay, Public Meeting: Panel 3, p. 23 (March 16, 2009).

(2) Affordability, and (3) Accountability. The "Three A's" are broadly reflected in the various considerations Congress mandated the NTIA to consider when awarding BTOP grants, such as:

- Increasing affordability and subscribership of broadband service to greatest population of users in the area (Availability, Affordability);
- Providing greatest broadband speed possible to the greatest population of users in the area (Availability);
- Enhancing service for health care delivery, education or children to the greatest population of users in the area (Availability);
- Preventing unjust enrichment (Accountability, Affordability);
- Giving attention to applicants' status as a socially and economically disadvantaged small business (Accountability);
- Providing broadband education, awareness, training, access, equipment and support to educational institutions, community support organizations, organizations targeting vulnerable populations, and job creating strategic facilities (Availability, Affordability);
- Improving broadband access and use by public safety agencies (Availability); .
- Stimulating demand for broadband, economic growth, and job creation (Availability, Affordability);
- Expediting completion of projects, new investment and 20% match requirements (Accountability);
- Requiring open access and interconnection on non-discriminatory basis (Accountability).

b. What should the weighting of these criteria be in determining consideration for grant and loan awards?

Recommendation.

The following scoring criteria should be adopted by the NTIA for States to use in screening and ranking BTOP grant applications, and for the NTIA to use in reviewing States'

recommendations for the award of BTOP grants.[23] Under NASUCA's proposal, there are a total of 125 points available for scoring grant applications for broadband projects to be funded under the BTOP. In addition, in the event of two or more grant applications for proposed broadband projects that would serve roughly the same area(s) or community(ies), NASUCA recommends that States and the NTIA would employ an additional ranking criterion that would assess the overall efficiency of the proposed project based on three factors: (1) population served, (2) transmission capacity and (3) cost of the proposed project.

(1) Availability of Broadband (40 possible points).

(a) Access to unserved v. underserved areas (25 points possible).

The grant application proposes to provide broadband service to an area that is currently unserved (25 points) or underserved (10 points). This reflects the emphasis placed on serving unserved areas or populations first, before moving on to areas or populations that currently have broadband but which have lower subscription rates due to such things as transmission capacity, price of broadband, content, etc.

(b) Open access to network (10 points possible).

NASUCA believes that the scoring criteria proposed by Free Press to account for the degree to which the broadband network constructed with public funds is made available for interconnection to other providers of broadband service or content is a reasonable means to properly implement the open access, non-discrimination requirements of the ARRA. Thus:

- The proposed project is completely wholesale, with more than one retail provider identified in the application (5 points).

- The proposed project is completely wholesale, with more than one retail provider identified in the application, AND is also operated on a nondiscriminatory open access basis (*i.e.* all wholesale terms and conditions are made publicly available) (10 points).

- The project is partially wholesale (*i.e.* the operator is both a retail and wholesale provider) and more than one retail provider is identified in the application (3 points).

[23] In order to give proper attribution, the scoring criteria proposed herein by NASUCA are, to a considerable degree adapted from scoring criteria proposed either by Free Press, available at http://www.freepress.net/files/Scoring%20Criteria%20for%20BTOP%20Grants.pdf, or criteria proposed by XO/Nextlink in their March 9, 2009 proposal.

• The project is partially wholesale (*i.e.* the operator is both a retail and wholesale provider) and more than one retail provider is identified in the application AND is also operated on a non-discriminatory open access basis (*i.e.* all wholesale terms and conditions are made publicly available) (8 points).

(c) Project's future scalability (5 possible points).

NASUCA agrees with Free Press that grant applicants should be encouraged to make suitable provision for future growth of the proposed broadband service or network, both in terms of population(s) served and broadband transmission speed. Scoring criteria should reward network designs that are efficiently scalable and rely, to the extent possible, on facilities that can be readily modified to serve a larger area or population and/or provide higher speeds.

(2) Affordability and Adoption (29 possible points).[24]

(a) Monthly recurring charge for service (10 possible points).

To encourage the provision of broadband service that is generally affordable and therefore likely to have a higher subscription (or "take") rate, the NTIA should adopt a criterion that measures the grant applicant's proposed monthly retail service cost as a percentage of an area's median household income, compared to the national average monthly broadband service cost as a percentage of the average median household income (0.7%, based on an average broadband subscription cost of $30 per month per household, and an average median household income of $51,000 annually). If the proposed service cost exceeds 0.7% of the area's median household income, then no points are awarded; if it is below 0.7%, points are awarded as follows:

Service Price to Area's Median Household Income Ratio	Points Awarded (10 possible)	Comparative national avg. mo. price[25]
< 0.35%	10	< $15/mo.
≥ 0.35% but < 0.6%	7	≥ $15 but < $25
≥0.6% but < 0.7%	3	≥ $25 but < $30
≥ 0.7%	0	> $30

(b) Speed of service (14 possible points).

NASUCA, like Free Press, believes that speed of service proposed must be a criterion that is utilized by States and the NTIA in ranking proposed projects for the award of

[24] Much of NASUCA's recommendations are derived from scoring criteria proposed by Free Press, though modified somewhat by NASUCA. *See* n. 23, above.

[25] Values in the third column are for reference purposes only, as the actual price figures will be entirely dependent on the area in question's median household income.

grants. However, NASUCA believes that Free Press' proposed criteria are too complicated and should be simplified as follows: (i) broadband transmission speeds below the FCC's "basic broadband tier one" service (*i.e.*, 768 Kbps – 1.5 Mbps in the faster direction) simply are not eligible for funding because, as NASUCA explains below, anything slower than this service (*i.e.*, "first generation data service") is simply too slow to support the sorts of services and applications commonly associated with "broadband"; (ii) the points awarded should track the FCC broadband service tiers, beginning with 2 points for "basic broadband tier one" and increasing by 2 points, cumulatively, for each successively higher tier service;[26] (iii) in order to encourage the provision of symmetrical service, the NTIA should impose an "asymmetry" deduction along the lines proposed by Free Press but, to simplify scoring, the NTIA should simply deduct 50% of points awarded for broadband transmission speeds where the speeds are asymmetric.

(c) Contention ratios (5 possible points).

NASUCA also supports the "contention" ratios award of from 0 to 5 points proposed by Free Press to ensure that the broadband speeds proposed in the grant application are not reduced by oversubscription or capacity over-utilization, as measured by last-mile contention ratios (from the first point of aggregation to the end user).

(3) Accountability (45 possible points).

Free Press proposes a series of additional, what NASUCA will refer to as "public benefits" criteria derived from additional goals or objectives identified by Congress in the ARRA. These criteria, together with scoring criteria related to the technical, managerial and financial capabilities of the grant applicant(s), NASUCA lumps together under the auspices of "Accountability."

(a) Public benefits (35 points possible).

(i) Public safety improvements (up to 5 points).

The grant application proposes to construct a broadband network to incorporate public safety concerns by making provision to increase the use of interoperable broadband by public safety agencies.

(ii) Socially and economically disadvantaged small business concerns (5 possible points).

The grant applicant meets the definition of a Socially and Economically

[26] Thus, 4 points for "tier two" broadband (≥ 1.5 Mbps but < 3.0 Mbps), 6 points for "tier three" broadband (≥ 3.0 Mbps but < 6.0 Mbps), 8 points for "tier four" broadband service (≥ 6.0 Mbps but < 10.0 Mbps); 10 points for "tier five" service (≥ 10.0 Mbps but < 25.0 Mbps), 12 points for "tier six" service (≥ 25.0 Mbps but < 100.0 Mbps), and 14 points for "tier seven" broadband service (≥ than 100 Mbps). *See In re: Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans*, Report and Order and Further Notice of Proposed Rulemaking, 23 F.C.C.R. 9691, 9700-01, ¶20 & n. 66 (rel. June 12, 2008).

