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**Before the  
NATIONAL TELECOMMUNICATIONS AND INFORMATION  
ADMINISTRATION AND THE RURAL UTILITIES SERVICE**

In the Matter of: )  
)  
Joint National Telecommunications and ) **Docket No. 0907141137-91375-05**  
Information Administration - Rural Utilities )  
Service Request for Information )  
)  
)  
)

**COMMENTS OF THE  
TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Telecommunications Industry Association (TIA) hereby submits comments to the National Telecommunications and Information Administration (NTIA) and the Rural Utilities Service (RUS) in the above-captioned proceeding.<sup>1</sup> TIA members appreciate the opportunity to discuss the rules and procedures governing fund awards for the RUS Broadband Initiatives Program (BIP) and the NTIA Broadband Telecommunications Opportunity Program (BTOP)<sup>2</sup> and any necessary changes for the Second BIP/BTOP Notice of Funds Availability (Second BIP/BTOP NOFA).

The Telecommunications Industry Association (TIA) represents the global information and communications technology (ICT) industry through standards development, advocacy, tradeshows, business opportunities, market intelligence and world-wide environmental regulatory analysis. Its 600 member companies manufacture or supply the products and services used in the provision of broadband and broadband-enabled

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<sup>1</sup> Broadband Initiatives Program and Broadband Technology Opportunities Program, Joint Request for Information, 74 Fed. Reg. 58,940 (Nov. 16, 2009) (Second NTIA-RUS RFI).

<sup>2</sup> Broadband Initiatives Program, Broadband Technology Opportunities Program, Notice of Funds Availability, 74 Fed. Reg. 33,104 (July 9, 2009) (First BIP/BTOP NOFA).

applications. Since 1924, TIA has enhanced the business environment for broadband, mobile wireless, information technology, networks, cable, satellite and unified communications. Members' products and services empower communications in every industry and market, including healthcare, education, security, public safety, transportation, government, the military, the environment and entertainment.

## **SUMMARY.**

It is essential that broadband infrastructure networks are deployed for all Americans and that all Americans adopt broadband technology as part of their lives. The use of broadband networks, and particularly next-generation networks, advance many of our nation's priorities, including job growth,<sup>3</sup> our nation's health and education, and public safety. The First BIP/BTOP NOFA took a strong step toward meeting the purposes of the broadband funding provisions of American Recovery and Reinvestment Act of 2009 (ARRA) by focusing on Last Mile projects bringing broadband directly to unserved and underserved Americans and anchor institutions, and providing funding for Sustainable Adoption projects. The RUS and NTIA should not scale back funding for Last Mile projects or Sustainable Adoption projects, since this would severely limit the ability of Applicants to deliver Last Mile connectivity to households and entities identified in the ARRA and consumers' adoption (use) of this broadband availability. Last Mile projects and Sustainable Adoption projects targeted to households in the areas served by such

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<sup>3</sup> Robert W. Crandall et al., *The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data*, Issues in Economic Policy, No. 6, at 2 (July 2007), available at [http://www.brookings.edu/~media/Files/rc/papers/2007/06labor\\_crandall/06labor\\_crandall.pdf](http://www.brookings.edu/~media/Files/rc/papers/2007/06labor_crandall/06labor_crandall.pdf) (last visited Nov. 25, 2009) ("We find that nonfarm private employment and employment in several industries is positively associated with broadband use. More specifically, for every one percentage point increase in broadband penetration in a state, employment is projected to increase by 0.2 to 0.3 percent per year.... At a more disaggregated level, we find that employment in both manufacturing and services industries (especially finance, education and health care) is positively related to broadband penetration.").

funding (as well as underserved households) can significantly spur Middle Mile broadband infrastructure development; conversely, if Last Mile or Sustainable Adoption funding is limited, investments in Middle Mile projects will likely decrease. The present rules fund anchor institutions as Middle Mile projects. However, treating them as Last Mile projects and funding them regardless of their location, and continued focus on Sustainable Adoption projects (targeted to unserved and underserved households) will best meet the ARRA's goals.

In order to provide BIP funding to the best broadband infrastructure and adoption projects, the Second BIP/BTOP NOFA should allow all projects in rural areas – regardless of their location – to qualify for BIP grants in accordance with the other criteria established in the First BIP/BTOP NOFA. Additionally, it is crucial that RUS and NTIA have the authority to allow transfers of BIP- and BTOP-funded facilities when such transfers serve the purposes of the ARRA and the BIP and BTOP programs.

