

# **The International Comparative Legal Guide to: Telecommunication Laws and Regulations 2010**

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# Recent Developments in U.S. Broadband Policy

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### Introduction and Background

U.S. policy has encouraged nationwide broadband deployment for over a decade, but the recent stimulus package - the American Recovery and Reinvestment Act of 2009 ("Recovery Act") - has brought an increased intensity and focus to this goal. The statutory framework for U.S. communications policy, the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Communications Act"), directs the Federal Communications Commission ("FCC") - the agency with principal regulatory authority over telecommunications, including broadband - to encourage the deployment of advanced telecommunications capability or high-speed broadband to all Americans. The new administration of President Barack Obama has made ubiquitous broadband deployment a top priority.

The US\$787 billion Recovery Act that President Obama signed into law on February 17, 2009 is aimed at providing a direct fiscal boost to the U.S. in the current economic crisis and lays the foundation for future growth. To this end, the Recovery Act provides up to US\$7.2 billion in broadband stimulus funds to develop and expand broadband in order to facilitate economic development and tasks three federal agencies with implementing certain broadband initiatives.

The U.S. Commerce Department's National Telecommunications and Information Administration ("NTIA") - the agency that serves as the President's principal advisor on telecommunications and information policies and is responsible, together with the FCC, for developing federal telecommunications policies - is tasked with creating a grant programme to fund broadband infrastructure programmes to unserved and underserved areas, public computer centers, and broadband education campaigns. NTIA also is charged with creating a nationwide broadband map. The U.S. Agriculture Department's Rural Utility Service ("RUS") is charged with administering a grant and loan programme aimed at improving broadband access in rural areas. RUS already administers several broadband programmes and has long played a role in bringing telecommunications to rural areas. The Recovery Act expands RUS's existing authority to make loans and authorises new authority and funding to provide grants and grant/loan combinations. RUS and NTIA recently announced the general policy and grant application procedures and guidelines for their respective broadband programme initiatives and have already accepted applications for grants and loans. The first round of awards is expected to be made before year end. In addition, the Recovery Act tasks the FCC with developing a national broadband plan, and the FCC has initiated a proceeding to begin the process. These agencies are charged with defining certain nondiscrimination and network interconnection obligations set forth in the Recovery Act.

In addition to the broadband measures in the Recovery Act, the FCC also has several ongoing proceedings and programmes aimed at encouraging the deployment of broadband.

Bringing broadband services to rural America is expected to improve education, healthcare, public safety, and America's economy as a whole. Stakeholders are watching carefully the regulatory approach that the FCC, NTIA and RUS - with new Democratic leadership in all three agencies - take in implementing the nondiscrimination and network interconnection provisions of the Recovery Act. Ultimately, the success of the new administration's efforts in stimulating additional build-out of broadband infrastructure may depend on whether the federal agencies allow the provision of broadband services to remain free from regulation.

This article provides an overview of the Recovery Act broadband provisions, the federal agencies' actions to implement their directives under the Recovery Act, and other recent congressional and FCC efforts relating to broadband deployment. (See Endnote 1.)

### Recovery Act Broadband Provisions

The funds allocated and initiatives created under the Recovery Act place a primary focus on ubiquitous access to broadband. Specifically, the Recovery Act includes a variety of broadband-related programmes, such as:

- US\$4.7 billion for the Broadband Technology Opportunities Program ("BTOP"), which includes:
  - US\$350 million for NTIA to develop and make publicly available on a 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 programmes to encourage sustainable adoption of broadband service; and
  - Authority and funding for the 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.
- US\$2.5 billion for grants, loans and loan guarantees for broadband infrastructure under programmes administered by 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. The terms "unserved area", "underserved area", and

“broadband” are not defined by the Recovery Act. 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”.

BTOP grants, which must be made by the end of the fiscal year 2010, may be made for several purposes, including: (i) acquiring equipment, networking capability, hardware and software, digital network technology, and infrastructure for broadband services; (ii) constructing and deploying broadband infrastructure; (iii) ensuring access to broadband service by community anchor institutions; (iv) facilitating access to broadband service by vulnerable populations, such as low-income and aged, to provide educational and employment opportunities; (v) constructing and deploying broadband facilities to improve public safety broadband communications services; and (vi) other projects that the Assistant Secretary of NTIA finds consistent with the purposes of the programme.

Numerous entities may qualify as grantees under the BTOP. For example, 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 of NTIA must do so in a “technologically neutral manner” to the extent practicable to promote the purposes of the programme.

The Recovery Act also directs NTIA to 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 health care 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 programme 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.

