

Before the

FEDERAL COMMUNICATIONS COMMISSION

**DEPARTMENT OF COMMERCE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION**

**DEPARTMENT OF AGRICULTURE
RURAL UTILITIES SERVICE**

Joint Request for Comments on) NTIA/RUS Docket No. 090309298-9299-01
Implementing the American Recovery)
and Reinvestment Act of 2009) FCC GN Docket No. 09-40
Broadband Initiative)

**COMMENTS OF CBeyond INC., INTEGRA TELECOM, INC.,
ONE COMMUNICATIONS CORP., AND TW TELECOM INC.**

Cbeyond, Inc., Integra Telecom, Inc., One Communications Corp., and tw telecom inc. (the “Joint Commenters”) hereby file these recommendations as to the manner in which NTIA should implement the Broadband Technology Opportunities Program (“BTOP”) provisions¹ of the American Recover and Reinvestment Act of 2009 (“Recovery Act”).²

¹ These comments respond to FCC and NTIA requests for information. *See* Comment Procedures Established Regarding the Commission’s Consultative Role in the Broadband Provisions of the Recovery Act, *Public Notice* (Mar. 24, 2009); American Recovery and Reinvestment Act of 2009 Broadband Initiatives, 74 Fed. Reg. 10,716 (Mar. 12, 2009).

² *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

I. INTRODUCTION

In implementing the BTOP grant program provisions of the Recovery Act, NTIA must establish a consistent and efficient means of identifying projects that will receive grants. In so doing, NTIA should focus on the primary purposes of the BTOP grant program – establishing and enhancing sustainable broadband access to as many citizens and critical organizations as possible, as quickly as possible. This is an extremely complex undertaking given the wide diversity of market conditions and of broadband needs across different types of end users and communities. In order to implement the BTOP grant program in this environment, NTIA should adopt a flexible framework for considering grant proposals that balances (1) the need to establish “top down” coherent national priorities and a coherent means of assessing specific grant requests with (2) the need to establish a “bottom up” means of taking advantage of the expertise of state government entities, public interest groups, private providers of broadband service and equipment and other interested parties. Erring too far in the direction of the top down approach would cause the program to become too rigid, bureaucratic, slow and complex. Erring too far in the direction of a bottom up approach would cause the program to become incoherent and inconsistent. Sound implementation therefore requires that the agency strike the correct balance. The relatively high-level approach proposed herein seeks to achieve this objective.

II. DISCUSSION

The Recovery Act states that NTIA shall distribute the BTOP grant money as soon as possible and in no event later than the end of fiscal year 2010.³ While this tight timeframe comports with the need to implement the economic stimulus plan as soon as possible, it means that NTIA will have little time to gather information and consider the optimal approach to

³ *Id.* § 6001(d)(2).

subsidizing broadband. Moreover, the development of a national broadband plan by the FCC (to be developed within one year of the enactment of BTOP -- February 17, 2010) and the implementation of a broadband mapping capability by NTIA (to be completed within two years of the enactment of BTOP -- February 17, 2011) under the Recover Act will occur too late to inform substantially the manner in which BTOP grants are distributed.⁴ NTIA will therefore need to establish a separate analytical framework to determine how to distribute BTOP grants, and it will need to do so by pragmatically relying on the information resources that are available within the applicable implementation deadline.

Terms of the Statute. In developing its analytical framework for the BTOP grant program, NTIA must begin with the terms of the statute. Under the Recovery Act, NTIA must promote the six **Primary Policy Objectives** established for the BTOP grant program:

1. Deployment of broadband to unserved areas;
2. Improved deployment of broadband to underserved areas;
3. Deployment of broadband to health care facilities, schools, and other community organizations;
4. Improved broadband education, awareness, training, equipment and support to health care facilities, schools, and other community organizations;
5. Improved deployment of broadband to public safety agencies; and
6. Stimulation of broadband demand, economic growth and job creation.⁵

The Recovery Act provides NTIA with guidance as to how to award funds to advance the Primary Policy Objectives. For example, the Act lists numerous different categories of facilities and services that NTIA **may** choose to subsidize as it seeks to promote the Primary Policy

⁴ *Id.* § 6001(k)(1), (l).