The RUS and NTIA must expedite fund allocations to promote job growth and meet the other goals of the ARRA by streamlining procedures in the second NOFA. First, infrastructure and adoption applications for projects serving multiple areas, which have one or more areas that are shown not to be unserved or underserved, should be allowed further review after excluding the non-qualifying projects. Additionally, information submitted in the First Round challenging claims that an area is unserved or underserved should be referenced and reviewed for any proposed projects in the Second Round that would serve that area.

In order to increase participation in the BIP and BTOP, NTIA and RUS should make clear that the award terms and conditions for infrastructure and adoption projects apply

exclusively to the Applicants themselves, and do not extend to project partners. Express clarification that award terms and conditions apply exclusively to Applicants will remove reluctance on the part of some highly-qualified would-be project partners and thus increase the use of the best and most cost effective contractors, subcontractors, and service providers to awardees who may have been reluctant to partner with Applicants due to fear that certain rules and reporting requirements in the First BIP/BTOP NOFA would apply to them.

RUS and NTIA should clarify what nondiscrimination rules apply if any nondiscrimination rules created by the Federal Communications Commission (FCC) conflict with nondiscrimination rules attached to BIP/BTOP funds and consider establishing a time limitation on the application of nondiscrimination requirements on awardees.

Finally, RUS and NTIA should modify aspects of the First BIP/BTOP NOFA that clearly disadvantage applications proposing multi-state or national projects. All providers capable of broadband delivery must be given an equal opportunity to succeed if the ARRA is to be implemented in a technology neutral manner as mandated by Congress.

As RUS and NTIA evaluate ways to make their programs even stronger, these policy proposals will increase delivery of broadband to households and anchor institutions, encourage program participation, and streamline the BIP and BTOP processes to expedite the delivery of award funding.

## DISCUSSION

### **I. LAST MILE INFRASTRUCTURE AND SUSTAINABLE ADOPTION PROJECTS, INCLUDING THOSE FOR ANCHOR INSTITUTIONS, WILL SPEED MIDDLE MILE DEPLOYMENT AND SHOULD NOT BE FUNDED BELOW THE RATIOS SET IN THE FIRST BIP/BTOP NOFA.**

In its Second NTIA-RUS RFI, NTIA and the RUS seek comment on whether they should “focus on or limit [the Second BIP/BTOP NOFA’s] funding on projects that will deliver Middle Mile infrastructure facilities into a group of communities and connect key anchor institutions within those communities.”<sup>4</sup> TIA believes that Last Mile infrastructure and Sustainable Adoption projects targeted to households should not be funded below the ratios set forth in the first BIP/BTOP NOFA. TIA urges RUS and NTIA to continue to amply fund Last Mile and Sustainable Adoption projects and modify application rules to make clear that anchor institutions in all areas are eligible for such funding.

The First BIP/BTOP NOFA properly balances funding for broadband infrastructure and Last Mile projects. The First BIP/BTOP NOFA provided up to \$1.2 billion in BIP funding for Last Mile projects to serve anchor institutions and other end users and end-user devices.<sup>5</sup> Further, the BIP allowed up to \$800 million for loans or loan/grant combinations for Middle Mile projects.<sup>6</sup> These funding levels reflect the goals of the

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<sup>4</sup> See Second NTIA-RUS RFI at 58,942.

<sup>5</sup> See *id.* at 33,109 (stating that, “Last Mile project means any infrastructure project the predominant purpose of which is to provide broadband service to end users or end-user devices (including households, businesses, community anchor institutions, public safety entities, and critical community facilities). TIA encourages the RUS and NTIA to keep the First NOFA’s definition of anchor institutions, which includes, among others, public safety entities. See First BIP/BTOP NOFA at 33,108.

<sup>6</sup> See *id.* (defining Middle Mile as a broadband infrastructure project that does not predominantly provide broadband service to end users or to end-user devices, and may include interoffice transport, backhaul, Internet connectivity, or special access).

broadband programs in the ARRA<sup>7</sup> and generate even greater deployment of Middle Mile facilities. Revenue from broadband subscribers served via Last Mile projects and household-targeted Adoption projects will fund expansion and spur continued investment that will include connecting community anchor institutions. Excluding RUS and BTOP infrastructure funding from Last Mile projects would severely limit this increased Middle Mile growth. Thus, the Second BIP/BTOP NOFA should continue to focus funding on projects that deliver broadband to unserved and underserved Americans through Last Mile Funding and that increase broadband Adoption by unserved and underserved households.

