

July 16, 2009

The Honorable Larry Strickling  
Assistant Secretary of Commerce  
Administrator  
National Telecommunications and Information Administration  
U.S. Department of Commerce  
1401 Constitution Ave. NW  
Washington, D.C. 20230

Dear Assistant Secretary Strickling,

We greatly appreciate NTIA's exhaustive process of soliciting public input as the agency crafted guidelines for the use of broadband Recovery Act funds. We recognize the challenges agency staff faced in considering the volumes of comments filed, and issuing a Notice of Funding Availability (NOFA) under the intense pressures of Recovery-Act imposed deadlines.

Our organizations, which represent rural and urban constituencies, as well as municipal governments and public interest groups, have significant concerns about several items in the NOFA. We hope the agency will consider the changes we recommend, as outlined below. In addition to considering this letter, we would like to request an opportunity to meet with you and other appropriate NTIA staff to outline our suggestions in more detail.

In light of the complex nature of the NOFA and varying interpretations of its meaning that have surfaced in public workshops, we also urge NTIA to publish a clarification on how it will interpret the NOFA to resolve these issues. We also are ready to assist the agency in reaching out to the community of public interest broadband advocates to further clarify the agency's intent and the program guidelines.

**The definition of "underserved" will exclude many worthwhile projects**

The definition of "underserved" has the effect of precluding any residential infrastructure program in an area where a minimal level of broadband, even first-generation DSL, is generally available. This preclusion occurs regardless of whether advertised speeds are actually delivered; whether service is affordable; whether systems are capable of serving all interested consumers (in many communities where DSL is advertised, residents and small businesses are refused service because circuits are tapped out); and whether the speed of service meets the needs of the consumer (for example, DSL and even cable modem service are woefully insufficient for home-based business and teleworking).

*Recommendation: To be consistent with the recently published application, amend the definition of "underserved" to clarify that only one, rather than two, of the definitional options be met, thus enabling urban and metropolitan areas, and*

*even small towns in rural areas to apply even if there are other forms of low-speed broadband, such as early-generation DSL, in the community.*

*Recommendation: Add a definition of “affordability” as a measure of whether an area is underserved. Allow applicants to supply data from the most recent Census or other source of legitimate, verifiable data to demonstrate that existing service is not affordable relative to average household income.*

### **The NOFA de-prioritizes statutorily important projects**

Although the ARRA assigns five co-equal purposes to the BTOP program, the NOFA prioritizes the first two purposes (serving “unserved” and “underserved” areas), creating prerequisites for projects that address the other three purposes (community anchor institutions/vulnerable populations; public safety; and job creation/economic development). One result is that community anchor institutions and middle mile projects in areas that do not meet the definition of “underserved” are ineligible for infrastructure grants. Communities cannot apply for funds to build capacity to schools, libraries, first responders, and health care facilities—all of which require 100 *Megabit* or *Gigabit*+ connection speeds—because they are located in neighborhoods where residents can purchase consumer services of several hundred *kilobits* per second.

*Recommendation: Waive or eliminate the requirement that projects to community anchor institutions have to be in “unserved” or “underserved” areas. Allow applications that serve any community anchor institution because the Recovery Act DOES NOT prioritize purpose areas 1 (unserved) and 2 (underserved) over 3 (anchor institutions and vulnerable populations), 4 (public safety), and 5 (job creation and economic development). In a related fashion, waive or eliminate the requirement that “last mile” networks to community anchor institutions also have to serve the entire Census block.*

*Recommendation: Allow funding for middle-mile projects that are in unserved or underserved areas or that promote the other statutory purposes of BTOP, namely, provide improved broadband availability for community anchor institutions and vulnerable populations, public safety entities, and/or stimulate job creation and economic development.*

### **The NOFA gives incumbents opportunities to eliminate potential competitors**

By using the language of “advertised” speeds to determine whether an area is “underserved,” the NOFA enables carriers to preclude participation through advertised (and frequently exaggerated) maximum speeds rather than guaranteed minimum speeds. This problem is compounded by the de facto veto the NOFA affords carriers to show that an area is not “underserved” by quoting aggregate speeds—not what they actually deliver. This outcome is patently unfair—carriers, who have an incentive to obfuscate service shortcomings, may advertise speeds of up to 3 Mbps while refusing to guarantee those speeds. For example, cable modem systems are engineered as shared networks so speeds can drop dramatically as

providers use larger and larger contention ratios. Or a carrier may advertise service in a mid-size city's newspaper, but may offer no service at all throughout much of the paper's circulation area. An application for funding for an alternative network that will deliver guaranteed speeds would be precluded by overstatements contained in carriers' advertising.

The NOFA also allows carriers to dispute data submitted by an applicant, yet gives the applicant no ability to refute the carrier's claims. As is, applicants must go to extraordinary lengths to gather the data necessary to prove that it meets the NOFA's definition of unserved or underserved, particularly in the absence of publicly available data on broadband speed, availability and subscribership. To require applicants to engage in rigorous data collection without allowing them to defend that data against a potential competitor's attacks is without merit. Furthermore, we argue that allowing incumbents to contest applications at all gives an unfair advantage to carriers with significant legal expertise and staff resources to block potential competitors. Carriers may even resort to blocking applicants they may not immediately compete with simply to prevent competitors from gaining market share anywhere, ultimately undermining the BTOP program.