⁵ *Id.* § 6001(b)(1)-(5).

Objectives, including various types of facilities needed to provide broadband, ensuring provision of broadband service to community anchor institutions, facilitating access to broadband by low-income, unemployed, aged and otherwise vulnerable populations, and so on.⁶ The law also states that NTIA **shall**, to the extent possible, award no less than one grant in each state, and **shall**, to the extent possible, consider the following **Primary Weighting Factors** in assessing whether to award grants that would promote the Primary Policy Objectives:

1. Whether subsidizing the broadband infrastructure at issue would increase affordability of, and subscribership to, service to the greatest population of users in the area;
2. Whether subsidizing the broadband infrastructure at issue would provide the greatest broadband speed possible to the greatest population of users in the area;
3. Whether subsidizing the broadband infrastructure at issue would enhance service for health care delivery, education, or children to the greatest population of users in the area;
4. Whether subsidizing the broadband infrastructure at issue would result in unjust enrichment; and
5. Whether the applicant is a socially and economically disadvantaged small business concern.⁷

In addition, the Recovery Act establishes minimum funding allocations for projects that expand public computer center capacity (\$200 million) and for projects that promote sustainable adoption of broadband service (\$250 million).⁸ NTIA must also keep in mind the overarching goals of (i) technology neutrality in the award of grants,⁹ (ii) limiting the distortion of investment incentives by targeting grants to undertakings that would not have been initiated absent the

⁶ *Id.* § 6001(g).

⁷ *Id.* § 6001(h)(2)-(3).

⁸ *Id.* at 123 Stat. 128.

⁹ *Id.* § 6001(e)(1)(C).

availability of subsidy,¹⁰ and (iii) promoting efficient and expeditious execution of projects by firms that are competent in the relevant field.¹¹

These requirements support the following conclusions. *First*, the terms of the Recovery Act mandate that NTIA promote the Primary Policy Objectives in implementing the grant program. NTIA does not have the discretion to ignore any of these objectives. *Second*, NTIA may allocate funds in the manner it chooses between projects that promote the **supply** of broadband (e.g., deployment of broadband to unserved areas, to underserved areas, to community organizations, and public safety agencies) and those that promote the **demand** for broadband (e.g., education), except that, as mentioned, NTIA must allocate at least the statutory minimum for demand projects that expand public computer center capacity and that promote the sustainable adoption of broadband service. *Third*, in assessing the merits of supply proposals involving the deployment of infrastructure, NTIA must consider the Primary Weighting Factors where possible. The Primary Weighting Factors do not indicate a congressional intent to favor one Primary Policy Objective over another. They do not, for example, indicate a preference for deployment of broadband to unserved areas over underserved areas or for deploying broadband directly to consumers over deploying broadband to the community organizations that serve consumers or to public safety agencies. Thus, NTIA has broad discretion to allocate grant funds among proposals that promote the Primary Policy Objectives. In so doing, the statute states that it may consult the states. *Fourth*, the statute does not include Primary Weighting Factors for consideration of proposals involving the promotion of broadband demand.

¹⁰ *Id.* § 6001(e)(3).

¹¹ *Id.* § 6001(e)(3)-(4).

Implementation of Terms of the Statute in General. In implementing these provisions, NTIA should establish a broad framework for presumptively allocating resources among the Primary Policy Objectives. As explained, the statute requires that NTIA promote each of the Primary Policy Objectives. At least some grant money must be allocated to projects that advance each of these objectives. Nevertheless, NTIA must keep the process for considering supply project proposals as flexible as possible to ensure that the Primary Weighting Factors are promoted as fully as possible and to ensure that NTIA takes advantage of information supplied by grant applicants.