Additionally, TIA agrees with NTIA and RUS that funding should continue to be directed to all worthy infrastructure projects, including those that ensure anchor institutions have broadband access.<sup>8</sup> In order to achieve this goal, TIA recommends modification to the BIP/BTOP application and eligibility requirements. The Second BIP/BTOP NOFA should remove the obligation that, to qualify for funding, projects providing broadband to anchor institutions be located in unserved or underserved areas. The First BIP/BTOP

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<sup>7</sup> See American Recovery and Reinvestment Act of 2009, § 6001(b), Pub. L. No. 111-5, 123 Stat. 115 (2009) (“Recovery Act”). Section 6001(b) of the ARRA states that the BTOP Purposes are 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 (5) stimulate the demand for broadband, economic growth, and job creation.

<sup>8</sup> See Second NTIA-RUS RFI at 58,942.



NOFA limits funding for anchor institutions to those in unserved and underserved areas.<sup>9</sup> As a result, some libraries, elementary and high schools, universities, public safety entities, hospitals, health clinics, and other anchor institutions in urban and suburban areas that currently do not have broadband service may not be eligible for BTOP funding. These institutions, regardless of their location, need broadband. Thus, TIA supports eliminating the requirement that projects targeting unserved anchor institutions be located in an unserved or underserved area.

## **II. NTIA AND RUS SHOULD EXPEDITE ALLOCATION OF BIP AND BTOP FUNDS TO SPEED DEPLOYMENT AND ADOPTION OF BROADBAND AND STIMULATE THE ECONOMY.**

TIA urges RUS and NTIA to expedite grant and loan awards from the First Round of funding and that of the Second Round as quickly as possible. TIA members are increasingly aware of public and private service providers withholding investments in ICT today. Many providers are awaiting BIP and BTOP grant and loan awards to make such investments, thereby stalling the economic engine the ICT industry can be in our nation's difficult economic times. With the First Round of grant and loan awards not yet made, ICT investment spending could be further stalled for at least 2 to 3 quarters. This will have a devastating impact on our economy – one that NTIA can prevent by making initial BTOP grant awards as quickly as possible.

TIA recognizes the importance of carefully evaluating BIP and BTOP applications to ensure that all Americans benefit from the best projects. Simultaneously, TIA believes that funding worthy projects as quickly as possible will speed economic recovery. Thus,

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<sup>9</sup> See First BIP/BTOP NOFA at 33,114 (stating “For the purposes of BTOP grant funds, applications for Last Mile projects must be for unserved and underserved areas and have the predominant purpose to provide broadband service to end users or end user devices (including home, businesses, schools, libraries, medical and health care providers, community support organizations, public safety entities, vulnerable populations and other institutions and individuals).

TIA urges RUS and NTIA to balance these two interests and expedite the awards for the First and Second Rounds of funding.

**III. THE SECOND NOFA SHOULD AMEND THE “NON-REMOTE” PROVISION AND ALLOW ALL RURAL AREAS TO RECEIVE BIP GRANTS.**

TIA urges that RUS and NTIA amend provisions in the First BIP/BTOP NOFA to ensure that all truly rural areas, notwithstanding their proximity to a city or other urbanized area, can equally benefit from BIP grant funding and gain access to broadband service and technologies.

Of the \$1.2 billion available for Last Mile projects, up to \$400 million was made available for grants covering “remote area” projects, and up to \$800 million of this sum was made available for loans or loan/grant combinations for “non-remote” projects.<sup>10</sup>

The First BIP/BTOP NOFA defines a “remote area” as an unserved, rural area 50 miles from the limits of a non-rural area.<sup>11</sup> The First BIP/BTOP NOFA also makes clear that projects providing broadband to “non-remote” and underserved areas may only receive funding in the form of loans or loan/grant combinations.<sup>12</sup> In contrast, “remote area” projects will exclusively receive grant funding.<sup>13</sup> Further, the First BIP/BTOP NOFA states that the size of the grant portion of any loan/grant combination for a remote project

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<sup>10</sup> See First BIP/BTOP NOFA at 33,109.

