

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**COMMENTS OF THE
OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION**

The Office of Advocacy of the U. S. Small Business Administration (“Advocacy”) submits these comments to the National Telecommunications and Information Administration (“NTIA”) in the above-referenced docket.¹ Advocacy commends NTIA for its efforts to ensure full public participation in the policy guidance of the Broadband Technologies Opportunities Program (“BTOP”) in the American Recovery and Reinvestment Act of 2009 (“ARRA” or “Recovery Act”).²

Advocacy first comments on Section 6001(h) of the Recovery Act and the test for whether an applicant is a socially and economically disadvantaged small business of concern as defined under Section 8(a) of the Small Business Act.³ Second, Advocacy has attached comments sent to the Federal Communications Commission (“FCC” or “Commission”) that address the development of broadband definitions for the Recovery Act programs. These comments specifically provide responses to NTIA and Rural Utilities Services’ (“RUS”) Question 13 which seeks input on the FCC’s consultative role, certain broadband definitions, speeds, nondiscrimination obligations, network interconnection standards, other related

¹ *In the Matter of The Commission’s Consultative Role in the Broadband Provisions of the Recovery Act*, GN Docket No. 09-40; DA Docket No. 09-668 (rel. March 24, 2009).

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

³ 15 U.S.C. § 637.

regulatory points.⁴

Socially and Economically Disadvantaged Small Business

Section 637 of the Small Business Act provides the definition for socially and economically disadvantaged business.⁵ This definition has been subject to debate by various groups, as it may be based in part on outdated data inputs. Advocacy submits that the definition adopted for use in the Recovery Act's BTOP loan/grant program should:

- (1) Allow for self-certification with respect to applicable size standards;
- (2) Tailor the appropriate size standards⁶ to reflect current economic conditions within the U.S. telecommunications sector; and
- (3) Reflect the ultimate objective of the socially and economically disadvantaged small business program, which is the maximization of participation of this specific type of loan/grant applicant.

The Office of Advocacy is available to NTIA, RUS and FCC to provide further guidance on how the final standard can best accomplish this goal. For additional information or assistance please contact Cheryl Miller Johns of my staff at (202) 205-6949 or cheryl.johns@sba.gov.

⁴ 74 Fed. Reg. 0716 (March 12, 2009).

⁵ 15 U.S.C. § 637. Advocacy notes that the FCC also has what is called the "Designated Entity" ("DE") Program, which also seeks to enhance small business participation in the Commissions competitive bidding regulations pursuant to Section 309(j) of the Communications Act of 1934.

⁶ 15 U.S.C. § 632.

Comments to the FCC for Consideration by NTIA

In order to maximize the public benefits of the BTOP loans, Advocacy submits that the FCC's consultative role should have three main components: (1) to ensure consistency with established principles and the Telecommunications Act of 1996 ("The Telecom Act" or "The Act");⁷ (2) to promote competition in unserved and underserved markets; and (3) to ensure regulatory certainty for loan recipients. The Commission has the authority to fulfill these roles as the agency charged with regulating interstate and international communications in the United States.⁸

Introduction and Summary

The Commission has invited interested parties to comment on the FCC's consultative role in developing rules to implement the Recovery Act's BTOP loans/grants.⁹ This role complements the Commission's preexisting obligations under the Telecom Act, which directs the FCC to "promote competition" and to "secure lower prices and higher quality services" for customers. This duty should shape the agency's consideration of small business needs and final recommendations to NTIA and RUS as a consultative agency partner.¹⁰

There is an overarching need to ensure that the final FCC, NTIA and RUS broadband definitions are consistent with one another and with FCC practice, to reduce burdens that small telecommunications firms may face in applying for loans. Additionally, in practice, the loan/

⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁸ See, About the FCC, available at: <http://www.fcc.gov/aboutus.html>. See also, 47 U.S.C. § 151 (stating the Commission's role in making available to all Americans "Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges"). See also, Federal Communications Commission Strategic Plan 2009-2014 (September 30, 2008) (stating that "The FCC is responsible to Congress and the American people for ensuring that an orderly framework exists within which communications products and services can be quickly and reasonably provided to consumers and businesses").

