

US\$7.2 BILLION FOR BROADBAND IN STIMULUS BILL COMES WITH NON-DISCRIMINATION OBLIGATIONS

The US\$787 billion stimulus bill that President Obama signed into law on February 17, 2009—the American Recovery and Reinvestment Act of 2009 (Act)—includes a variety of broadband-related programs, such as:

- US\$4.7 billion for the Broadband Technology Opportunities Program (BTOP) which includes:
 - US\$350 million for the Commerce Department’s National Telecommunications and Information Administration (NTIA) to develop and make publicly available on website within two years a map of the United States that identifies broadband deployment and availability.
 - US\$200 million for grants expanding public computer center capacity.
 - US\$250 million for programs to encourage sustainable adoption of broadband service.
 - Authority and funding for the Federal Communications Commission (FCC) to issue a national broadband plan, within one year of enactment of the Act, that establishes benchmarks and strategies for universal broadband access and use in the United States.¹
- US\$2.5 billion for grants, loans and loan guarantees for broadband infrastructure from the Agriculture Department’s Rural Utility Service (RUS).

Of the US\$4.7 billion for the BTOP, which is to be established by NTIA, US\$4.35 billion must be spent on, among other things, grants to build out broadband in “unserved” and “underserved” areas. This client advisory will describe the BTOP and, in particular, the Act’s requirements that broadband providers that accept funding must also agree to comply with “non-discrimination” and “network interconnection” obligations, including, at a minimum, adherence to the principles set forth in the FCC’s 2005 *Internet Policy Statement*. These obligations are to be defined by the official that oversees NTIA—the Assistant Secretary of Commerce for Communications and Information (Assistant Secretary)—in coordination with the FCC. How the Assistant Secretary defines these obligations will be closely

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¹ For full text of the American Recovery and Reinvestment Act of 2009, please visit: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr016.111.pdf.

followed by both sides in the long running debate over net neutrality and open access.

BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM

BTOP grants may be made for the following purposes:

- acquire equipment, instrumentation, networking capability, hardware and software, digital network technology, and infrastructure for broadband services;
- construct and deploy broadband infrastructure;
- ensure access to broadband service by community anchor institutions;
- facilitate access to broadband service by vulnerable populations, such as low-income and aged, to provide educational and employment opportunities;
- construct and deploy broadband facilities to improve public safety broadband communications services; and
- other projects that the Assistant Secretary finds consistent with the purposes of the program.

Federal funding of any project may not exceed 80 percent, unless the Assistant Secretary grants a waiver or determines financial need. All BTOP grants must be made before the end of fiscal year 2010. A report on the status of the program to Congress must be made every 90 days.

Grantees may include (i) a state or local government or Indian tribe; (ii) a nonprofit foundation, corporation, institution, or association; or (iii) “any other entity, including broadband service or infrastructure provider, that the Assistant Secretary finds by rule to be in the public interest.” In determining whether “any other entity” will be eligible, the Assistant Secretary must do so in a “technologically neutral manner” to the extent practicable to promote the purposes of the program. The Conference Report notes that “[i]t is the intent of the Conferees that . . . as many entities as possible be eligible to apply for a competitive grant, including wireless carriers, wireline carriers, backhaul providers, satellite carriers, public private partnerships, and tower companies.”

Grantees must also detail how funds will be used to carry out BTOP’s purposes; demonstrate that they could

not implement the project without the funds and that the funds are properly appropriated; and disclose any other government funds relating to the proposed project. Grantees must provide assurances that they will substantially complete funded projects within two years following an award and in accordance with project timelines. Grantees must file quarterly reports, which will be made public, on use of the funds and progress fulfilling the grant objectives.

NTIA must consider certain factors in awarding grants, including whether a grant will: (i) increase the affordability or subscribership to the greatest population of users in the area; (ii) provide the greatest broadband speed possible to the greatest population of users in an area; (iii) enhance service for healthcare delivery, education, or children to the greatest population of users in the area; and (iv) not result in unjust enrichment because the entity has applied for support for non-recurring costs through another federal program in the area. In addition, NTIA must award at least one grant in each state. NTIA also must consider whether the applicant is a socially and economically disadvantaged small business.

The terms “unserved area,” “underserved area,” and “broadband” are not defined. Rather, Congressional Conferees instruct the NTIA to coordinate with the FCC its understanding of these terms. With regard to “broadband service,” “the Conferees intend that the NTIA take into consideration the technical differences between wireless and wireline networks, and consider the actual speeds that broadband networks are able to deliver to consumers under a variety of circumstances.”

IMPLICATIONS FOR NET NEUTRALITY AND OPEN ACCESS

In addition to the requirements described above, BTOP grantees are required to adhere to the non-discrimination and network interconnection obligations determined by the Assistant Secretary in coordination with the FCC. Those non-discrimination and network interconnection obligations must be at least as strict as those contained in the FCC’s 2005 *Internet Policy Statement*, which provides, with respect to wireline facilities:

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

As Section 6001(j) of the Act states: “[T]he 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.”

Possible points of contention in defining non-discrimination and network interconnection obligations may include:

- whether and to what extent the Assistant Secretary may go beyond the Commission’s *Internet Policy Statement*;
- whether the obligations apply only to facilities constructed with BTOP funds or whether they apply to all of a grantee’s facilities;
- applicability of those obligations to wireless networks in light of the fact that, to date, the *Internet Policy Statement* has only been applied within the telephone wireline context and to cable broadband networks; and
- enforcement of the obligations.

How these points of contention and others are resolved may impact the attractiveness of the grant program and its ultimate success in stimulating additional build-out of broadband infrastructure.

We hope that you have found this client advisory useful. If you have additional questions, please contact:

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