Disadvantaged Small Business (5 points).

(iii) Broadband education, awareness, training, access, equipment and support (10 possible points).

The proposed project: (1) includes provision of broadband education, awareness, training, access, equipment and support to educational institutions, community support organizations, organizations targeting vulnerable populations, and job creating strategic facilities; or (2) integrates or coordinates the proposed project with other aspects and goals of ARRA, such as smart-grid or tele-medicine projects.

(iv) Jobs creation (10 possible points).

As Free Press correctly notes in its scoring proposal, an over-arching goal of the ARRA is economic stimulus – or to put it more bluntly, getting people back to work and pumping money back into the economy. NASUCA supports Free Press' proposal to establish a scoring criterion that recognizes and rewards proposed grant applications that address Congress' goal though the 15 points recommended by Free Press seems excessive compared to the scoring criteria associated with other, valid objectives of the ARRA. Accordingly, NTIA should establish the following scoring criteria for States to use in assessing applications for projects funded under the BTOP:

Multiplier (Jobs created/$ million expended in total projected cost, including 20% match)	Points Awarded (Out of a Possible 10)
< 5	0
≥ 5 but < 10	2
≥ 10 but < 15	4
≥ 15 but < 20	7
≥ 20	10

(v) Buy American initiative (5 possible points).

Finally, the scoring criteria should include some provision for awarding more points to projects that utilize manufactured products produced in the United States, in accordance with the Buy American provisions of Sec. 1605 of the ARRA. NASUCA suggests that States may subjectively award additional points to grant applications that demonstrate that a significant percentage of the equipment and facilities utilized in the proposed project (calculated by total purchase price or value of the equipment as a percentage of the total proposed project) are manufactured in the United States. NASUCA recommends that the points be awarded as follows:

Value of U.S. Manufactured Goods as % of Total Project Cost	Points Awarded (Out of a Possible 5)
≥ 1% but < 5%	1
≥ 5% but < 10%	2
≥ 10% but < 15%	3
≥ 15% but < 25%	4
≥ 25%	5

(b) Applicant's suitability, project's feasibility and timeliness, and provision against unjust enrichment (10 possible points).

(i) Applicant's technical and managerial experience, financial resources (5 points possible).

Applicants should be encouraged to submit suitable documentation to demonstrate a viable business plan (including expected take-rates and ongoing costs, and "shovel ready" nature of the project), applicant's history associated with communications- and/or broadband-related projects, appropriate financial records (*e.g.*, balance sheet, profit and loss statement, etc.), biographical data for employees with managerial or technical oversight of the project, etc.

(ii) No multiple-funding sources (up to 5 points).

Free Press' proposal to reward projects that do not require government support after completion is reasonable and Applicants should be awarded up to 5 points if they affirm that end-user locations served by a network or facilities funded under by a grant issued under the BTOP will not need, and will not be the subject of a request for federal or state universal service or similar support programs.

(4) Miscellaneous (up to 6 points).

States should be able to award up to 6 additional points to account for unique benefits or other considerations associated with a particular grant application that are not covered by the other scoring criteria. For example, the proposed project may primarily be aimed at improving broadband access to an "underserved" area but will also, to a lesser degree, provide broadband access to an "unserved" area as well. Or a proposed project may provide broadband access to a community or area that has been the source of numerous complaints to State regulators over a long period of time. Alternatively, a proposed project may address more than one of the statutory purposes set forth in the ARRA. Finally, the miscellaneous category should be available to award additional points for proposed projects that leverage other elements of the ARRA, such as tele-medicine or smart grids.

States should be required to fully document and explain the award of any points under this Miscellaneous category to the NTIA and the NTIA should make it clear that the award of additional points should be used sparingly, and that abuse of this criteria may

result in rejected grant applications for the proposed project or even other proposed projects, diminished federal funding for approved projects, or other action as the NTIA deems reasonable and appropriate.

(5) Overall efficiency of competing proposals.

NASUCA recognizes that there may be situations that arise in which two or more projects are proposed for an area or community, which receive relatively equal scores applying the criteria above (NASUCA suggests that projects within 10 points of one another should be considered to have "relatively equal" scores), but which employ different broadband technology, would serve different numbers of customers, and provide differing levels of broadband capability. For example, one application might propose a fiber-to-the-home ("FTTH") project that would deliver 10 Mbps service to 2,000 customers in a community for an estimated cost of $2 million, while a competing application proposed a wireless broadband technology delivering transmission speeds of 1.5 Mbps to 20,000 customers in approximately the same area for $1 million.

As an exception to its general aversion to using mathematical formulae in scoring and ranking projects, NASUCA recommends that States and the NTIA apply the following formula to assist them in selecting between such competing projects:

$$\frac{\text{Projected transmission speed x Customers to be served}}{\text{Project estimated cost}}$$

Applying this formula to the examples above, the second project would be ranked higher than the first (10,000,000 bps x 2,000/$2,000,000 = 10,000 versus 1,500,000 bps x 20,000/$1,000,000 = 30,000).

While both projects are worthy of public support, given the limited funds available under the ARRA and the scope of the need to deploy broadband, some means of deciding between competing proposals is needed. The formula NASUCA proposes, moreover, is consistent with the overall goals of the ARRA, which direct the NTIA to approve projects that will "*increase* the *affordability* of*, and subscribership* to, service to *the greatest population of users* in the area," and that will "provide the *greatest broadband speed possible* to the *greatest population of users* in the area."[27]

Rationale.

Much of the rationale for NASUCA's proposed scoring criteria has been set forth above.

The main points, again, are that:

(1) The NTIA should not devote considerable time or resources to the development and adoption of scoring criteria that are mathematically precise or

[27] H.R. 1, Sec. 2, Div. B, § 6001(h)(2)(A) & (B) (emphasis added).

elegant but rather should adopt criteria that suffice to justify funding decisions and provide a basis against which actual versus projected performance can be measured.

(2) Since States should be the entities applying these criteria in the first instance – during the screening of applications that are then forwarded to the NTIA with recommended scores, the criteria should have sufficient built-in flexibility to enable them to be used across the country under widely varying conditions.

(3) Likewise, scoring criteria should have sufficient flexibility built-in to enable States to make value judgments that are based on unique circumstances and considerations that are not easily "set to paper."

(4) The scoring criteria should be straightforward and easily understood by all parties to the grant process, both reviewer and applicant.

Finally, the scoring criteria should encourage Availability, Affordability and Accountability. The scoring criteria proposed by Free Press, as modified by NASUCA, satisfy these considerations and should be adopted for use by the NTIA and States in reviewing BTOP grant applications.[28]

c. Prioritizing proposals to serve underserved or unserved areas; consideration of USDA broadband grant awards and loans in establishing priorities.

Recommendation.

As reflected in the scoring criteria proposed above, grant applications that propose to serve currently unserved areas should be given a sufficiently higher-weighted score to help ensure that the BTOP's focus is on extending affordable broadband service to populations and areas that have been neglected for years.

Rationale.