⁹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (Recovery Act).

¹⁰ See Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)(enacting the Act to "promote competition and reduce regulation in order to secure lower prices and higher quality services" for telecommunications consumers throughout the United States and to "encourage the rapid deployment of new telecommunications technologies").

grant programs need to enable small businesses that undertake new broadband projects to receive a return on their investment so that they can further stimulate the U.S. economy.

There are specific factors related to small business involvement in the loan programs that the FCC should consider in its consultative role to assist in achieving the above-mentioned goals. First, creating technologically neutral broadband definitions that address small business needs and keep pace with innovation in the telecommunications sector is a principal step in making the loan programs successful. Second, by ensuring that small firms have the ability to compete in the provision of broadband service, the FCC will serve the public interest by expanding competition and in turn increasing coverage, driving down prices, and enhancing the quality of services offered.¹¹ Removing barriers to entry to the extent possible through the broadband definitional considerations will help to achieve this goal. Finally, coordinating regulatory actions and examining how future FCC rulemakings may impact these Recovery Act projects is necessary to ensure that small companies can profit and invest in future telecommunications projects.

1. Advocacy Background.

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (“SBA”), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Part of our role under the Regulatory Flexibility Act (“RFA”) is to assist agencies in understanding how regulations may

¹¹ 47 U.S.C. § 257(b) (explaining that the Commission should promote the public interest as a part of its national policy, which is tied to the reduction of barriers to entry under 47 U.S.C. §257(a)). Advocacy notes that references to supporting and promoting the public interest appear throughout the Telecommunications Act. Making sure that small firms can successfully compete for these loans involves a number of aspects, such as providing for a streamlined, clear, and transparent applications process, removing various entry barriers, and maintaining a regulatory environment that enables competition to flourish.

impact small businesses, and to ensure that the voice of small businesses is not lost within the regulatory process.¹² Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.¹³ In addition, the RFA’s purpose is to address the adverse effect that “differences in the scale and resources of regulated entities” has had on competition in the marketplace.¹⁴

Executive Order 13272 further gives small business owners a voice in the complex and confusing federal regulatory process by directing the Office of Advocacy to work closely with the agencies to ensure that the agencies properly consider the impact of their regulations on small entities.¹⁵

2. The Definitions That the FCC Seeks Comment on Must be Uniform and Should Address Advancing Technologies and Small Business Needs

A. The Definition of “Broadband”

Congress laid the foundation for the definition of broadband in Section 706 of the Telecom Act by characterizing the term “advanced telecommunications capability.”¹⁶ Since the Act’s passage, the Commission has built upon this definition, designating broadband as an advanced service offering with an upstream and downstream speed of 200 Kilobits per second (Kbps) or greater.¹⁷ As a first step, the FCC must ensure that the broadband definition for the

¹² Pub. No. 96-354, 94 Stat. 1164 (1980).

¹³ Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

¹⁴ Pub. L. 96-354, Findings and Purposes, Sec. 4, 126 Cong. Rec. S299 (1980).

¹⁵ Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking (67 Fed. Reg. 53461)(August 16, 2002).

¹⁶ 47 U.S.C. § 706 (c)(1) (1996) (stating that “ ‘advanced telecommunications capability’ is defined, without regard to any transmission media or technology, as high-speed, switched broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology”).

¹⁷ See *Third Report*, 17 FCC Rcd at 2850-52; *Second Report*, 15 FCC Rcd at 20919-21; *First Report*, 14 FCC Rcd at 2406-08. See also, *Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, 15 FCC Rcd. 7717, 7731 (2000). In order to fulfill the requirements of the Telecom Act, the FCC instituted the use of Form 477 Reporting Requirements, which required providers of high speed service to 250 or more customers to

loan program is consistent with the agency's general definition of broadband.