NTIA must also adopt specific definitions of, among other terms, “broadband,” “unserved” and “underserved.” In doing so, NTIA should rely on the capacity tiers and geographic units (*i.e.*, census tracts) used in the FCC Form 477 Broadband Report. These categories have recently been updated and improved. They may not be perfect, but they are sufficient for this purpose, they are already in place, and firms are already collecting information using the current categories. It is therefore more likely that grant applicants will be able to supply the information needed to implement grant criteria that utilize the Form 477 categories than would be the case if other criteria were used. In addition, in order to advance the policy of technology neutrality, the definitions must apply without regard to the technology used to provide a service.

The definitions should be based on broadband speed demanded by residential customers and the availability of such broadband to residential customers. Focusing on residential customers rather than business customers makes sense because relatively similar demand patterns among residential customers make it possible to adopt a single minimum bandwidth capacity as the definition of “broadband” for all residential customers. The wide disparity of

broadband needs among different types of businesses (everything from relatively basic xDSL service demanded by small businesses to extremely high capacity optical service demanded by some enterprise customers) makes it impossible, as a practical matter, to identify a minimum level of broadband service required for all businesses.

Adopting a definition of broadband based on residential customers' demand obviously requires that definitions of unserved and underserved also rely on measures of the availability of broadband to residential customers. This is an administratively straightforward approach, but it is also sufficient to promote the Primary Policy Objectives. Areas that meet the definition of unserved and underserved for residential customers are likely also to have insufficient broadband facilities for most business customers. The availability of broadband for residential customers can therefore serve as a proxy for the availability of broadband for businesses. In addition, the Primary Policy Objectives establish the provision of broadband to certain specific types of business and government customers (community organizations and public safety agencies) as independent objectives of the BTOP grant program. Grant money can therefore be distributed for the purpose of serving such non-residential customers based on criteria established for those purposes. Similarly, the sixth Primary Policy Objective is the stimulation of broadband demand, economic growth and job creation regardless of whether this occurs in an unserved or underserved area. Applications that propose to promote one or more of these objectives by, for example, providing new services to customers in areas that do not meet the definitions of unserved or underserved would meet the sixth objective.

The following definitions of broadband, unserved and underserved comport with these considerations:

Definition of Broadband. The definition of broadband should be based on a level of broadband bandwidth that is sufficient for residential customers to perform the basic functions normally performed by residential broadband users today. The minimum level of bandwidth should set relatively low, so that grant money is targeted to communities with little or no broadband service today. In light of these observations, a reasonable definition of “broadband” would appear to be at least 768 kbps upstream and 1.5 mbps downstream in capacity. Customers with less than this level of capacity likely do not have access to cable modem service or high-quality xDSL service. Moreover, this level of capacity allows residential customers to perform most of the functionalities that residential customers perform using broadband.

Definition of Unserved and Underserved. The definitions of unserved and underserved should be based on the percentage of residential customers for whom “broadband,” as defined above, is available in a census tract. A reasonable definition of “unserved” would be a census tract in which 90 percent or more of the residential end user locations do not have access to broadband service. A reasonable definition of “underserved” would be a census tract in which 50 percent or more of the residential end users do not have access to broadband service. Accordingly, in order to qualify as providing service to an unserved or underserved area, a grant applicant would need to propose the deployment of broadband in one or more census tracts that meet the relevant definition. It should be noted, however, that it would be inappropriate to require that a grant applicant propose to serve all customers within the census tract, since telecommunications networks do not necessarily conform to the borders of census tracts.

The Definitions of Broadband and Unserved/Underserved Should Not Apply to Applications Proposing to Serve Community Organizations, Public Safety Agencies or to Advance the Sixth Primary Policy Objective. As indicated, the definitions proposed for