<sup>11</sup> A “rural” area is defined in the NOFA as an “area, as confirmed by the latest decennial census of the Bureau of the Census, which is not located within: 1. A city, town, or incorporated area that has a population of greater than 20,000 inhabitants; or 2. An urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants. For purposes of the definition of rural area, an urbanized area means a densely populated territory as defined in the latest decennial census of the U.S. Census Bureau.” See *id.*

<sup>12</sup> *Id.* at 33,106.

<sup>13</sup> See *id.*

cannot exceed the amount of the loan portion of the award.<sup>14</sup> However, a project serving a remote area can receive grants totaling up to 100 percent of its cost.<sup>15</sup>

These provisions create a bias against rural areas closer to cities or urbanized area than others; rural “non-remote” areas are excluded from a higher percentage of grant funding and must incorporate loans matching the amount of grant funds requested. The First BIP/BTOP NOFA also extends this imbalance in the BIP project application scoring criteria section entitled, “Remote Area Targeting.” In this section, the First BIP/BTOP NOFA states that five points will be awarded to projects serving non-remote areas that are at least 50 miles from a non-rural area and up to four additional points for each additional 50 miles that at least one proposed funded service area is located away from a non-rural area.<sup>16</sup>

There are several outcomes resulting from the NOFA’s provisions on “remote” and “non-remote” BIP funding, each of which are inconsistent with the language and intent of the ARRA. First, these provisions discourage potential Applicants from reaching many unserved areas despite the fact these areas have the same needs for broadband as rural areas farther away from cities. The emphasis on predominantly providing loan funding for “non-remote” areas, in combination with the scoring preferences targeted toward “remote areas,” make serving “non-remote” areas with BIP funding far less viable for Applicants and indicate that they will have a far greater chance to receive funding for “remote” projects. Second, the decision to inject low-cost capital into rural broadband projects, while requiring them to be sustainable on a going-forward basis, forces

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<sup>14</sup> *See id.*

<sup>15</sup> *See id.* at 33,114.

<sup>16</sup> *See id.* at 33,118.

Applicants to make business judgments about whether areas can generate sufficient cash flow. Those judgments may or may not align with the First BIP/BTOP NOFA delineation of “remote” versus “non-remote.” By parsing the rural geographic areas, the First BIP/BTOP NOFA may present Applicants with an insurmountable hurdle to their business plans and the ability to sustain the network. A better approach for RUS is to allow providers to step forward with what they believe to be sound business judgments and evaluate the applications based on the statutory provisions. Thus, many rural areas will be left behind in the effort to bridge the broadband divide through BIP funding. Such a result does not reflect the ARRA’s statutory language, which makes no distinction between “remote” and “non-remote” areas when calling upon the RUS to place priority on funding projects for broadband deployment in rural communities.

In order to create balance in the BIP program and make funding equally available to rural areas that are closer to cities than others, TIA urges that the Second BIP/BTOP NOFA not include provisions that provide considerable advantage to rural areas that are located further than 50 miles away from a city or urbanized area.

#### **IV. THE SECOND BIP/BTOP NOFA SHOULD ALLOW RUS OR NTIA TO APPROVE TRANSFERS OF BIP- OR BTOP-FUNDED FACILITIES.**

The Second NTIA-RUS RFI asks whether the First BIP/BTOP NOFA’s general prohibition of the sale or lease of BIP- or BTOP-funded broadband facilities should “be revised to adopt a more flexible approach toward awardee mergers....”<sup>17</sup> TIA urges that, in the Second BIP/BTOP NOFA, the ability of RUS and NTIA to use discretion is not restricted, and allow transfers of BIP- or BTOP- funded facilities when such transactions further the purposes of the programs.

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<sup>17</sup> Second NTIA-RUS RFI at 58,944.