Second, the FCC should note that the rapid innovation characteristic of the telecom sector has challenged these baseline definitions.¹⁸ Given the pace of technology, the definition of broadband may best be described as a "moving target." Because the FCC's current classification of broadband may be outdated, the Recovery Act programs offer an opportunity to update it, building on past Commission efforts.¹⁹ The Commission should foster the creation of a dynamic definition that incorporates their past work and recognizes that the technology in this field is advancing quickly.²⁰ To best complete this task, the FCC should compare its broadband definition against the requirements of Section 706 of the Telecom Act, using state, industry, and international data to support what speed and other designations constitute broadband.²¹ Specifically, the Commission should evaluate whether residential and/or business customers of broadband could use the set speed to receive "high-quality voice, data, graphics, and video telecommunications."²² In developing this definition, Advocacy urges the Commission to consider the various types of broadband customers' needs, specifically those of residential and

report on their broadband activity. The FCC also sets the threshold for high-speed service at 200 kbps in one direction, either upload or download.

¹⁸ See, Sherille Ismail and Irene Wu, *A Staff Report of the Office of Strategic Planning and Policy Analysis and International Bureau: Broadband Internet Access in OECD Countries: A Comparative Analysis* (October 2003).

¹⁹ In the past, the FCC has also sought comment from industry on redefining the term "advanced service" and asking whether consumer expectations have changed with regard to such service. See, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54; FCC Docket No. 04-55 (rel. March 17, 2004).

²⁰ Advocacy also stresses that this definition should be uniform across agencies, to alleviate confusion and best incorporate the final definition into a national broadband strategy. Advocacy also encourages the FCC to consider the fact that what is defined as broadband today, may not be considered broadband tomorrow.

²¹ Some industry experts claim that the current designation of 200 kbps is too low to receive video telecommunications service in the way the Act intends. See, e.g., S. Derek Turner, *Broadband Reality Check II: The Truth Behind America's Digital Decline* (August 2006), available at: <http://www.freepress.net/files/bbrc2-final.pdf> (stating that "At the thresholds set by the FCC, a user would be unable to receive, much less originate, high-quality video telecommunications, an activity which requires symmetrical connections 20 to 100 times faster than 200 kbps). Advocacy notes that DSL speeds typically start at 700 kbps, and wireless (an emerging technology) is typically measured in megabits. See also, *Broadband Connectivity Competition Policy*, FTC Staff Report (June 2007).

²² 47 U.S.C. § 706 (c)(1).

small business users.

B. The Definition of “Unserved”

Section 706 of the Telecom Act directs the FCC to foster the deployment of advanced telecommunications services to all Americans in a reasonable and timely fashion.²³ Thirteen years after the Act’s passage some small businesses today are still left with satellite service as their only option for advanced telecommunications capabilities.²⁴ To address the lack of competitive alternatives, the definition of unserved should contemplate the technology needs of small businesses and also promote competition in the provision of broadband service.

More specifically, the definition of unserved should consider speed to encourage the deployment of adequate broadband Internet service for small entities.²⁵ Because some small businesses rely heavily on content they may require greater bandwidth to support their operations. Faster broadband speeds will allow these small businesses to utilize video streaming, telemedicine, e-learning and other important applications.²⁶ In order to best understand the types

²³ 47 U.S.C. § 706 (a).

²⁴ See, *Advanced Telecom and Broadband Deployment in Arizona: ATIC Recommendations to the Telecommunications Infrastructure Subcommittee Governor’s Council on Innovation and Technology* (May 2005)(stating that “many rural Arizona communities still lack consistent coverage of basic broadband services and lack high capacity service”) [hereinafter, ATIC Recommendations].

²⁵ Advocacy notes that what is considered an “adequate” broadband speed for residential customers may not necessarily meet the needs of small business customers. Typically, small businesses download and upload larger amounts of data, and if their operations rely heavily on content they may require greater bandwidth. For example, many small businesses need the ability to use video streaming and video conferencing, both of which require real time speeds. See, e.g., The Comments of JAB Wireless, Inc., GN Docket No. 09-40 (April 8, 2009). See also, The Comments of Link Shadley, GN Docket No. 09-40 (March 25, 2009)(discussing the need for regional broadband projects that will “bring adequate bandwidth at affordable costs to all citizens, businesses and organizations”). See also, *Testimony of Roger J. Cochetti, Computing Technology Industry Association (CompTia), Before the Senate Commerce Committee* (May 25, 2006)(discussing how small computer companies are “the backbone” of America’s information economy and how small business customers of broadband service “do everything” from “Web surfing, for price quotations to instant video conferences with small business customers”) [hereinafter, CompTia]. See, e.g. *Broadband Speed Test*, available at: <http://www.speedtest.net/about.php> (highlighting the importance of speed for broadband customers and testing customer connections through a broadband speed analysis tool). Advocacy also notes that due to the prevalence of home-based businesses, it may be difficult to distinguish between residential and small business users in some instances.