broadband, unserved and underserved are based on residential demand patterns and the availability of broadband to residential customers. These definitions should not be used to assess grant applications for the provision of broadband to community organizations or public safety agencies. These entities demand broadband services that are dramatically different, and usually far more sophisticated, than the broadband demanded by residential customers. Moreover, while the availability of broadband to residential customers is a helpful proxy for the availability of broadband to most businesses, the availability of broadband to residential customers is not a sufficiently reliable proxy for the availability of broadband to community organizations and public safety agencies. The Joint Commenters have encountered many areas in which broadband service is available to most residential customers but where the services available to a particular hospital, school or other community organization are insufficient for such entities' present and future needs. Moreover, it appears likely that this is the case with regard to public safety agencies as well. It would make no sense therefore to apply the definitions of broadband, unserved or underserved to grant applications that propose to serve community organizations or public safety agencies. Accordingly, to qualify to serve a community organization or to serve a public safety agency, an applicant need not propose to serve such an entity in an "unserved" and "underserved" area. Finally, as discussed, the sixth Primary Policy Objective defines projects promoting demand, job creation and economic growth as separate policy objectives of the statute without limiting such projects to unserved or underserved areas. Accordingly, applicants that propose promoting the supply of broadband and meet these objectives need not do so in "unserved" or "underserved" areas.

Allocation of Funds between Supply and Demand Projects in General. NTIA should presumptively allocate the amount of money that will be used to support projects that promote

the **supply** of broadband and that promote the **demand** for broadband (if different from the statutory minimums). This allocation of funds is sensible because it would seem very difficult to adopt an objective and consistent means of comparing the benefits of proposals that fall within these two broad categories.

NTIA should also determine the allocation of funds to projects in each of the **Supply Project Categories**: (a) those that provide broadband to consumers and businesses in unserved areas; (b) those that improve broadband access to consumers and businesses in underserved areas; (c) those that provide broadband to health care facilities, schools, and other community organizations; (d) those that improve broadband to public safety agencies; and (e) other broadband deployment projects that yield job creation and economic growth. Such an allocation of money is sensible because, as with supply and demand projects, it would be difficult to adopt an objective and consistent means of comparing the benefits of projects in these five different categories.

In making its presumptive allocation of grant money between supply and demand categories and among the Supply Project Categories, NTIA should seek input from the states as to the optimal allocation of funds within each state. NTIA should give special weight to the views of a state that has completed a broadband mapping function for the state.

Threshold Requirements for Grant Requests. NTIA should also establish threshold requirements that apply to grant proposals such that any applicant that does not meet the applicable threshold filing requirements would be rejected without further consideration. This approach would make the application review process more efficient because it would allow NTIA to screen out deficient or incomplete grant applications. Any applicant that meets the

threshold filing requirements should be deemed to be eligible to receive BTOP grant funds.

Following are suggested filing requirements:

1. Each applicant must demonstrate that its proposed project advances at least one of the Primary Policy Objectives;
2. Each applicant must demonstrate that it has a proven track record in successfully undertaking precisely the activities proposed in the grant application;
3. Each applicant must demonstrate that the proposed project would not have been initiated within 12 months from the filing of the grant application absent the availability of a grant subsidy; a 12 month time frame is sensible because most companies forecast their capital spending using a 12 month window; it is also important that any project that an applicant had committed to undertake in order to comply with a state or federal regulatory requirement or commitment (*e.g.*, as a condition of state or federal agency approval of a transaction) should **not** be deemed to meet this requirement;
4. Each applicant must provide a detailed analysis as to why a broadband supply proposal will be sustainable as an economic matter over the long run; furthermore, if the applicant claims status as a socially and economically disadvantaged small business concern, such an entity must demonstrate that it has sufficient funding and a viable business plan to provide the functions described in the grant proposal and, if relevant, remain a viable concern over the long run; viability over the long run would be relevant if, for example, the firm seeking socially and economically disadvantaged small business concern status would provide broadband service over the funded facilities after completion of subsidized network construction;
5. For projects that propose the supply of broadband in unserved or underserved areas, each applicant must demonstrate that there is sufficient demand for broadband service in the targeted census tract(s) or, if this is not the case, that the application includes a proposal for stimulating demand in the relevant area;
6. For projects that propose stimulating demand for broadband, each applicant must demonstrate that the areas that will be targeted do not meet the definition of underserved or underserved, or if they do meet one of those definitions, that the demand proposal is accompanied by a supply proposal that would achieve deployment of broadband in excess of the threshold for underserved areas;
7. For projects that propose providing service to a community organization or to public safety entities, the applicant must file an affidavit from the executive at the community organization/public safety entity with responsibility for telecommunications stating that

the proposed project will satisfy the organization's/entity's existing and foreseeable broadband requirements;

8. All applicants must commit to comply with applicable interconnection requirements as set forth in the Communications Act and in the FCC's rules; as part of this interconnection obligation, incumbent LEC applicants that will provide IP voice services must agree to interconnect their IP voice networks directly with the IP voice networks of other service providers at any technically feasible point and to comply with all other interconnection requirements; and

9. Each applicant shall commit to complying with such other reporting, unjust enrichment, nondiscrimination and other requirements as established by NTIA.

