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**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
The Commission’s Consultative Role in the) GN Docket No. 09-40
Broadband Provisions of the Recovery Act.)

COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Telecommunications Industry Association (“TIA”) hereby submits its comments in response to the Commission’s Public Notice¹ on its consultative role in the broadband provisions of the American Recovery and Reinvestment Act of 2009.² TIA is a leading trade association for the information and communications technology industry, with over 500 member companies that manufacture or supply the products and services used in the provision of broadband and broadband-enabled applications.

TIA members have a vested interest in expanding the deployment and adoption of broadband, and welcome the opportunity to offer our policy and technical expertise to the Commission as it aids the National Telecommunications and Information Administration (NTIA) and the U.S. Department of Agriculture (USDA) in defining five specific terms

¹ See Public Notice, *Comment Procedures Established Regarding the Commission’s Consultative Role in the Broadband Provisions of the Recovery Act*, GN Docket 09-40, DA 09-668 (rel. Mar. 24, 2009) (“Public Notice”).

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

and concepts referenced in the Recovery Act: unserved area;³ underserved area;⁴ broadband;⁵ the non-discrimination obligations⁶ and the network interconnection obligations⁷ that will be contractual conditions of the Broadband Technologies Opportunities Program (BTOP) grants. TIA shares the goal of Congress and the Administration: To facilitate swift deployment and utilization of cutting-edge technologies, and to nurture a vibrant and growing high-technology sector. The definitions given to these terms will greatly impact the success of the BTOP and USDA's Rural Utilities Service (RUS) grant and loan program. To carry out the goals of the Recovery Act, the FCC should recommend that NTIA and USDA allow maximum flexibility in its grant and loan distribution through definitions that are not overly restrictive and will not unintentionally hamper a wide variety of applicants and solutions for broadband deployment.

I. TIA URGES NTIA AND THE FCC TO DEVELOP FLEXIBLE AND EXPANSIVE DEFINITION OF “UNSERVED” AND “UNDERSERVED” AREAS

TIA supports the flexibility Congress has granted NTIA in administering the BTOP. We urge the FCC to recommend that NTIA, in turn, incorporate flexibility into its BTOP rules to encourage widespread broadband deployment and the development of

³ *Id.* at §6001(a) (“The [Recovery Act] does not define such terms as ‘unserved area’ ‘underserved areas’ and ‘broadband.’ The Conferees instruct the NTIA to coordinate its understanding of these terms with the FCC, so that the NTIA may benefit from the FCC’s considerable expertise in these matters.”).

⁴ *Id.* at § 6001(b)(2) (“The purposes of the [BTOP] are to . . . provide improved access to broadband service to consumers residing in underserved areas of the United States.”).

⁵ *See generally* Recovery Act §6001.

⁶ Recovery Act § 6001(j) (“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[1], adopted August 5, 2005).”).

⁷ *Id.*

new innovative technologies; this will come with a flexible definition of “unserved” and “underserved” and empower American entrepreneurs in developing business plans and selecting technologies that most effectively use BTOP funds. TIA believes it is important that “gating” criteria such as the interpretation of these terms not be so overly restrictive that it leads to the unintended consequence of keeping compelling applications from being evaluated on their own merits.

The term “underserved” should be interpreted in the most expansive manner as is reasonable. In addition to the objective of filling in geographic and demographic gaps in broadband availability and adoption, such an interpretation will generate increased service competition, superior quality of service, more capacity and offerings, choice among providers and platforms, and lower prices for consumers.⁸ Any speed thresholds established in definitions of “unserved” and “underserved” should be as flexible as practicable, and, as the Conference report states, should reflect “that the construction of broadband facilities capable of delivering next generation broadband speeds is likely to result in greater job creation and job preservation than projects centered on current-generation broadband speeds.”⁹

This flexibility, in conjunction with the prohibition of providing funding to projects that would otherwise be financed commercially, prevents abuse of BTOP funds

⁸ TIA agrees with Chairman Boucher’s comments on the need to adopt an expansive definition of the term ‘underserved’: “The agencies must craft a definition of ‘underserved’ with care. [W]e should not equate underserved only with the absence of competition. Underserved can also refer to communities with inadequate broadband speeds. A community should not be disqualified from the program because there are multiple providers offering broadband with a download speed of just 256 or 512 kbps. Finally, communities where broadband is only available at unreasonably high prices should also be considered underserved.” Oversight of the American Recovery and Reinvestment Act: Broadband Before the Subcomm. on Communc’ns, Tech. and the Internet, 111th Cong. 1 (2009) (statement of Rep. Boucher, Chairman, House Subcomm. on Communc’ns, Tech. and the Internet).

⁹ H. R. Rep. No. 111-116 at 775 (2009).

and mitigates the concern that avoiding rigid definitions of “unserved” and “underserved” may lead to funding projects not envisioned by the ARRA. Additionally, serving as guidance to NTIA, each state should identify areas that have the greatest need for delivery of broadband service and identify areas it deems “unserved” or “underserved.”