The First BIP/BTOP NOFA prohibits the sale or lease of any portion of the BIP-funded broadband facilities unless the awardees follow very specific and financially-straining guidelines.<sup>18</sup> RUS or BTOP can approve a sale or lease of facilities only if: a) it is for adequate consideration; b) the purchaser commits to abiding by the terms and conditions of the project; and c) an application for BIP or BTOP funds includes the proposed sale or lease, or the agencies waive this provision for any sale or lease occurring after the tenth year from the date the funds are awarded.<sup>19</sup>

It is appropriate for RUS and NTIA to take steps against speculators who could manipulate the sale or lease of BIP- or BTOP-funded facilities; review of such proposed transactions may be effective in preventing unjust enrichment. However, categorically restricting the sale of such facilities for ten years (absent inclusion of a planned sale or lease in an application) discourages legitimate providers to unserved, underserved, and rural areas from applying for funding for worthy projects. Further, this provision may discourage private sector Applicants from partnering with anchor institutions to deploy high-capacity broadband service. Additionally, this restriction limits the discretion of RUS or NTIA to approve transactions that may further the purposes of the broadband programs through economies of scale or other efficiencies. Thus, TIA urges that the Second BIP/BTOP NOFA allow RUS and NTIA to approve the sale or lease of BIP- or BTOP-funded facilities at any time upon determination that the transaction advances BIP or BTOP objectives.

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<sup>18</sup> See First BIP/BTOP NOFA at 33,123.

<sup>19</sup> See *id.*

**V. APPLICATIONS PROPOSING SERVICE FOR MULTIPLE AREAS SHOULD NOT BE REJECTED IN TOTO IF ONE OR MORE AREAS DO NOT QUALIFY AS UNSERVED OR UNDERSERVED.**

The Second NTIA-RUS RFI requests suggestions on how to streamline the BIP and BTOP application process.<sup>20</sup> TIA believes that, in order to make the application process more efficient and less costly for Applicants, any application proposing to serve multiple unserved or underserved areas should not be completely rejected when one proposed area is found not to be unserved or underserved.

The First BIP/BTOP NOFA indicates that, if one area proposed to be served in an application proposing to serve more than one unserved or underserved area is shown not to be unserved or underserved, the entire application will be rejected.<sup>21</sup> As a result, Applicants are discouraged from submitting an application that proposes serving multiple areas out of fear of having that entire application rejected. Thus, Applicants are inclined to submit separate applications for each and every area it seeks to serve, unnecessarily and dramatically increasing the number of applications RUS and NTIA must review. This procedure results in increased effort and cost to both the agencies and Applicants.

Thus, TIA requests that the Second BIP/BTOP NOFA allow an application proposing to serve multiple unserved or underserved areas that has been shown to propose serving one or more served areas to not be fully rejected. Alternatively, only the proposals for serving areas not unserved or underserved should be rejected from the proposal, and all other projects in the application should remain and be further reviewed. This “carve-out”

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<sup>20</sup> See Second NTIA-RUS RFI at 58,941.

<sup>21</sup> See First BIP/BTOP NOFA at 33,122 (stating that, “[i]f ... the applicant’s proposed funded service area is not [unserved or] underserved, both RUS and NTIA may reject the application.”).

procedural change will streamline the application process and make application reviews more efficient.

**VI. SERVICE PROVIDERS SHOULD NOT BE REQUIRED TO RE-FILE INFORMATION SUBMITTED IN THE FIRST ROUND CHALLENGING AN APPLICANT'S ASSERTION THAT A PROJECT IS IN AN UNSERVED OR UNDERSERVED AREA.**

As NTIA and RUS seek to streamline the BIP and BTOP process, they should consider how data and other information provided in the first application process can be used in the second application process to speed review of applications and minimize costs of all interested parties. For example, information submitted in the First Round of funding that challenge assertions in applications that a project will be located in an unserved or underserved should be applied to Second Round projects serving the same areas.

The First BIP/BTOP NOFA allows service operators to provide information rebutting claims that a project will be located in an unserved or underserved area.<sup>22</sup> This provision effectively ensures that proposed projects meet a central goal of the ARRA's provisions – to bring broadband to unserved and underserved areas. An opportunity exists to advance this goal in the Second BIP/BTOP NOFA by allowing operators to reference previously-submitted information on whether a proposed project will be located in an unserved or underserved area. This step will prevent operators from the costly and time-consuming process of resubmitting duplicative data and make the agencies' review process more efficient.

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<sup>22</sup> *See id.* at 33,122 (“RUS and NTIA will post a Public Notice of the proposed funded service areas of each Broadband Infrastructure application a <http://www.broadbandusa.gov> for a 30-day period. The Public Notice will provide existing service providers an opportunity to submit to the agencies information regarding their service offerings.”).