Congress intended that providing broadband access to unserved areas should be a priority

[28] It was considerations such as these that led NASUCA to reject the criteria proposed by XO/Nextlink as being overly complex and formulaic, though XO/Nextlink certainly should be commended for their effort.

for infrastructure projects funded under the ARRA. This is clear under the provisions allocating funds to the RUS, as well as the provisions establishing the BTO Program administered by the NTIA. For example, with regard to the RUS program, Congress required that "priority for awarding funds . . . shall be given to projects that provide service to the highest proportion of rural residents that do not have access to broadband service."[29]

Likewise, Congress placed "provid[ing] access to broadband service to consumers residing in unserved areas of the United States" first among the purposes to which broadband grants should be put under the BTOP administered by the NTIA.[30] Moreover, in its original version, the Senate bill included tax credits for broadband investment, with a 20% credit provided for investments in "current-generation broadband" in unserved areas, while only a 10% credit was provided for similar investment in underserved areas.[31]

Although the Conferees declined, without discussion, to adopt the Senate bill on this issue, the increased emphasis on encouraging investment in unserved, as opposed to underserved, areas warrants assigning a higher priority to projects that will provide broadband access to areas that have yet to be served. Finally, assigning a higher priority to projects that provide broadband access in areas that are still without access to basic broadband service, years after it became available in most parts of the country, is warranted on purely equitable grounds: Those who have gone without should receive the benefits of broadband investment first.

[29] H.R. 1, Sec. 2, Division A, Title I.

[30] H.R. 1, Sec. 2, Division B, Title VI, § 6001(b)(1).

[31] *See* H. Conf. Rep. 111-16, pp. 571-73 (rejecting s. 1271 of the Senate version of the ARRA).

d. Should priority be given to proposals that leverage other Recovery Act projects?

Recommendation.

As discussed above, proposals that leverage other ARRA projects, such as smart grids or tele-medicine, or that emphasize Buy American elements of the ARRA, should be awarded additional points under the scoring system NASUCA proposes.

Rationale.

One of the criticisms leveled at the stimulus package contained in the ARRA is that it is too little and will be inadequate to resuscitate our flagging economy.[32] Leveraging other ARRA programs makes sense since it will ensure that projects get the most "bang for the buck" and stretch stimulus dollars farther.

e. Priority to proposals that address several purposes or populations identified in the ARRA, or that provide service to different types of areas.

NASUCA Recommendation.

Yes. *See* scoring criteria set forth above.

NASUCA Rationale.

The scoring criteria initially developed by Free Press, as modified by NASUCA, adequately address the weight that should be given to grant applications that propose to address multiple purposes, populations or areas. Among other things, NASUCA proposes a "miscellaneous" criteria that allows States to award up to an additional 6 points to address special or unique considerations, such as projects that would provide service to different types of

[32] Paul Krugman, "Behind the Curve," *The New York Times*, p. A23 (March 9, 2009), available at http://www.nytimes.com/2009/03/09/opinion/09krugman.html?_r=1. Regardless of whether the stimulus package is large enough, NASUCA discussed at length in its March 18, 2009 letter to the Agencies and its January 16, 2009 letter to Congress and the Administration, why the funds allocated for broadband, while a good start, are not enough to address the Nation's broadband deficit. Copies available at www.nasuca.org. Indeed, NASUCA originally suggested in its January 16, 2009 letter that a broadband fund of from $25 to $50 billion would ultimately be needed to address that broadband deficit.

areas (non-rural v. rural, unserved v. underserved) or populations (such as minority, low income, elderly or poor health populations).

States would be expected to document the special or unique circumstances warranting the additional weight given to the proposed project's score to the NTIA. Moreover, via its review and ultimate approval authority, the NTIA would be able to "police" against States overusing the "miscellaneous" scoring criteria to inflate the scores of grant applications for projects within their borders vis a vis scores for grant applications from other States. In other words, the "miscellaneous" scoring criteria would be expected to be used sparingly and the NTIA has a variety of measures to correct States that do otherwise, including at a minimum rejecting the add-on score.

f. What factors should be given priority in determining whether proposals will encourage sustainable adoption of broadband service?

Recommendation.

See scoring criteria set forth above.

Rationale.

See discussion above.

g. Should the fact that different technologies can provide different service characteristics, such as speed and use of dedicated or shared links, be considered given the statute's direction that, to the extent practicable, the purposes of the statute should be promoted in a technologically neutral fashion?

Recommendation.

See scoring criteria above.

Rationale.

The scoring criteria recommended by NASUCA appropriately assign higher scores to grant applications that propose broadband services with greater transmission speeds but are

technologically neutral in that they are not based in any way upon the technology used to deliver broadband service. As the Joint Notice observes, the legislative findings underlying enactment of the ARRA express Congress' direction that, to the extent practicable, the legislation's purposes should be promoted in a technologically neutral fashion.[33] Congress' agnosticism on broadband technology was further exhibited in the Conference Committee's report, which noted:

> The Conferees also intend that the NTIA select grant recipients that it judges will best meet the broadband access needs of the area to be served, whether by a wireless provider, a wireline provider, or any provider offering to construct last-mile, middle-mile, or long haul facilities.[34]

Moreover, the final version of the ARRA dropped some provisions in the earlier House and Senate bills that specified specific awards of grants to particular technologies, such as specific set asides for wireless services.[35]

Despite Congress' clear manifestation of its intent that no particular broadband technology should be favored, some parties have urged the NTIA to do just that. For example, PCIA urges that the "NTIA should give funding priority to wireless deployment as *the clear 'path to the broadband future.*'"[36] NASUCA urges the NTIA to give short shrift to such pleas. To the extent there are winners and losers among broadband technologies, those wins and losses should be based on appropriate considerations of capability, cost, open access, scalability, etc., applied on a case-by-case basis to the unique facts of each grant application.

h. What role, if any, should retail price play in the grant program?

Recommendation.

See scoring criteria set forth above.

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[33] 74 Fed. Reg. at 10717-18 n. 5.

[34] H. Rep. 111-16, p. 774.

[35] *Id*. at 773 (discussing § 6002 of the original H.R. 1).

[36] PCIA Comments, p. 6 (April 3, 2009) (emphasis added).

Rationale.

See discussion above.

Question 6. Grants for Expanding Public Computer Center Capacity.

The Recovery Act directs that not less than $200,000,000 of the BTOP shall be awarded for grants that expand public computer center capacity, including at community colleges and public libraries. The NTIA has asked for comment on two questions under this heading. First, what selection criteria should be applied to ensure the success of this aspect of the program? And second, what additional institutions other than community colleges and public libraries should be considered as eligible recipients under this program?

a. What selection criteria should be applied to ensure the success of this aspect of the program?

Recommendation.

As NASUCA previously indicated in comments to Congress and the Agencies, it is crucial to support projects that take steps to support adoption of broadband, not just deployment. Programs that will be the most successful will be those that offer programs and services that employ innovative methods of engaging populations that are unfamiliar with either the technical aspects of broadband or the multitude of uses to which it can be put. We recommend that the NTIA and the RUS consider the following factors when considering applications for grants for expanding public computer center capacity.

(1) What programs are currently available at the center?

If such programs are currently available, the applicant should demonstrate the need for additional resources and provide information showing that funds received under ARRA would not duplicate existing projects.

(2) Does the applicant have previous experience with providing public computing services utilizing funding obtained from grants?

This factor should not be construed as providing an applicant with an advantage or disadvantage over competing proposals from organizations that have not previously been funded for similar projects. Rather, it should be a tool employed by the agencies in assessing the ability of applicants to fulfill the terms of a grant. For example, the Agencies could consider whether the applicant provided the services specified in other projects in a timely and effective manner, whether the applicant has fulfilled the objectives of the program for which it was funded, including how the program was evaluated by clients. Applicants who have received funding from other programs should provide the Agencies with information about such projects (including the funding source) so that the performance of the applicant can be taken into consideration.