It is important to note that the ARRA provided RUS funding limitations distinct from provisions in the BTOP with respect to geographic areas to which RUS funds may be dedicated. Under the ARRA, RUS must ensure that funding is directed to areas where 75 percent of the area is rural and without sufficient access needed for economic development. Differently, BTOP must seek to provide funding in “unserved” and “underserved” areas. The nature of the RUS limitations indicate that Congress intended that BTOP funds be more broadly and flexibly distributed as it provides broadband service in “unserved” and “underserved” areas. Based upon the clear differences in the statutory language for BTOP and RUS funding, Congress likely intended for there to be some areas that BTOP funds can serve that RUS funds cannot. This provides NTIA and RUS the ability to collectively identify a broader area of funding coverage. This opportunity should be recognized in order to ensure the broadest penetration of broadband service possible with the BTOP and RUS funds.

II. THE FCC SHOULD RECOMMEND THAT NTIA AND USDA USE THE MOST RECENT DEFINITION OF BROADBAND SET BY THE FCC AT 768 KBPS.

The FCC should recommend that NTIA and RUS recognize the Commission’s most recent definition of broadband of 768 kbps for purposes of providing BTOP and

RUS funds.¹⁰ Applying this definition is consistent with current law and precludes the need for lengthy analysis that will delay grant awards. Additionally, this definition's technology-neutral approach allows more flexibility for NTIA and RUS to select projects that use technologies in the most efficient way. However, the FCC should recommend that NTIA and RUS recognize, as does the FCC, the value of speeds below 768 kbps,¹¹ and consider projects offering such speeds that may effectively serve the area proposed.

III. THE FCC'S INTERNET POLICY STATEMENT IS WORKING AND THERE IS NO NEED FOR ADDITIONAL NON-DISCRIMINATION OR NETWORK INTERCONNECTION OBLIGATIONS BEYOND THIS STATEMENT.

a. The FCC's Broadband Policy Statement Sufficiently Protects Consumers and Stimulates Innovation and Competition.

TIA urges the FCC to recommend to NTIA to limit its non-discrimination obligations to the FCC's Broadband Policy Statement.¹² Its principles are protecting consumers, content providers, and other network operators against anti-competitive conduct. TIA believes that providers should be encouraged to experiment with new and innovative offerings and should be afforded flexibility in designing their business models. This regulatory flexibility, as provided by the FCC's Broadband Policy Statement, has

¹⁰ See 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 FCC Rcd 9691, 9701 (2008). TIA also argues that this definition of broadband should apply to both middle mile and long haul bandwidth, during a typical week peak usage period.

¹¹ See *id.* at fn. 65. The FCC states that: "As many commenters noted, this benchmark includes services that remain valuable to consumers because of their 'always-on' nature and their capacity for more basic Internet services. See, e.g., US Telecom Comments at 14-15 ('For many consumers and businesses, the 200 Kbps capability is more than sufficient to meet their current needs, which often consists of basic e-mail use, access to general information (e.g. government websites and news) and the transmission of standard digital media such as pictures and documents.)'....".

¹² See Appropriate Framework for Broadband Access to Internet over Wireline Facilities, Policy Statement, 20 FCC Rcd 14986 (2005).

fostered growth in the ICT sector, and is essential to ensuring that the BTOP funds most effectively benefit the public.

b. This proceeding is not the forum in which to resolve net neutrality issues.

Moreover, this proceeding is not the forum in which to resolve issues generally associated with the term “Net Neutrality.” For example, the terms “non-discrimination” and “interconnection” already have defined meanings in the Commission’s regulations. Any action to interpret or re-examine these complicated concepts is best addressed by FCC, as the agency of expertise, through a comprehensive rulemaking process. The goal of the ARRA to swiftly provide \$4.7 billion for broadband deployment and adoption to those without broadband access will be frustrated by infusing into the BTOP grant process new, precedent-setting interpretations of nondiscrimination and interconnection requirements. Such requirements are likely to chill interest among otherwise strong applicants in applying for BTOP grants and short-circuit established rulemaking procedures designed to provide a full vetting of such issues.

Again, TIA believes that this is not the time or the venue for establishing a new framework for these issues. However, TIA supports an approach to nondiscrimination and interconnection that is competitive and encourages efficient use of broadband networks. A cautious approach to regulation of next-generation offerings has stimulated broadband deployment and economic growth. NTIA should not adopt “open-access” requirements that will likely depress investment and deter applicants. The ARRA’s nondiscrimination and interconnection language should not be construed to impose any unbundling requirements that could deter applicants, further undermine deployment, and likely lead to years of litigation as did the unbundling provisions in the

Telecommunications Act of 1996.¹³ These onerous requirements would only detract from the goals of the ARRA and could, ultimately, increase the cost of deploying broadband networks.

Due to the unique nature of varying types of broadband networks, the FCC, NTIA and RUS should not prescribe which network management techniques are allowable and which ones are not. Operators need flexibility to tailor the network management technique to the specific cause of the network constraint. Further, listing only certain allowed elements of network management techniques does not account for future changes in technology that may alter the way operators manage their networks. For these reasons, the FCC should recommend that NTIA utilize its established Broadband Policy Statement as its tool for ensuring compliance with the ARRA's nondiscrimination and interconnection requirements.

CONCLUSION

For the foregoing reasons, TIA recommends that the FCC to NTIA and USDA to use definitions of "unserved" and "underserved" areas that will provide maximum flexibility in granting applications; utilize the FCC's current definition of broadband; and there is no need for additional non-discrimination and interconnection obligations beyond the FCC's Broadband Policy Statement.

Respectfully submitted,

**TELECOMMUNICATIONS INDUSTRY
ASSOCIATION**

By: _____

¹³ See e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); *Covad Communc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

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