²⁶ See, ATIC Recommendations, *supra* note 24 (stating that “Although the FCC defines broadband as an Internet connection at a speed of 200 kilobits per second (kbps), 200 K is already inadequate for applications such as telemedicine and e-learning that have ever increasing bandwidth requirements”).

of services needed to support different types of small businesses, the FCC should review data from current providers of small business services.

Small businesses also need a definition that will help to create multiple high-quality telecommunications projects in their area to expand service and ensure affordable prices.²⁷ The Telecom Act's competition goals further stress that the unserved definition should foster new, competitive market entrants to provide broadband service.²⁸ Competition among providers should be widely supported to give small firms a chance to service unserved areas and offer greater consumer choice to small business customers.²⁹

C. The Definition of "Underserved"

Section 706 also requires the Commission to assess the level at which these advanced services are available and to accelerate deployment through the removal of barriers to infrastructure investment.³⁰ Similar to unserved areas, the definition for underserved areas should facilitate the provision of adequate levels of broadband service to support small business operations and spur competition among small telecommunications providers. Small Internet service providers have explained to Advocacy that the small business customers that they serve traditionally have sought service upgrades on a 6 to 9 month basis. It is important that small businesses have the ability to expand their operations so that they can reach their full potential.³¹

²⁷ Advocacy notes that satellite service may be a viable option for many areas where the cost of providing alternative service is prohibitive under possible funding scenarios. As such, expansion of satellite service may also be an option, and regulatory action that drives down the price of broadband via satellite may be appropriate. *See, Notice of Ex Parte Communication by WildBlue Communications: Satellite Broadband and the ARRA*, GN Docket No. 09-40 (April 1, 2009).

²⁸ 47 U.S.C. § 257(b) (explaining that as a national policy, the FCC must eliminate market entry barriers and "seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity").

²⁹ *See, CompTia, supra* note 25 (explaining that "while we have seen gains in availability to small business since 1996, much more needs to be done. We need more suppliers, more competition, and a wider reach for broadband services. This will in turn drive innovation and investment in small business").

³⁰ *Id.*

³¹ Stephen B. Pociask for Office of Advocacy, *Broadband Use by Rural Small Businesses* (December 2005)(stating that "connected" businesses can expand their markets beyond traditional geographic boundaries, and need access to

3. Regulatory Considerations Must Ensure that the BTOP Guidelines Are Consistent With FCC Efforts and Can Enable a Return on Investment For Small Providers

A. The Non-discrimination Obligations that will be Contractual Conditions of BTOP Grants

The Recovery Act requires that the Commission coordinate with the grant-providing agencies to publish non-discrimination principles that will become part of the contractual conditions awarded under Section 6001.³² Advocacy believes that the FCC should build upon its past policy efforts in meeting this requirement.

In September 2005, the FCC released a policy statement to offer guidance on its approach to non-discrimination obligations related to the Internet and broadband consistent with its congressional directives in Section 230(b) of the Communications Act of 1934, as amended³³ and in Section 706 (a).³⁴ Congress established that it is the policy of the United States to “preserve the vibrant and competitive free market that presently exists for the Internet”³⁵ and “to promote the continued development of the Internet.”³⁶ Congress further charged the FCC with supporting this policy through the reasonable and timely deployment of “advanced telecommunications capability” to “all Americans”.³⁷ Because the FCC’s four broadband policy principles³⁸ provide an adequate foundation to the non-discrimination policies, they should shape

a variety of different technologies to meet their growing needs).