(3) Public computer centers should be able to accommodate special needs, through the use of measures such as providing material in multiple languages, large print, having no physical barriers to access, providing ergonomic work stations, and offering voice recognition software.

(4) Public computer centers should provide clear, user-friendly written instructions, in appropriate languages.

(5) Public computer centers should offer a curriculum that allows residents of the community to make full use of the broadband facilities. Successful projects will offer more than just open laboratories.

There are two components to such a curriculum: (1) training on how to effectively use the computer and the Internet/WWW; and (2) training that will encourage adoption of broadband. The curriculum should be designed to serve community members at different levels of knowledge - from the most basic beginner to more advanced students who already have some knowledge of computers.

Training to use the technology effectively could include hands-on instruction on topics

such as:

- Using MS Word to prepare a resume;
- Troubleshooting technical problems;
- Using a web browser and setting up e-mail accounts;
- Privacy safeguards and Internet scams and fraud;
- Conducting research using the World Wide Web;
- Filling out applications on a computer; and
- Understanding the differences between Windows and MacIntosh-based equipment.

Training to provide community members with the ability and incentive to use broadband services should focus on accessing interesting, relevant content available through the Internet, such as:

- Using broadband as means for participants to learn about their history and culture;
- Job hunting;
- Improving language skills;
- Using online curriculum to prepare for a GED;
- Obtaining school assignments online; and
- Social networking

These are examples of the information that would be conveyed in a curriculum that could successfully enable and encourage use of broadband.

(6) Public computer centers should be accessible to low income neighborhoods, both in terms of location and hours. They should provide services during evenings and weekends.

(7) Public computer centers offered by Community Colleges should be open to the entire community, at no charge, or for a small flat fee. Students should not be charged

additional fees to utilize the lab. Community colleges should consider holding training off-site to encourage broader participation.

(8) Recipients such as libraries and community colleges should be encouraged to partner with Community Based Organizations.

Community-based organizations play a major role in providing people access to computers with broadband as well as training and support services. Community-based organizations have proven success in providing services to populations not otherwise reached. By establishing computer learning centers at already established community-based organizations, families have ready access to the computers, employment counseling, continued education, literacy classes, English as a Second Language programs, citizenship classes, and emergency services. Many hard-to-reach youth feel more comfortable in computer technology programs that are not located on school grounds. By extending the eligible programs to include off campus programs, a greater number of hard-to-reach students can be targeted and served.

(9) The Agencies should evaluate the success of projects through both quantitative and qualitative methods.

For example, Applicants should track participation and retention of clients, implement an exit evaluation to learn how their program is not meeting the expectations of clients who drop out before completing the program, establish a method to measure clients' progress from beginning to completion of the program and have clients complete an evaluation at the end of a training course in order to determine if the objectives of the program were met. Applicants should provide periodic progress reports documenting the extent to which clients continue to use the center.

b. What additional institutions other than community colleges and public libraries should be considered as eligible recipients under this program?

Recommendation.

For the reasons discussed above, eligible entities should include community-based organizations that qualify under ARRA as non-profit foundations, corporations, institutions or associations. In rural communities, where there may not be a library or community college facilities, other government sponsored programs, such as recreation programs, may be offered that would provide a viable alternative for hosting a public computing center.

Rationale.

See discussion above.

Question 7. Grants for Innovative Programs to Encourage Sustainable Adoption of Broadband Service.

The Recovery Act directs that not less than $250,000,000 of the BTOP shall be awarded for grants for innovative programs to encourage sustainable adoption of broadband services. The Agencies have asked for comment on two questions under this heading. First, what selection criteria should be applied to ensure the success of this program? And second, what measures should be used to determine whether such innovative programs have succeeded in creating sustainable adoption of broadband services?

a. What selection criteria should be applied to ensure the success of this program?

Recommendation.

The selection criteria for programs designed to encourage sustainable adoption should be similar to those discussed above regarding public computing centers.

(1) Determine what programs are currently available and consider whether the applicant has demonstrated needs for further resources.

(2) Evaluate any previous experience/performance by an applicant with offering similar programs. As discussed above, this factor should not be construed as providing an applicant with an advantage or disadvantage over competing proposals from organizations that have not previously been funded for similar projects.

(3) The applicant should be able to accommodate special needs with respect to language and people with disabilities.

(4) The support and training offered should offer information that is designed to provide clients with skills and information to address both technical barriers and content that clients find useful and relevant.

(5) The programs should be accessible to low income neighborhoods, both financially (no fees) and logistically (afternoon, evening and weekend hours).

(6) Applicants should be encouraged to partner with Community Based Organizations.

b. What measures should be used to determine whether such innovative programs have succeeded in creating sustainable adoption of broadband services?

Recommendation.

The Agencies should evaluate the success of projects through both quantitative and qualitative methods. For example, Applicants should document the number of people who receive training from the center, including demographic data on age and ethnicity. This information should be supplemented by exit evaluations, as described above. Applicants should provide regular, periodic progress reports documenting the extent to which clients continue to use the center.

Question 8. Broadband Mapping.

Recommendation.

(a) Uses to which the NTIA broadband inventory map may be put.

The "comprehensive nationwide inventory map of existing broadband service capability and availability in the United States," which the ARRA requires depict "the geographic extent to

which broadband service capability is deployed and available from a commercial or public provider throughout each state"[37] must be capable of serving the following uses:

(1) Allowing members of the general public to determine:

(a) The availability and capabilities (including transmission speeds, broadband technology type, and contact information) of each retail broadband service offering in their local community, by entering street address and locality, or by viewing a street map or topographic map of sufficient detail to allow members of the public to generally locate their residence or place of business.

(b) Geographic areas or communities that currently lack access to broadband service altogether.

(2) Allowing providers of wholesale or retail broadband service to determine, in addition to the information contained in (1) above:

(a) Each person providing wholesale broadband service in a local community, by entering street address and locality, or by viewing a street map or topographic map of sufficient detail to allow members of the public to generally locate their residence or place of business;

(b) The geographic location of "middle-mile" and "backbone" broadband facilities and infrastructure, the capabilities of such facilities and points of interconnection or access to such facilities, whether the facilities are currently "lit" or "dark," and the identity of any provider of broadband service that has interconnected to or otherwise obtained access to such facilities;

(c) The identity and location of schools, libraries, medical and healthcare providers, community colleges and other institutions of higher education, and other community support organizations and entities to facilitate greater us of broadband service by or through such organizations;

(d) The identity and location of job-creating strategic facilities located within a State-designated economic zone, Economic Development District designated by the Department of Commerce, Renewal Community or Empowerment Zone designated by the Department of Housing and Urban Development, or Enterprise Community designated by the Department of Agriculture.

(3) Allowing representatives of State, local and Federal government to determine, in addition to the information contained in (1) and (2) above:

(a) The retail price of service offered by each broadband service provider identified in (1) above; and

[37] H.R. 1, Sec. 2, Div. B, § 6001(*l*).

(b) Subscription levels, on a per household basis, in communities with access to broadband.

(b) Relationship of the NTIA mapping to State mapping under BDIA.