In addition to the requirements described above, BTOP grantees are required to adhere to the nondiscrimination and network interconnection obligations determined by the Assistant Secretary of NTIA in coordination with the FCC. Those nondiscrimination 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: (i) consumers are entitled to access the lawful Internet content of their choice; (ii) consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; (iii) consumers are entitled to connect their choice of legal devices that do not harm the network; and (iv) consumers are entitled to competition among network providers, application and service providers, and content providers.

The Recovery Act also allocates US\$2.5 billion to be administered by RUS for grants, loans and loan guarantees for broadband infrastructure in any area of the U.S. through a programme run by RUS. At least 75 percent of the area to be served by a project receiving such funds must be in a rural area without sufficient access to high-speed broadband service and priority must be given to projects serving the most rural residents without broadband service and that will deliver end users a choice of more than one

provider. The Recovery Act also mandates that priority be given to projects of current or former RUS borrowers and are fully funded and ready to start once Recovery Act funding is received. A project receiving these funds also may not receive funds to provide broadband service through the BTOP.

### RUS and NTIA Grant Application Procedures and Guidelines

In July 2009, RUS and NTIA announced the general policy and application procedures associated with the broadband initiatives established by the Recovery Act by publishing a Notice of Funds Availability (“NOFA”). In the NOFA, RUS established the Broadband Initiatives Program (“BIP”) to administer the Recovery Act funds and NTIA established the BTOP. The deadline for submitting applications for both programmes was in August 2009, and awards will be announced starting on or around November 7, 2009. Approximately US\$4 billion of programme level funding was created in this NOFA. In addition, the NOFA established definitions for purposes of the NOFA and application process for certain key terms that had not been defined by the Recovery Act, such as “broadband” (see Endnote 2), “underserved”, “unserved”, and “rural area”. These definitions are subject to change. RUS and NTIA also established nondiscrimination and interconnection requirements for all applicants, described in detail below.

**Broadband Initiatives Program (BIP).** The Recovery Act appropriates US\$2.5 billion of budget authority for RUS to extend loans, loan/grant combinations, and grants to projects where at least 75 percent of an RUS-funded area is in a rural area that lacks sufficient access to high-speed broadband service to facilitate rural economic development. Under this NOFA, US\$2.4 billion in programme level funding has been set aside for the BIP. Specifically, US\$1.2 billion in funding is available for last mile projects (i.e., to provide broadband service to end users, such as households or businesses); US\$800 million for non-remote projects; and US\$400 million for remote projects (i.e., unserved, rural area 50 miles from the limits of a non-rural area). There is also a national reserve available of up to US\$325 million.

Grants awarded under the BIP will be used to serve exclusively remote, unserved, and rural areas. The BIP loan and loan/grant funds will be used to provide funding to applications proposing to serve non-remote and underserved rural areas. Projects that wish to include both remote and non-remote areas will be funded by loans or loan/grant combinations. The size of the grant cannot exceed the size of the loan. Furthermore, RUS wants a rapid disbursement of funds for the BIP and asks for a commitment of transparency in the award process. The BIP consists of a two-phase application process. Phase I will determine whether the application is eligible and Phase II will rank/grade the application based on a set of criteria.

**Broadband Technologies Opportunities Program (BTOP).** The Recovery Act also appropriates US\$4.7 billion to NTIA to provide grants for broadband initiatives throughout the United States, including unserved and underserved areas, to be awarded from the BTOP fund by September 30, 2010. Under the current NOFA, up to US\$1.6 billion has been allocated and a national reserve of up to US\$200 million is available. The BTOP fund is split into three categories, which include the following programmes:

- Broadband Infrastructure - to fund projects to deliver broadband access to unserved and underserved areas;
- Public Computer Centers - to expand public access to broadband by improving broadband access at entities such as community colleges and public libraries; and



- Sustainable Broadband Adoption - to promote broadband demand by providing broadband education, awareness and training to population groups where broadband has been underutilised.

The priority of the BTOP fund is to seek to serve the highest priority needs for federal investment, particularly projects that offer the potential for economic growth and job creation, and provide benefits to education, health care and public safety. There will be a two-step application process for BTOP funds.