Formulas for Assessing Grant Applications. NTIA should assess the merits of applications that meet the threshold criteria by using formulas that apply the Primary Weighting Factors to each of the Supply Project Categories. In each case, values should be assigned to aspects of a proposal so that the proposals with the highest values are awarded grant money. Any applicant that qualifies as a socially and economically disadvantaged small business concern should receive an extra "credit" in each formula. The Joint Commenters suggest the following approach to developing the formulas.¹²

Applications to Serve Unserved Areas. For applications seeking grant funding to serve unserved areas, relative numerical values should be assigned based on (i) the capacity of the services to be provided (they must at least meet the definition of broadband), (ii) the number of residential end user customers to whom the service would be available, (iii) an assessment of the actual number of end users that would likely be able to afford the services, (iv) the amount of grant money needed for the project, (v) the number of jobs that the project would create (extra points should be allocated for jobs that would last beyond the duration of the subsidized project),

¹² The formulas set forth herein concern applications that propose increasing the supply of broadband. There may be a need to create separate formulas to assess applications that seek to enhance demand.

and (vi) the sufficiency of the demand stimulation proposal that must accompany the application. Projects that will (i) yield higher capacities, (ii) serve more residential end users at affordable rates and at the lowest grant money allocation, (iv) create more jobs (especially those that would last beyond the duration of the subsidized project) and (v) that are accompanied by a sufficient demand stimulation proposal, would be preferred. It should be noted that this formula would likely favor projects involving the deployment of large capacity transport (so-called “middle mile”) facilities to unserved areas, since such projects would enable service providers to leverage the transport facilities to provide broadband at substantial capacities to entire communities of end user customers at relatively low project cost.

Underserved Areas. For applications seeking grant funding to serve underserved areas, relative numerical values should be assigned based on the same criteria as for unserved areas. As with the formula for assessing proposals to serve unserved areas, the formula for assessing proposals to serve underserved areas favors proposals for deployment of middle-mile facilities.

Community Organizations. For applications seeking grant funding to serve community organizations, relative numerical values should be assigned based on (i) the size of the community served by the community organization, (ii) the amount of grant money needed for the project and (iii) the number of jobs that would be created (extra points should be allocated for jobs that would last beyond the duration of the subsidized project). Projects will be preferred to the extent that they involve (i) a larger number of residential end users served by the community organization, (ii) lower grant money levels, and (iii) a larger number of jobs created (especially those that would last beyond the duration of the subsidized project). Note that the capacity of the service probably cannot be used to assess applications to serve community organizations since

different types of community organizations have different broadband needs depending on their function and location.

Public Safety Agencies. For applications seeking grant funding to serve public safety agencies, relative numerical values should be assigned based on the same criteria as for community organizations.

Job Creation and Economic Growth. For applications seeking grant funding to promote job creation and economic growth outside of unserved or underserved areas, relative numerical values should be assigned based on (i) the number of residential and business end user customers to whom the service would be available, (ii) the number of jobs that would be created (extra points should be allocated for jobs that would last beyond the duration of the subsidized project), and (iii) the amount of grant money needed for the project. Projects will be preferred to the extent that they involve (i) a larger number of potential customers served, (ii) a larger number of jobs created (especially those that would last beyond the duration of the subsidized project), and (iii) lower grant money levels. Given the differences in the capacity of broadband services that are suitable for different areas and uses, it would be inappropriate include relative capacity in this formula.

III. CONCLUSION

NTIA should implement the BTOP in the manner described herein.

Respectfully submitted,

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