The NTIA's development of the nationwide broadband inventory map mandated by § 6001(*l*) of the ARRA should take precedence over States' independent broadband mapping efforts even to the extent those efforts are funded pursuant to the BDIA. To put it another way, the NTIA need not (and probably should not) emulate the maps or data generated by States through their independent broadband mapping efforts to date in attempting to develop the nationwide broadband inventory map required under § 6001(*l*) of the ARRA.

Instead, the NTIA should take the lead role in independently obtaining the data needed to develop the nationwide broadband inventory map. For those States that seek grants under the BDIA to develop broadband deployment maps, the NTIA should establish uniform guidelines or "best practices" for obtaining data in order to ensure that the data contained in States' maps, which would ultimately be incorporated into the NTIA's nationwide broadband inventory map, is consistent with the methodology adopted by the NTIA to develop the nationwide broadband inventory map. For those States that do not seek mapping grants under the BDIA, the NTIA should obtain relevant data and develop a map of broadband deployment in each such State itself.

Moreover, in order to ensure that the NTIA is able to utilize sufficiently granular broadband deployment information in developing its map, the NTIA should require any applicant for a grant under the BTOP to waive claims to "trade secrets" or other confidentiality claims for the type of information that will be displayed in the nationwide broadband inventory map developed by the NTIA pursuant to § 6001(*l*).

(c) Data displayed in the NTIA's nationwide broadband inventory map.

The broadband map required by § 6001(*l*) must be interactive and capable of displaying, at its users' request, multiple layers of information that allow users of the map to select the scale and level of detail of information sought.

Statistical information regarding broadband availability, transmission speeds and capability, mode of delivery (*i.e.*, wireless broadband technology vs. terrestrial vs. satellite), price, providers, etc. contained in the broadband map should be provided at the lowest level of disaggregation available (such as by Census Block or, if available, Census Tract).

Broadband facilities and infrastructure displayed via the broadband map should be capable of being displayed to the scale 1:24,000 (1 inch = 2,000 feet), for purposes of both identifying geographic areas that lack access to broadband (*i.e.*, are unserved) and identifying the location of "middle-mile" and "backbone" broadband facilities and networks, whether "lit" or "dark."[38] Moreover, the broadband map should utilize symbols and color-coded keys for displaying broadband infrastructure or facilities, based on the facilities' transmission capacity as well as whether the facilities are "lit," partially "lit" or "dark," much like highway maps distinguish among highways (Interstate, U.S., State) and other public roads. The broadband map of infrastructure and facilities should also display points on the network where broadband providers may interconnect with the network.

[38] The U.S. Geologic Society describes the level of detail in such maps as "useful for engineering, local area planning, and recreational purposes." *See* http://egsc.usgs.gov/isb/pubs/booklets/usgsmaps/usgsmaps.html#Topographic%20Maps. Clearly deployment of broadband infrastructure and services, particularly in areas where there is little or none currently, will require both local planning and engineering and thus the degree of detail afforded by such maps will be an invaluable tool for governments and broadband providers.

Rationale.

The ARRA spells out generally what information must be included in the nationwide broadband inventory map that the NTIA is to develop. The legislation directs the NTIA to:

> [D]evelop and maintain a *comprehensive nationwide inventory map* of *existing broadband service capability and availability* in the United States that *depicts the geographic extent to which broadband service capability is deployed and available from a commercial provider or public provider throughout each State*. Not later than 2 years after the date of the enactment of this Act, the Assistant Secretary shall make the broadband inventory map developed and maintained pursuant to this section *accessible by the public on a World Wide Web site* of the National Telecommunications and Information Administration *in a form that is interactive and searchable*.[39]

The nationwide broadband inventory map and underlying data that the NTIA is to develop under the ARRA is distinct from the maps that Congress anticipated States developing under the BDIA. Under the BDIA, Congress sought to "improve the quality of data collected at State and Federal levels regarding the availability and robustness of broadband services and to promote the deployment of affordable broadband services to all parts of the Nation," by:

> (1) Directing the FCC reevaluate its current 200 Kbps standard for broadband, revise its existing broadband reporting requirements to identify service tiers which can be used by consumers to reliably receive high definition video content, annually compile a list of unserved areas and, using Census Bureau data, study the population, population density, and average per capita income for each area.
>
> (2) Directing the NTIA to expand the American Community Survey conducted by the Bureau of the Census to elicit information about residential household computer use and subscription to dial-up or broadband Internet service.
>
> (3) Directing the Government Accountability Office to study and evaluate additional broadband metrics or standards to provide consumers with better information about the cost and capability of their broadband connection and to better compare the deployment and penetration of broadband.
>
> (4) Creating a matching grant program (of up to $40 million for 5 years)

[39] H.R. 1, Sec. 2, Div. B, § 6001(*l*) (emphasis added).

> administered by the NTIA, to assist States in entering into public-private partnerships to collect data and create a geographic inventory map of broadband service in order to identify any gaps in service and provide each State with a baseline assessment and more granular data regarding the availability of broadband at a local level.[40]

Unlike the inventory map and data contemplated by the ARRA, the information developed pursuant to the BDIA is primarily for use by government rather than the public or potential broadband service providers. For example, with respect to State mapping efforts funded by the BDIA's grant program, Congress provided that the NTIA would create a web page aggregating relevant information provided to the public by States, including hypertext links to any geographic inventory maps created by States, and that the FCC would provide aggregate data it collected from broadband service providers to the entity designated by the State to receive grant funds.[41] In addition, the BDIA provided for non-disclosure of any information that is a "trade secret, commercial or financial information, or privileged or confidential," provided to the State's grant recipient – either by the FCC or a broadband service provider – to carry out "the provisions of this title." This non-disclosure provision did not "otherwise limit or affect the rules governing public disclosure of information collected by any Federal or State entity under any other Federal or State law or regulation."[42]

The broadband inventory map that the NTIA is to develop in accordance with the ARRA differs markedly from maps (State only) and data (States and federal agencies) developed under the BDIA. First, the ARRA provides that the broadband inventory map is to be "comprehensive" and "nationwide," as opposed to state-by-state depending on States' mapping efforts. Second, the broadband inventory map required under the ARRA does not contemplate

[40] Pub. L. No. 110-385, §§ 103-106.

[41] *Id*., §§ 106(g) & (h).

[42] *Id*., § 106(h)(2).

"aggregated data" that providers may (or may not) supply to the State. Instead, data contained in the broadband inventory map must "depict[] the geographic extent" to which "existing broadband service capability and availability is deployed and available," "throughout each State" either from a "commercial" or a "public" broadband service provider. More importantly, the ARRA commands that the NTIA's broadband inventory map must be "accessible by the public" via the Internet, "in a form that is interactive and searchable," and requires this map to not only be developed but "maintained" as well – meaning that it must be periodically updated.

In other words, the ARRA's broadband inventory map is not simply a tool for government but is also a tool for consumers seeking to shop for broadband offerings in their area, and for potential broadband providers looking for market opportunities to fill service gaps. The NTIA's map must comport not only with the ARRA's requirements but must also contain sufficient information to enable broadband consumers (or potential consumers) to obtain detailed and accurate information about the kinds and capabilities of broadband services available – if available – in their local community. The map must also enable broadband service providers, or potential providers, to determine whether there are business opportunities involving unserved or underserved areas or populations and whether there is nearby "middle-mile" or "backbone" broadband infrastructure they can interconnect with in order to provide service. Finally, the NTIA map must contain sufficient information to enable government officials to assess whether broadband subscription is adequate and, if not, determine factors that may be reducing subscription rates.