*Nondiscrimination and Interconnection Requirements.* All Broadband Infrastructure applicants for both the BIP and BTOP must commit to the following nondiscrimination and interconnection obligations:

- adhere to the principles contained in the FCC's 2005 Internet Policy Statement;
- not favour any lawful Internet applications and content over others;
- display any network management policies in a prominent location on the service provider's web page and provide notice to customers of changes to these policies (awardees must describe any business practices or technical mechanisms they employ, other than standard best efforts Internet delivery, to allocate capacity; differentiate among applications, providers, or sources; limit usage; and manage illegal or harmful content);
- connect to the public Internet directly or indirectly, such that the project is not an entirely private closed network; and
- offer interconnection, where technically feasible without exceeding current or reasonably anticipated capacity limitations, on reasonable rates and terms to be negotiated with requesting parties. This includes both the ability to connect to the public Internet and physical interconnection for the exchange of traffic. Applicants must disclose their proposed interconnection, nondiscrimination, and network management practices with the application.

These obligations are a first indication of how NTIA and RUS will implement the nondiscrimination and network interconnection requirements of the Recovery Act. It remains to be seen, however, how these commitments will impact grant and loan applicants, how they will be enforced, or whether the agencies will apply the same requirements when the remaining funds are made available through subsequent NOFAs.

### FCC Creation of National Broadband Plan

In addition to providing funding for a variety of broadband-related programmes, the Recovery Act charges the FCC with establishing and delivering a national broadband plan to Congress by February 17, 2010. As a first step in this process, in April 2009, the FCC issued a Notice of Inquiry ("Broadband Plan NOI") seeking comment from all interested parties and industry stakeholders to inform the FCC's development of the national broadband plan.

The Recovery Act requires the plan to include several key elements, including:

- analysis of the most effective and efficient ways to ensure access to broadband capability for all people in the United States and benchmarks for meeting that goal;
- strategies for achieving affordability and maximum utilisation of broadband infrastructure and services;
- evaluation of the status of broadband deployment, including the progress of related grant programmes; and
- use of broadband to advance consumer welfare, civic participation, public safety and homeland security, community development, healthcare delivery, energy independence and efficiency, education, worker training,

private sector investment, entrepreneurial activity, job creation, economic growth, and other national purposes.

To assist in meeting its task, the FCC sought comment on each key element, with detailed questions in each broad category. It also sought comment on establishing benchmarks and goals and definitions for "broadband capability" and certain other terms. In general, within these key elements, the FCC identified several categories of programmes or policies that it will review in deciding how to implement the plan, including open networks, affordability and existing programmes, wireless service policies, market mechanisms and competition, and privacy. Below is a brief description of each key element and a sampling of questions and issues raised in the Broadband Plan NOI that will be used to inform the FCC's national broadband plan.

*Establishing Goals and Benchmarks.* The Recovery Act requires the plan to "establish benchmarks for meeting [the] goal" of ensuring that all people of the United States "have access to broadband capability". As an initial matter, the FCC notes that broadband can be defined in various ways and asks how the FCC should define "broadband" and "broadband capability". The FCC asks whether the definitions for "highspeed", "broadband", and "advanced telecommunications capability" should be the same and whether, for example, the FCC should: (1) raise the speeds that define broadband; (2) define broadband numerically or by some other metric (such as bandwidth or performance metrics); or (3) adopt a dynamic definition with speed tiers that adjust with changes in technology. It also asks whether the definition should vary based on the technology used and whether broadband services delivered via unlicensed devices should be included in the plan. In addition, the FCC raises a number of questions regarding what it means to have access to broadband capability. The FCC notes that its 2005 *Internet Policy Statement* is committed to preserving the open character of the Internet. The FCC asks whether the FCC should elaborate further on these principles in light of the evolving telecommunications environment; whether it should apply these principles more broadly in developing the national broadband plan; and whether it should undertake a formal rulemaking proceeding to codify the principles into rules. (See Endnote 3.)

*Effective and Efficient Mechanisms for Ensuring Access.* The Recovery Act tasks the FCC with analysing "the most effective and efficient mechanism for ensuring broadband access by all people of the United States". In the Broadband Plan NOI, the FCC identifies certain programmes and policies that it will review as part of this analysis, including: market mechanisms, deployment costs, existing universal service programmes, wireless service policies, open networks, and competition. As an initial matter, the FCC asks how effective existing mechanisms have been in ensuring consumer access to broadband capabilities and whether such mechanisms have been market-based or have been supplemented by activities of governmental or non-governmental entities. The FCC asks how the grants and other programmes under the Recovery Act should inform the analysis.

The FCC also raises a series of questions about the impact of broadband on existing universal service programmes and whether existing programmes should be modified. Commenters are asked how existing and new wireless service policies regarding, for example, spectrum use and access, licensing rules, and construction requirements, can help meet or constrain the goal of efficient and effective access to broadband. In addition, the FCC seeks comment on the value of open networks as a mechanism to ensure broadband access and how "open" should be defined. It asks whether development of the broadband plan should factor in broadband infrastructure and competition, interconnection, nondiscrimination, and openness. Commenters also are asked about the costs and benefits

of applying open network policies to wireless networks and whether competition between broadband network providers is an effective means of meeting the Recovery Act's goals. (See Endnote 4.)