**VII. NTIA AND RUS SHOULD REMOVE ANY DOUBT THAT TERMS AND CONDITIONS IMPOSED UPON AWARDEES DO NOT EXTEND TO SUBAPPLICANTS, CONTRACTORS, OR SERVICE PROVIDERS NAMED OR USED FOR THE APPLICANT'S PROJECT.**

The Second NTIA-RUS RFI seeks advice on how to encourage Applicant participation and enhance the BIP and BTOP.<sup>23</sup> TIA urges RUS and NTIA to expressly state that the terms and conditions of BIP or BTOP funding in the Second BIP/BTOP NOFA exclusively apply to grant or loan awardees. This will remove any doubt in this regard and thus encourage applications for efficient and effective projects that meet the purposes of the programs and allow awardees to partner with the best and most cost-effective contractors, subcontractors, and service providers to awardees (and make the private sector project partners more comfortable being named in an application)..

Under the First BIP/BTOP NOFA, infrastructure contractors and subcontractors must abide by the terms and conditions of the BIP or BTOP for the life of the project.<sup>24</sup> RUS and NTIA should evaluate how the current requirement may discourage Applicants and imposes inefficiencies and excessive costs to awardees. Applying the award terms and conditions to contractors, subcontractors, and services providers who can best implement the project can chill interest among these entities from participating in BIP and BTOP projects. The requirements may simply be too costly for the supporting entities and diminish profits margins to the point of futility. As a result, awardees may be forced to work with less qualified, less efficient, and less cost effective entities, thwarting efforts by RUS and NTIA to award grants and loans to the most cost effective projects that meet other goals of the BIP and BTOP programs.

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<sup>23</sup> See Second NTIA-RUS RFI at 58,944.

<sup>24</sup> See First BIP/BTOP NOFA at 33,123 (“Awardees, including all contractors and subcontractors, are required to comply with the obligations set forth in the Recovery Act and the requirements established herein. Any obligation that applies to the awardee shall extend for the life of the award-funded facilities.”)



While Sustainable Adoption applications do not have the same stipulations regarding contractors and subcontractors having to abide by the terms and conditions of the BIP or BTOP for the life of the project, express clarification that award terms and conditions are to be applied exclusively to the Applicants will remove any remaining reluctance on the part of some highly-qualified would-be project partners. NTIA or RUS would not want to discourage Applicants from naming project partners in their application; it is important that NTIA and RUS know that leading technology companies are willing to partner in an application, as this fact can go a long way to demonstrate the financial strength and sustainability of a proposed project. While NTIA and RUS may believe that this Applicant-partner distinction is widely understood by the public with respect to Adoption applications, it would be very helpful for the rules to expressly clarify that BIP and BTOP terms, conditions, reporting and requirements are limited to the Applicant only.

In order to encourage participation of the most effective entities that can carry out the work necessary to complete projects deemed worthy of federal funding, TIA urges NTIA and RUS to make clear that it will limit application of BIP and BTOP terms, conditions, reporting and requirements to awardees.

#### **VIII. NTIA AND RUS SHOULD CLARIFY AMBIGUITY RELATED TO THE APPLICATION OF FUTURE FCC NONDISCRIMINATION RULES**

The Second BIP/BTOP RFI asks whether RUS and NTIA should make any “minor” adjustments to the nondiscrimination requirements established in the NOFA.<sup>25</sup> In the

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<sup>25</sup> See Second NTIA-RUS RFI at 58,944 (“Although RUS and NTIA are not inclined to make significant changes to the interconnection and nondiscrimination requirements, are any minor adjustments to these requirements necessary?”).

First BIP/BTOP NOFA, the RUS and NTIA assigned to BIP and BTOP funding awardees the nondiscrimination policies of the FCC's Internet Policy Statement and listed additional nondiscrimination requirements.<sup>26</sup> However, the First BIP/BTOP NOFA is ambiguous as to the applicability of these requirements in the event the FCC ultimately adopts new nondiscrimination rules:

To the extent that the FCC takes action in this area, such as by modifying its Internet Policy Statement or by adopting additional or different rules or policies, awardees will become subject to FCC rules and policies in lieu of the conditions set forth only to the extent that the FCC rules or policies effectively supersede the conditions set forth above.<sup>27</sup>

TIA is concerned that, as presently written in the NOFA, the grantees may face inconsistent and duplicative obligations. It is unclear how the terms “supersede” and “only to the extent” are interpreted in the context of the First NOFA and which rules govern in the case of an incongruity. This uncertainty may also act as a deterrent to potential Applicants, since grantees could face burdens that their competitors may avoid, depending on any nondiscrimination requirements imposed by the FCC. RUS and NTIA can remedy this problem by making clear in the Second BIP/BTOP NOFA the definition of “supersede” and which rules apply if superseding FCC rules conflict with rules attached to BIP/BTOP funds.