*Recommendation: Clarify that "advertised speeds" means "guaranteed speeds" to individual premises, simultaneously and during peak network congestion times, for purposes of both the definition of "underserved" and the latter stages of the review process in which carriers may demonstrate their speeds in the proposed service areas.*

*Recommendation: Eliminate the provisions in the NOFA that allow incumbent carriers to challenge BTOP applications for any reason, in any location. At an absolute minimum, amend the NOFA to allow applicants to review and contest any claims made by incumbents about its application and accompanying data, including availability of service in the proposed area.*

### **Anchor Institutions and Municipal Projects Face Insurmountable Barriers**

Multiple elements of the NOFA have the effect of making municipal and community participation extremely difficult if not impossible. This runs contrary to the explicit language of the Recovery Act, which includes among "eligible entities" both local governments and non-profits. For example:

A.) By defining service to community anchor institutions as "last-mile" and requiring that last mile-networks serve entire census blocks, the NOFA tilts toward carrier models for residential service rather than community models that may focus on community anchor institutions such as schools and libraries. For nearly two decades localities have successfully operated Institutional networks, and these community anchor institutions have delivered Internet services to countless Americans. The NOFA makes residential service a requirement of funding for community anchor institutions (though the statutory language does not), eliminating countless potential public projects that would (1) serve community anchor institutions and (2) provide capacity to the private sector to bridge the last

mile—even if public projects do not themselves serve all residents in a given area.

B.) The NOFA requires a showing of “unserved” or “underserved” by census block—data that only the carriers can access without extraordinary efforts and cost. Many American cities, such as San Francisco, Miami, and Philadelphia, have engaged in extensive surveys of their community over the past few years, using multiple methodologies, including privately-conducted written and phone surveys of statistically-significant samplings of the communities and City-conducted community-wide surveys. But in order to gather data by census block, applicants would have to survey the community at a far more granular level with a concomitant cost that is simply not feasible. As a result, communities face an enormous hurdle in demonstrating that neighborhoods are “underserved.” Despite the fact that these communities have already done extensive surveying of the on-the-ground realities—this simply is not enough to meet the NOFA’s requirements. In rural areas, where a census block may cover a substantial geographic area, the challenges in collecting data are even greater. In contrast, incumbent carriers have much of this data already and they know where service is offered and what rates of penetration have been achieved. The end result is that the telecommunications incumbents have far lower burdens to meet under the NOFA than do public entities or community anchor institutions.

*Recommendation: Waive or amend the requirement for census block data such that communities can demonstrate that they meet the definition for “underserved” in other ways, such as statistically-significant data, that are more feasible, less burdensome, and just as rigorous. Alternatively, the FCC should require that all providers make these data publicly available.*

### **BTOP and RUS Coordination is Unclear**

Coordination between the NTIA’s BTOP program and the USDA’s Rural Utilities Service (RUS) is necessary, however the requirement that projects which serve rural areas must apply first to RUS before being considered for a BTOP grant could cause confusion. RUS offers loan and loan guarantees, not grants. So if a rural applicant is seeking a grant, not a loan, it is unclear whether their application would be summarily rejected by RUS for failing to meet the basic grant guidelines.

*Recommendation: Clarify that any proposals that are submitted to RUS seeking grant funds would be routed to BTOP. Alternatively, allow applications for rural projects to be submitted to BTOP directly.*

### **Projects that are Holistic in Approach are Discouraged**

The most successful broadband projects combine access to high quality, affordable infrastructure with adoption programs. Yet the NOFA requires separate applications for infrastructure projects and projects for sustainable broadband adoption. If only one of those applications is successfully funded, it may be less or ineffective without the other. For example, a proposal to create a public computing

center may only be possible if the proposal to bring infrastructure to the center is also funded. Infrastructure is only valuable if people use it effectively; this artificial barrier hamstrings NTIA in identifying and funding innovative projects that could serve as models for other communities.

*Recommendation: Clarify that one proposal may contain elements of infrastructure, sustainable broadband adoption, public computing center capacity, or other priorities as identified in ARRA, regardless of what “pots” of money NTIA pulls from in funding the project.*

### **Projects on Native Lands may be Disadvantaged**

The NOFA gives state governments the opportunity to rank projects submitted from entities within its borders, which we believe may disadvantage proposals to bring broadband to Native American lands. State governments have a history of failing to consider the impact of state policy on Native lands located within their borders, often do not consult with Tribal government leaders, and lack the necessary data to appropriately judge the merit of proposals on Native lands. Indeed, Native lands are sovereign nations, and not under the jurisdiction of any state government. Since Native lands are among those least served by telecommunications companies, it is important to remove any potential barriers to broadband projects that could bring service to these historically disenfranchised communities.

- *Recommendation: Consider proposals on Native lands on their own merit, and without influence of any state rankings or recommendations.*

The organizations listed below are deeply invested in the success of BTOP and RUS in bringing affordable, high quality broadband to the U.S. We offer our assistance to NTIA in ensuring funded projects can be held up as examples of what can be done with continued U.S. investment in broadband. Please contact Beth McConnell, Media & Democracy Coalition, at [bmccconnell@media-democracy.net](mailto:bmccconnell@media-democracy.net) or 267-918-7207 if we can be of any assistance.

Sincerely,

Charles Benton, Benton Foundation  
Dee Davis, Center for Rural Strategies  
Amalia Deloney, Main Street Project  
Harold Feld, Public Knowledge  
Mary Beth Henry, National Association of Telecommunications Officers and  
Advisors (NATOA)  
Joel Kelsey, Consumers Union  
Gerry Lederer, TeleCommunity  
Beth McConnell, Media & Democracy Coalition  
Sean McLaughlin, Access Humboldt  
Sascha Meinrath, Open Technology Initiative  
Tracy Rosenberg, Media Alliance