*Affordability and Maximum Utilisation.* The Recovery Act charges the FCC with establishing "a detailed strategy for achieving affordability of such service and maximum utilisation of broadband infrastructure and service to the public". To do so, the FCC seeks comment generally on how to interpret this task, whether affordability and maximum utilisation are interrelated, and how to define affordability. In addition, the FCC asks what factors beyond affordability, such as digital literacy skills or lack of a computer or other broadband access, affect broadband use and choice; who is not using broadband; and how consumers and businesses are using broadband.

*Status of Deployment.* The Recovery Act requires the FCC to evaluate "the status of deployment service, including progress of projects supported by the grants made pursuant to this section". This section raises a series of questions relating to tracking and mapping subscribership data and how the Recovery Act grant and loan programmes fit into the national plan to be developed by the FCC. For example, in the Broadband Plan NOI, the FCC seeks comment on how the current FCC forms for collection of data regarding broadband subscribership can be used in tracking and which additional measures will help the FCC assess deployment status, including a means for obtaining data for stimulus grant and loan programmes.

*Specific Policy Goals of the National Broadband Plan.* The Recovery Act requires that, in developing the broadband plan "for use of broadband infrastructure and services", the FCC advance a series of public policy goals, including: (1) advancing consumer welfare; (2) civic participation; (3) public safety and homeland security; (4) community development; (5) health care delivery; (6) energy independence and efficiency; (7) education; (8) worker training; (9) private sector investment; (10) entrepreneurial activity; (11) job creation and economic growth; and (12) other national purposes. In seeking comment on these public policy goals, the FCC raises numerous questions in each of these areas on how to interpret and implement that directive.

*Comments.* In response, the FCC received comments from a large number and variety of stakeholders, including telecommunications carriers, wireless providers, broadband service providers, multichannel video programming distributors, equipment manufacturers, content and applications providers and consumers and public interest groups. The FCC will use the comments to inform its creation of the national broadband plan. In addition, the FCC is conducting a series of public workshops to further address key issues related to the national broadband plan.

### Ongoing FCC Efforts Regarding Broadband Deployment

*Broadband Deployment Notice of Inquiry.* Shortly before enacting the Recovery Act, Congress enacted the Broadband Data Improvement Act ("BDIA") which provides for improved federal data collection on the deployment and adoption of broadband services. The BDIA requires the FCC to compile information on unserved areas, include an international comparison of broadband deployment, and publish reports required by Section 706 of the Communications Act ("Section 706") annually, rather than "regularly". (See Endnote 5.)

In response to the BDIA and separate from the Recovery Act's national broadband plan requirement, on August 7, 2009, the FCC released a Notice of Inquiry ("Broadband Deployment NOI") as

required by Section 706 (see Endnote 6), as amended by BDIA, seeking comment on whether broadband is being deployed to all Americans in a reasonable and timely fashion. The purpose of the Broadband Deployment NOI is to collect information for the FCC's sixth Section 706 report on broadband deployment in the U.S., due to Congress on February 3, 2010. While the Section 706 report is a statutory requirement separate from the national broadband plan, the FCC notes that it will largely consider the proceedings together. Since the last Section 706 report, Congress enacted the BDIA, as described above, which, in part, amended Section 706. The FCC solicits information in this Broadband Deployment NOI according to the Section 706 framework, as amended by the BDIA. The Broadband Deployment NOI notes that the framework and analysis of the five prior Section 706 reports increasingly has been called into question and that none was based on data providing an accurate picture of broadband deployment in terms of geography, service capabilities, or other characteristics. The Broadband Deployment NOI explains that the current Section 706 inquiry will benefit from the FCC's new broadband data collection activities.

The FCC breaks down the NOI into five component parts, as follows, with each component consisting of more detailed inquiries:

- How should the FCC define "advanced telecommunications capability" or "broadband"?
- Is broadband available to all Americans?
- Is the current level of broadband deployment reasonable and timely?
- What actions, if any, should the FCC take to accelerate broadband deployment?
- What actions should the FCC take to improve its regular broadband data collection efforts?

Comments and reply comments from interested stakeholders are due in September and October, 2009, respectively, which the FCC will use to inform its report to Congress.