Another discrepancy between the First BIP/BTOP NOFA and potential FCC rules is that RUS and NTIA requirements apply indefinitely to the life a project. In contrast, rules implemented by the FCC can be updated as technology and the broadband marketplace evolve. Thus, in the Second BIP/BTOP NOFA, the agencies should consider establishing

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<sup>26</sup> See First BTOP/BIP NOFA at 33,131-33,133.

<sup>27</sup> *Id.* at 33,134.

a time limitation on the application of nondiscrimination requirements on awardees.<sup>28</sup>

This could assuage hesitation of potential Applicants caused by nondiscrimination obligations. Further, this will allow for consistency in federal law since FCC rules would apply uniformly to all broadband networks upon expiration of NOFA requirements.

#### **IX. APPLICATION PROCESSES THAT DISADVANTAGE MULTI-STATE AND NATIONAL PROJECTS SHOULD BE MODIFIED.**

TIA recommends that NTIA and RUS modify certain aspects of the First BIP/BTOP NOFA that disadvantaged large providers and others proposing multi-state or national projects. Adopting the four recommendations discussed below will help level the playing field for all Applicants.

First, RUS and NTIA should reconsider its use of the Broadband USA Mapping Tool in connection with Broadband Infrastructure applications. The Mapping Tool is fundamentally flawed because it requires manual entry of service area boundaries on a county-by-county basis. For Applicants proposing projects covering a wide area, the associated administrative burdens and costs are daunting. In lieu of the Mapping Tool, TIA recommends that the Second BIP/BTOP NOFA include a list of census tracts or blocks which Applicants could simply select to define their coverage area. All Applicants – and in particular those proposing broadband service on a multi-state or national basis – would benefit from this straightforward, uncomplicated means of specifying geographic service boundaries. A less attractive alternative, but one that still marks an improvement over the Mapping Tool, would allow for the submission of an

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<sup>28</sup> AT&T Inc. and BellSouth Corporation Application for Transfer of Control, *Memorandum Opinion and Order*, 22 FCC Rcd 5663 (2007).

Excel spreadsheet or Word document that lists the census blocks covered by the application.

Second, TIA recommends elimination of the requirement that projects requesting more than \$1 million in funding be certified by a professional engineer registered in each of the states where service will be provided.<sup>29</sup> While certification of a project's technical feasibility is a sound requirement, mandating certification by engineers registered in each state where service is proposed is plainly excessive and needlessly duplicative – especially where a uniform technology is involved. For example, broadband service providers with a national or regional footprint should be able to have their projects certified by a single engineer qualified to attest to the technological viability of a satellite delivery system. Requiring anything more would impose unnecessary costs and burdens on Applicants.

Moreover, multi-State projects should not be excluded from review by individual States; unfortunately, it seems that many States only reviewed (and thus ranked) applications that were for their State only, rather than broader applications that covered their State as well as other States. This prevented in many highly qualified, well funded multi-State applications from being considered at the State level. For streamlining purposes, Applicants should be encouraged to continue to file multi-area or multi-State applications – and should be assured that they will be considered by each State named in an application.

Finally, to avoid the prospect of future, but unforeseen, discriminatory treatment of any type of Applicant, TIA strongly recommends that NTIA and RUS reserve for themselves

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<sup>29</sup> See Broadband Infrastructure Application Submission to RUS (BIP) and NTIA (BTOP), Section F, Item 31 at 14 (Certification by Professional Engineer).

the authority to grant waivers of any Second BIP/BTOP NOFA requirement that an Applicant adequately demonstrates to be unnecessary, burdensome or otherwise contrary to the public interest. Had this waiver provision been in place during the First BIP/BTOP NOFA, the administrative burdens discussed above could have been avoided.