³² Recovery Act § 6001(j).

³³ 47 U.S.C. § 230 (b).

³⁴ See, *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33 (rel. September 23, 2005)(explaining that in order to ensure that “broadband networks are widely deployed, open, affordable, and accessible to all consumers”, the Commission would adopt four new principles, often referred to as the “FCC’s Broadband Policy Statement” or the “FCC’s Net Neutrality Principles”) [hereinafter, Broadband Policy Statement].

³⁵ 47 U.S.C. § 230 (b)(2).

³⁶ 47 U.S.C. § 230 (b)(1).

³⁷ 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996)).

³⁸ Broadband Policy Statement, *supra* note 34, at 3 (Listing as the four principles: “consumers are entitled to access the lawful Internet content of their choice...consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement...consumers are entitled to connect their choice of legal devices that

the contractual conditions of the BTOP grants. The network neutrality principles and the specific non-discrimination principles of the loan projects should be uniform, so that all carriers, whether loan recipients or not, are subject to the same regulatory obligations to ensure consistency.

B. *The Network Interconnection Obligations*

The Recovery Act also requires the FCC to coordinate with respect to publishing network interconnection obligations as part of the contractual conditions of grants awarded.³⁹ Network interconnection obligations represent another important policy aspect directly tied to the success of small carrier recipients of The BTOP loans/ grants. None of the telecommunications projects funded by the Recovery Act will have the potential to flourish and provide increased connectivity at reasonable prices absent network interconnection obligations. Wireline and wireless networks need to connect to existing infrastructure. As such, the FCC's consultative role is critical in ensuring that the relevant language in the various broadband grant/loan programs addresses this need. Advocacy believes that Section 251⁴⁰ and other relevant portions of the Telecom Act lay the foundation for network interconnection obligations, and encourages the FCC to rely upon these sections in advising NTIA to further ensure consistency of policies.

C. *Other Regulatory Considerations*

Coordination of regulatory policies is important to the success of small business participation in the Recovery Act's loan/grant programs. Moreover, the need for enhanced coordination extends the FCC's consultative role beyond definitional considerations into their regulatory role established by the Telecom Act. Regulatory certainty dictates that once the definitions are

do not harm the network...consumers are entitled to competition among network providers, application and service providers, and content providers").

³⁹ Recovery Act § 6001(j).

⁴⁰ 47 U.S. C. § 251 (requiring carriers to interconnect, afford access to rights of way and charge reasonable rates to connect with other carriers).

selected, the loans/grants are disbursed, and the shovels are in the ground, the Commission needs to focus on factors that will support the long-term success of the new telecommunications projects. Advocacy believes that the FCC's policies can and should support the success of new market entrants so that they can innovate and invest in small business.

To accomplish this goal, the Commission should consider these various loan projects and how FCC regulatory actions may have an impact on small firm recipients of the BTOP loans as they move forward with relevant rulemakings. This will ensure that the small companies that have undertaken difficult build-out projects have a meaningful opportunity to secure a return on the investments they make and further stimulate the economies in their area with future projects and job opportunities.

4. Conclusion.

To ensure that that Congress' goals in promoting competition via the Telecom Act and the Recovery Act are fully realized, Advocacy urges the FCC to focus on harmonizing the broadband definitions in the loan programs and in overarching FCC policy. Additionally, Advocacy believes that the definitions need to address speed in a way that takes into account the needs of small business customers in addition to residential customers. Finally, Advocacy encourages the creation of language that will reduce entry barriers and the establishment of regulatory actions that will allow new entrants to build, maintain, expand and upgrade their networks. This will provide the competition that the U.S. telecommunications market needs to improve the quantity and quality of broadband service in an efficient manner throughout unserved and underserved areas in the United states. The Office of Advocacy is available to assist the Commission in its outreach to small business or in its consideration of the impact upon them. For additional information or assistance, please contact me or Cheryl Miller Johns of my

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Respectfully submitted,

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via electronic filing

Certificate of Service

I, Cheryl M. Johns, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this April 13, 2009, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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