*FCC Report on a Rural Broadband Strategy.* In addition to the BDIA, in October 2008, Congress enacted The Food, Conservation, and Energy Act of 2008 ("2008 Farm Bill"), which was intended to improve broadband deployment by requiring the Chairman of the FCC to submit to Congress "a comprehensive rural broadband strategy" by May 22, 2009, that included recommendations to promote interagency coordination of rural broadband initiatives, an assessment and solutions for rapid build-out of rural broadband, identification of how federal programs and agencies can best respond to rural broadband requirements, and recommendations to overcome obstacles to deployment and describe goals and timeframes.

To discharge the 2008 Farm Bill directive, the then-interim Chairman of the FCC released the Report on Rural Broadband Strategy on May 22, 2009. While the report was intended to respond to the 2008 Farm Bill requirement, the Chairman viewed it as a building block and prelude to the national broadband plan. As required, the report makes a number of recommendations, including in the topics of coordination of rural broadband efforts, assessing broadband needs, and overcoming challenges to rural broadband deployment.

Specifically, the FCC recommends that federal agencies, state, tribal and local governments, and community groups increase coordination between and among each other. In addition, the FCC recommends that federal agencies streamline and improve existing federal programmes to determine what internal barriers may be making rural broadband deployment more difficult, promote efficient use of government funds and resources to determine whether non-broadband-related programmes that involve rural issues can provide opportunities to promote rural broadband

deployment, coordinate broadband programme criteria with regard to key broadband definitions, and improve government websites related to government resources available for promoting broadband.

The report also makes certain recommendations regarding assessing both short- and long-term needs for rural broadband, such as instructing decision makers to make decisions on a technological-neutral basis; recommending that federal and local governments focus on obtaining accurate information on broadband availability; advising the FCC and administration to continue efforts to develop a national broadband map; encouraging private and public stimulation of demand for broadband by developing consumer education and training initiatives and broadband affordability programmes; and recommending that all levels of government address network costs and ways to help overcome the high costs of rural broadband deployment. In addition, the FCC will consider all pending and proposed FCC proceedings affecting rural broadband, such as universal service reform, network openness, spectrum access, and others, to identify challenges to rural broadband deployment.

*Universal Service Programmes.* The Communications Act includes several provisions related to preserving and advancing specific, predictable, and sufficient universal telecommunications service. Among other things, it requires access to advanced telecommunications and information services in all regions of the nation. The FCC has established several programmes - the High-Cost Program, the Low-Income Program, the E-rate Program and the Rural Health Care Program - to implement the universal service goals of the Communications Act. While the universal service programmes have largely focused on the availability of telecommunications services, the FCC has made efforts to use these programs to expand broadband availability.

For example, the Rural Health Care Program supports broadband deployment by providing funding for construction of state or regional broadband networks and for the information services provided over those networks for health care providers. The E-rate Program supports broadband access to rural and other insular areas by providing discounts to qualifying schools and libraries for Internet access and services and other telecommunications services as well as funding for broadband. The High-Cost and Low-Income Programs indirectly support the provision of broadband by ensuring access to telecommunications service, including by those carriers that provide broadband services, to rural, insular, high-cost, and certain low-income consumers.

## Conclusion

The Obama administration has spearheaded an effort to make broadband deployment a top U.S. policy priority. U.S. lawmakers and federal agencies expect that developing and expanding broadband access will facilitate economic development and improve education, healthcare, public safety, and America's economy as a whole. The federal agencies' regulatory approach to nondiscrimination and network interconnection obligations may impact the attractiveness of the grant programme and its ultimate success in stimulating additional build-out of broadband infrastructure.

## Acknowledgment

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## Endnotes

- 1 This article does not address legislation that has been introduced, but not yet enacted by the U.S. Congress.
- 2 For purposes of the NOFA, broadband means providing two-way data transmission with advertised speeds of at least 768 kilobits per second (kbps) downstream and at least 200 kbps upstream to end users, or providing sufficient capacity in a middle mile project to support the provision of broadband service to end users.
- 3 To date, the FCC has issued one decision enforcing its *Internet Policy Statement*, which involved Comcast Corporation's network management practices. An appeal of that decision currently is pending in federal court.
- 4 The FCC notes that the extent to which the *Internet Policy Statement* applies to wireless service providers is currently pending before the FCC in another proceeding.
- 5 The FCC has a statutory directive under Section 706 to report regularly on "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion", which includes broadband access. To meet this directive, it has been tracking broadband subscribership and deployment since 2000 through its Form 477 local competition and broadband deployment reporting programme.
- 6 Section 706 of the Telecommunications Act of 1996 directs the FCC to "initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans". The FCC has used the term "broadband" synonymously with "advanced telecommunications capability".

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