NASUCA has devoted considerable time to this topic because, as noted in our March 18, 2009 letter to the Agencies, past broadband mapping and data collection efforts have too often generated data that is inadequate or misleading, and such efforts have also been hindered by the

refusal of providers to make public granular data regarding broadband deployment and capabilities on grounds such data are "trade secrets" or otherwise "proprietary and confidential."[43] Other persons submitting comments during the Agencies' series of public meetings have echoed the same concerns.[44]

Question 12. Coordination with USDA's Broadband Grant Program.

a. What specific programmatic elements should both agencies adopt to ensure that grant funds are utilized in the most effective and efficient manner?

b. In cases where proposals encompass both rural and non-rural areas, what programmatic elements should the agencies establish to ensure that worthy projects are funded by one or both programs in the most cost effective manner without unjustly enriching the applicant(s)?

Recommendation.

See comments at pp. 58-59, below.

Question 13. Definitions.

a. For purposes of the BTOP, how should NTIA, in consultation with the FCC, define the terms "unserved area" and "underserved area?"

Recommendation.

(a) "Unserved" area.

As discussed in NASUCA's March 18, 2009 letter to the Agencies,[45] the NTIA should define the term "unserved area" for purposes of implementing the provisions of the ARRA (and BDIA) as follows:

[43] *See* NASUCA Letter to Agencies, pp. 21-23, 25-26 (March18, 2009). Frankly, NASUCA is skeptical whether the sort of data withheld absent some protective agreement could be considered a "trade secret" or "confidential." Revelation of the fact that one is *not* providing broadband service to a community seems unlikely to damage the business that one is not providing. Likewise, if a broadband provider is offering service to a community or area, then the fact of its offering is known to third persons (*i.e.*, customers and potential customers) and is hardly a secret.

[44] Public Meeting: Panel 3 (March 16, 2009): Gillett Comments, pp. 45, 50; Brodsky Comments, pp. 22-26; Donnie Smith Questions, p. 73.

[45] NASUCA Letter to Agencies, p. 27 (March 18, 2009).

> An "unserved" area means an area that is not served by any form of facilities-based broadband or where Internet connectivity is available only through dial-up service or satellite.

Rationale.

While there will no doubt be numerous proposals that "unserved area" should be defined as an area in which less than a threshold number of households subscribe to broadband service, the definition offered by NASUCA offers a number of advantages that militate in favor of its adoption.

First, NASUCA's definition is simple, straightforward and unarguably consistent with the most literal interpretation of the term "unserved."[46] There should be no disputes regarding whether the percentage of households utilized as a threshold is too high or too low. Nor should there be any question whether the community or area to be served should be considered a priority for funding under the ARRA. Communities and areas that still – in the first quarter of 2009 – lack any broadband service and instead are forced to rely on dial-up or satellite unquestionably deserve to be considered a priority for broadband funding.

Second, proposals that rely on some threshold of unserved customers to define "unserved" areas introduce complexities and opportunities for disputation. XO/Nextlink, for example propose that an "unserved area" should be defined to mean "a geographic area where at least 90% of the customers to be served by the project lack access to a provider of Current Generation Broadband Transmission Service (which is to be determined separately for wireline/fixed wireless or mobile wireless providers)."[47] Similarly, Free Press suggested that the NTIA establish a three-tier definition for "unserved area" that includes "completely unserved

[46] The prefix "un-" literally means "not" or "the opposite of: contrary to," as in "not served" or "the opposite of served." *Webster's II New College Dictionary*, p. 1196 (1995).
[47] XO/Nextlink Proposal, p. 4 (March 9, 2009).

areas," "severely unserved areas," and "moderately unserved areas."[48] In NASUCA's opinion, the latter two categories of "unserved" area suggested by Free Press are more appropriately considered "underserved" areas, while XO/Nextlink's proposal has several problems, such as defining a "customer" (*i.e.*, households v. total population, residences and/or businesses), calculating the 90% threshold (is the calculation based on actual broadband subscription levels or simply the fact that fiber bypasses the requisite number of customers) and, most problematic of all, the proviso that "unserved" is determined separately by broadband technology (wireline/fixed wireless v. mobile wireless).

Ultimately, however, areas or communities that have some, albeit low, level of broadband service can be addressed as "underserved areas" and questions of the percentage of broadband penetration/subscription can be assessed in the scoring process.

(b) "Underserved" area.

Recommendation.

NASUCA does not have a precise, formal definition of "underserved" to offer the Agencies at this time. Instead we propose that the definition adopted by the Agencies should include the following components:

(1) Geographic areas that receive some form of broadband service at speeds below 768 Kbps, or at a price higher than the national average price per month.

(2) Geographic areas in which broadband is generally available, but where there are disparities in the speed and quality of service provided to different neighborhoods.

(3) Segments of the population that lack the training, experience, education or financial resources to utilize broadband service and, thus, without support, would not subscribe to broadband service.

[48] *See* S. Derek Turner, "Putting the Angels in the Details: A Roadmap for Broadband Stimulus Success," Free Press, p. 5 (Feb. 2009), available at http://www.freepress.net/files/Angels_in_the_Details.pdf.

Rationale.

The term "underserved" is likely to encompass a wide variety of different situations. For example, "underserved" might mean that an entire community receives some form of broadband service at very low speeds or very high prices. "Underserved" may also include geographic areas, such as telephone company/cable company service territories, where broadband may be generally available but where there are disparities in the speed and quality of the services provided to different neighborhoods. Likewise, there may be unserved neighborhoods within larger areas that generally have service and some neighborhoods or communities with poor service compared to that which is available to the rest of the surrounding area. Similarly, an "underserved" area may also include areas in which restrictive conditions apply to existing broadband service that do not apply to other forms of broadband service such as a situation in which only mobile broadband is available and the provider imposes download limitations or metering whereas fixed broadband providers in nearby areas impose no such restrictions.

"Underserved" may also refer to segments of the population that lack the training, experience, education or financial resources to utilize broadband service and thus, without support, would not subscribe to broadband service. For example, studies have shown that broadband utilization in Los Angeles is lower among Latinos, African Americans and the elderly, as well as in neighborhoods that are relatively isolated due to a reliance on public transportation and no access to automobiles. Thus, in defining the term "underserved," the NTIA should consider areas where adoption rates are low.[49]

[49] *See* "Technology and The Geography of Inequality in Los Angeles", Ali Modarres, Ph.D., Bill Pitkin, Ph.D., Edmund G. "Pat" Brown Institute of Public Affairs, California State University, Los Angeles, (Sept. 2006), available at http://www.patbrowninstitute.org/publications/documents/CTF_Report.pdf; *see also* "In Search of Digital Equity: Assessing The Geography of Digital Divide in California," Edmund G. "Pat" Brown Institute of Public Affairs, California State University, Los Angeles, Issue Brief No. 5 (Dec. 2008), http://www.patbrowninstitute.org/documents/PolicyBrief.pdf

b. How should the BTOP define "broadband service?"

Recommendation.

"Broadband service" should defined as any service with information transfer rates equal to or greater than 768 kbps but less than 1.5 mbps, corresponding to "basic broadband tier 1 service" defined by the FCC.[50]

Rationale.

NASUCA believes that its proposed definition establishes the absolute minimum service that can reasonably, at this point in time, be considered "broadband."

First, recognizing the merit of longstanding criticism of the notion that services offering transmission speeds of 200-768 Kbps should be considered "broadband,"[51] the FCC has finally abandoned that notion altogether.[52] In a June 2008 order, the FCC redefined "advanced services" into two categories: first generation data service (the old broadband standard); and tier 1-7 broadband service, the lowest category of which consists of services offering transmission speeds of 768 Kbps to 1.5 Mbps in the faster direction. The minimum service considered "broadband" by the FCC (*i.e.*, tier 1 broadband) should serve as the basis for defining areas that are "unserved" or "underserved" by broadband.

Second, NASUCA's proposed standard is technology neutral, consistent with Congress' intent embodied in the ARRA. Granted, many satellite service offerings will be adversely affected by the definition of "broadband" advocated by NASUCA and may not be eligible for

[50] See In re: Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Report and Order and Further Notice of Proposed Rulemaking, 23 F.C.C.R. 9691, 9700-01, ¶20 & n. 66 (June 12, 2008).

[51] Id. at 9764 (separate statement of Commissioner Michael J. Copps); id. at 9767 (comments of Commissioner Jonathan S. Adelstein).

[52] *Id*.

BTOP grants. However, this is the inevitable result of recognizing that to properly be considered "broadband" service, a service must realistically offer content and capabilities consistent with broadband offerings. It is no more discrimination against satellite service than promoting the development of telephone service discriminated against telegraph service.

Third, adopting NASUCA's proposed definition has a beneficial impact on those areas that fall under the definition of "unserved" areas. As noted above, NASUCA has proposed a very conservative, literal definition of "unserved" areas. The strictness of NASUCA's definition is ameliorated considerably if services offering transmission speeds of 200 to 768 Kbps are no longer considered "broadband" – areas with such service, once characterized as broadband by the FCC and still characterized as broadband by many state statutes,[53] would now be considered "unserved."

Fourth, NASUCA's proposed definition is technology neutral and does not establish different transmission speed thresholds for wireline, wireless or other technologies as some parties have proposed.[54] Moreover, the transmission speeds covered by the definition are provided by the majority of wireline and wireless broadband service applications. To the extent there are transmission capacity limitations associated with one technology versus another, those limitations are accounted for in the selection criteria scoring system outlined above, and deductions for such limitations may well be offset by higher scores awarded for other characteristics of the technology.

[53] See, e.g., W. Va. Code § 31-15C-2(a)(1).

[54] *See, e.g.*, XO/Nextlink Proposal, p. 3 (proposing different standards for "Advanced Broadband Transmission Service" and "Current Generation Broadband Transmission Service" based on whether the technology is wireline/fixed wireless or mobile wireless).

c. How should the BTOP define the nondiscrimination and network interconnection obligations that will be contractual conditions of grants awarded under Section 6001?

Recommendation.

NASUCA strongly recommends that the NTIA require *all* successful grant applicants to provide access to network facilities, at cost, to any provider of broadband service or content (such as competitive local exchange carriers, cable providers, Internet Service Providers) seeking to expand broadband to unserved or underserved populations. The requirement for open access networks should result in vastly more broadband connections and much greater public benefits, without any significant increase in costs to taxpayers.

Open access requirements should be consistent with the competitive open access principles that Congress required in the 1996 Telecommunications Act.[55] Moreover, from a fairness, efficiency and public interest perspective, it would be difficult to justify not requiring open access to facilities constructed predominantly with public dollars. Finally, open access will allow for competition and consumer choice, factors that tend to make retail services more affordable and of higher quality. As NASUCA has indicated in prior filings, the availability of broadband facilities will not provide great public benefits if the price of the resulting retail service remains unaffordable to many.

Using incumbent local exchange carriers' unbundling and interconnection obligations as a general model, the NTIA should require that all successful grant applicants must furnish a set of terms and conditions and rates for each type of access to broadband facilities that are constructed and operated predominantly with public funds. The rates proposed by the owner of a publicly supported broadband network should be designed to recover no more than actual costs

[55] *See* 47 U.S.C. §§ 251-252.

plus a modest margin. Such rates should be subject to specific rules to be promulgated by the NTIA, and subject to its review. Examples of network elements to be made available to other entities include access to fiber, routing facilities, remote terminals, and towers and transmitters.

The degree to which networks are designed to accommodate other carriers should be a substantial factor in the NTIA's selection of projects. Each applicant should be encouraged to demonstrate that it is ready to accommodate at least four other broadband providers that may seek access to the publicly-funded network. The NTIA should ensure that its priorities discourage applicants from proposing networks that incorporate technologies that are not conducive to access by other carriers or that are not feasibly open to other carriers for any other reason.

The NTIA could continue to select projects that do not allow open access in the event of a clear demonstration that a particular project would not be sustainable if competition were present. However, such projects should be few and represent rare exceptions to the rule. Moreover, in many cases, open access may allow substantial, additional broadband connections to populations or areas that were not covered by the original grant application (*i.e.*, broadband extensions into adjacent unserved or underserved areas).

Competitive access to the broadband facilities constructed by successful applicants will serve to leverage federal funds to create new services to substantially more unserved and underserved areas – the very essence of the purpose of the broadband stimulus funds. In addition, open access will encourage much wider participation in broadband deployment of capable entities, thereby creating more jobs as well as more retail services. For these reasons, open access should rise to the level of a fundamental priority with respect to the NTIA's selection process.

d. Are there other terms in this section of the Recovery Act, such as "community anchor institutions," that NTIA should define to ensure the success of the grant program? If so, what are those terms and how should those terms be defined, given the stated purposes of the Recovery Act?

Recommendation.

NASUCA recommends that the NTIA adopt the following definition of "community anchor institution":

"Community Anchor Institution" means any of the following:

(1) Community education resources such as public schools and libraries, adult education centers, community colleges, vocational/technical education centers, and public universities or other institutions of higher education;

(2) Community medical resources such as public hospitals, healthcare clinics, physical or mental health counseling centers, and emergency medical services providers;

(3) Community government resources such as local government offices, local law enforcement offices, fire and other emergency services, and public safety answering points and 911 call centers;

(4) Community support organizations and entities organized primarily to facilitate greater use of broadband service by or through these organizations, organizations and agencies that provide outreach, access, equipment, and support services to facilitate greater use of broadband service by low-income, unemployed, aged, and otherwise vulnerable populations; and

(5) Community-based, job-creating strategic facilities located within a State-designated economic zone, Economic Development District designated by the Department of Commerce, Renewal Community or Empowerment Zone designated by the Department of Housing and Urban Development, or Enterprise Community designated by the Department of Agriculture.

Rationale.

The ARRA itself in § 6001(b)(3) is the source for most of the terms contained in NASUCA's proposed definition of "community anchor institution," though NASUCA also

referred to XO/Nextlink's proposed rules for additional guidance.[56] NASUCA merely expanded upon the terms used in the ARRA and categorized the sorts of entities that Congress appeared to have in mind when it used the term "community anchor institution" in § 6001(g)(3).

e. What role, if any, should retail price play in these definitions?

Recommendation.

NASUCA does not believe retail price should play any role in defining the terms addressed in this particular section, with the sole exception of playing an indirect role in defining "underserved" areas.

Rationale.

Question 15. Other Issues.

With regard to other issues that the NTIA may wish to consider in promulgating rules governing the BTOP grant process, NASUCA refers the NTIA to its March 18, 2009 letter discussing broader issues related to deficiencies with broadband deployment in the U.S. historically. The rules adopted by the NTIA should take the concerns noted by NASUCA into account in order to avoid repeating some of the policy-making errors that have caused America's fall from broadband preeminence.

In addition, NASUCA set forth detailed recommendations for use of a single broadband funding application form for use by both the NTIA and the RUS. NASUCA suggests that the Agencies adopt that application form for use by funding applicants and make it available online, in read/write format, for use and submission electronically to the Agencies.

Finally, the NTIA should consider reinstituting regular reporting on the progress of broadband in the United States. From the mid-1990s through 2002, the NTIA produced a series

[56] XO/Nextlink Proposal, p. 3 (March 9, 2009).

of reports, entitled *Falling Through the Net*,[57] which highlighted the digital divide. Subsequently, the report was renamed *A Nation Online* and the way in which the NTIA reported statistics regarding broadband coverage changed. The *A Nation Online* reports did not provide as much detail as the *Falling Through the Net* series regarding which segments of the population were actually using broadband. Several studies such as those by Manuel Pastor looked more carefully at the gaps between broadband availability and broadband subscription (or "take rate").[58]

After 2004, the NTIA stopped preparing the *A Nation Online* reports altogether and the federal reporting regarding broadband deployment and availability was carried out primarily in the FCC's advanced services reports. As has been widely recognized, the FCC reports were woefully deficient. In addition to greatly overstating the availability of broadband facilities, the FCC's reports did not consider adoption rates and relied exclusively on carrier-reported deployment. The FCC's reports have been somewhat improved – primarily by Congress' intervention through the BDIA and criticism leveled at the FCC by the GAO – by requiring reporting on a census tract level; however this is still insufficient to provide a true picture of broadband deployment and use among underserved populations. Data collected on a census tract basis simply does not provide the level of detail necessary to ensure accurate reporting of underserved communities.

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[57] *See* "Falling Through the Net: A Survey of the 'Have-Nots' in Rural and Urban America," NTIA (Washington, DC, 1995); "Falling Through the Net II: New Data on the Digital Divide," NTIA (Washington, DC, 1998); "Falling Through the Net: Defining the Digital Divide," NTIA (Washington, DC, 1999); "Falling Through The Net: Toward Digital Inclusion, A Report On Americans' Access To Technology Tools," NTIA (Washington, DC, 2000); "A Nation Online: How Americans Are Expanding Their Use of the Internet," NTIA (Washington, DC, 2002); and "A Nation Online: Entering the Broadband Age," U.S. Dept. of Commerce, Economics and Statistics Administration and NTIA (Washington, DC, Sept. 2004).

[58] *Crossing the Divide – Immigrant Youth and Digital Disparity in California*, Robert W. Fairlie, Rebecca A. London, Rachel Rosner, Manuel Pastor, Center for Justice, Tolerance and Community, University of California, Santa Cruz (Sept. 2006).

Moreover, NASUCA believes that it would be shortsighted for the Agencies to focus solely on deployment in reporting and monitoring areas that are underserved for broadband. For example, the ARRA makes a major investment in improving health care through information technology. Broadband is increasingly used for transmitting electronic records and e-prescriptions, doctors are encouraged to make increasing use of information technology. The success of these programs will depend on people being connected. Similar issues arise with respect to education. Studying deployment only, as been the practice of the FCC, is insufficient. "Take" rates should also be a major consideration.

With the foregoing in mind, NASUCA offers the following recommendations with regard to assessing reporting regarding provision of broadband to underserved communities:

- The NTIA studies on broadband adoption and use (identifying the underserved) should be reinstituted.
- The FCC reports should be refined to collect data at the census block level.
- The NTIA should formally and carefully examine the differences between the reports on broadband deployment vs. broadband adoption.
- The NTIA should reassess national average subscription rates in areas that currently have broadband service.

II. RUS REQUEST FOR INFORMATION.

Question 1. Most Effective Ways to Offer Broadband Funds to Provide Broadband Access.

Recommendation.

NASUCA recommends that the RUS consider utilizing loans and loan guarantees where an applicant requests this form of funding, or where the agency determines that such funding is feasible and will better leverage scarce funds appropriated to it. In addition, the RUS should review its other funding programs to determine whether those programs can be expanded in order to provide additional funds that could be utilized to fund projects under the ARRA.

Question 2. Ways RUS and NTIA Can Align Their Broadband Activities Under the ARRA.

Recommendation.

As set forth in NASUCA's March 18, 2009 letter to the Agencies, we suggest that the RUS and the NTIA can, among other things, take the following measures to align their broadband activities under the portions of the ARRA that they each administer:

- To the maximum extent allowed by law, NASUCA recommends that the Agencies establish an interagency task force that would include representatives of the FCC, groups representing key stakeholders, such as State governments or, preferably, representatives of the States (*e.g.*, NASUCA, NARUC) and possibly public interest organizations with experience in broadband efforts.[59]

- Alternatively, establish an advisory committee in accordance with the provisions of the Federal Advisory Committee Act, to assist the Agencies in implementing the provisions of the ARRA. This committee's membership should be the same as that recommended for the interagency task force discussed above.[60]

- Develop a single application form/template by which entities may apply for federal assistance for broadband-related projects under either the rural broadband program(s) administered by the RUS or the BTOP administered by the NTIA. NASUCA

[59] *See* NASUCA Letter to Agencies, p. 10 (March 18, 2009).

[60] *Id*.

believes that development of such an application form will not only be of assistance to applicants for federal funding but will also assist the agencies in coordinating their efforts to distribute federal funding under the programs expeditiously and to ensure that funds are spent and accounted for appropriately.[61]

- Adopting the same or similar processes and scoring criteria for States to review, evaluate, score, etc. applications for funding under the BTOP administered by the NTIA for the RUS-administered programs funded under the ARRA, or for applicants to seek review of those State decisions.[62]

- Adopt the same definitions of key terms used in the ARRA, such as "unserved" and "underserved" areas, "broadband" and "community anchor institutions."[63]

- Prepare jointly with the NTIA annual reports regarding broadband deployment and subscription in the United States.[64]

Question 3. How to Evaluate Whether a Particular Level of Access is Needed for Economic Development.

Recommendation.

NASUCA recommends that the RUS utilize the scoring criteria and considerations recommended for use by the NTIA in order to determine whether a particular level of access is needed for economic development. In addition, however, given the RUS' particular emphasis on rural areas, the agency should consider the sorts of exceptional circumstances outlined by NASUCA in its comments to the NTIA that would support a request for funding of projects that cannot provide "broadband" service (speeds of 768 Kbps) in determining whether a lower level of access would support economic development.

[61] *Id*. at 35-38.

[62] *See* pp. 17-31, *supra*.

[63] *Id*. at 43-48.

[64] *Id*. at 52-54.

Question 4. Value to be Assigned to Statutory Priorities for Selecting Applications.

Recommendation.

NASUCA recommends that the RUS use the same scoring criteria as those proposed for use by the NTIA in implementing the BTOP grant process. For the most part, these criteria are consistent with those established by Congress for the RUS to utilize. One point, however, needs to be addressed, namely the ARRA's requirement that "priority shall be given for project applications from borrowers or former borrowers under title II of the Rural Electrification Act of 1936 and for project applications that include such borrowers or former borrowers."[65] While the RUS obviously cannot disregard Congress' directives, NASUCA recommends that the weight to be given to current or prior borrowers who apply for funding under the ARRA should be kept to a minimum in order to encourage broadband providers who otherwise have never qualified for RUS funding to apply for funding under the ARRA. This will promote Congress' other goals, such as stimulating broadband investment and jobs creation.

III. CONCLUSION.

NASUCA urges the Agencies to adopt rules in accordance with NASUCA's arguments and recommendations.

Respectfully submitted,

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[65] H.R. 1, Sec. 2, Div. A, Title I.

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