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LEGISLATIVE ALERT¹

**AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009
BROADBAND PROVISIONS**

March 16, 2009 Update

This alert serves as a follow up to our February 24, 2009 Legislative Alert² on the broadband provisions of the American Recovery and Reinvestment Act Of 2009, otherwise known as the Recovery Act or the stimulus package. On March 10, 2009, the Department of Commerce's National Telecommunications Information Administration ("NTIA"), the U.S. Department of Agriculture ("USDA") and the Federal Communications Commission ("FCC") held a joint public meeting at Commerce to discuss the broadband initiatives in the Recovery Act.

I. Meeting Summary

A. General Comments

Acting NTIA Administrator Anna Gomez made introductory remarks.

Secretary of Agriculture Tom Vilsack outlined President Obama's broadband strategy. USDA oversees the Rural Utilities Service (RUS) which, along with NTIA, will distribute broadband stimulus funds. Sec. Vilsack said recipients will include unserved and underserved areas, small businesses, farms, and students in rural areas and that the Department is looking for creative, innovative ways to expand technology.

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² Available at www.wstelecomlaw.com/files/Stimulus_Package.doc.

Acting FCC Chairman Michael Copps noted that the FCC's Sec. 706 reports³ have repeatedly stated that broadband deployment continues apace, but the latest International Telecommunications Union report says the U.S has fallen to 17th in the world in broadband deployment.

Acting Chairman Copps praised fellow Commissioner Jonathan Adelstein (from South Dakota)'s commitment to rural broadband, stating "we have been asking for years, 'Where's the policy for broadband?'"

Mr. Copps also mentioned that the FCC, at its next Commission meeting on April 8, 2009, will issue a Notice of Inquiry (NOI) to gather data on broadband deployment. The FCC has a one year statutory deadline under the Recovery Act to develop and report to Congress on a national broadband strategy.

Rick Wade, Acting Chief of Staff for the Department of Commerce, said that stimulus money will not get broadband to everyone, but is a start. He noted the need for "targeted, timely and temporary" investments and outlined five goals of the broadband stimulus:

1. Begin efforts to close broadband gap;
2. Stimulate investment;
3. Create jobs;
4. Ensure that schools, hospitals, universities, job training centers and other community anchor institutions have access to broadband; and
5. Encourage demand for broadband.

B. Discussion

A panel discussion followed, led by Mark Seifert, Senior Advisor for the NTIA, who made opening remarks. Topics discussed included the following:

1. Timing

Dr. Bernadette McGuire-Rivera, Associate Administrator for the NTIA, said applicants can begin working on grant applications now because the Act is "proscriptive".⁴ She indicated that publication in the Federal Register would follow shortly⁵. She announced a series of six public meetings in the coming weeks. [See Section II, below, for details.]

³ Section 706 of the Telecommunications Act of 1996 requires the FCC to make periodic reports to Congress examining the availability of advanced telecommunications capability to all Americans. The FCC's Fifth Report in GN Docket No. 07-45 was adopted March 19, 2008 and released on June 12, 2008.

⁴ The Recovery Act specifies 15 criteria with no fewer than 63 related questions to be addressed in order to determine how the NTIA should distribute its authorized \$4.7 billion in funding through its Broadband Technology Opportunities Program (BTOP).

⁵ American Recovery and Reinvestment Act of 2009 Broadband Initiatives, Joint request for information and notice of public meetings, 74 Fed. Reg. 10716 (March 12, 2009). Comments due by April 13, 2009.

The NTIA will distribute funds in 3 “grant rounds”. The first of these is expected between April and June 2009, the second between October and December 2009 and the third between April and June 2010. All grants are to be made by the end of September 2010. Applicants must disclose other state and federal funding they receive. Applicants may apply to both the NTIA and RUS, and may receive funds from both, but not for the same item.

David Villano, Assistant Administrator for Telecom Programs, USDA Rural Development, said the RUS’s first Notice of Funding Availability (NOFA) will be published in 60-90 days after public comments. The RUS will publish at least two subsequent NOFAs.⁶

2. Use of Funds

NTIA funds will include amounts for:

- (i) Broadband mapping: \$350 million
- (ii) Public computer centers: \$200 million
- (iii) Programs to encourage sustainable adoption of broadband: \$250 million
- (iv) Audits and oversight: \$10 million
- (v) Administrative costs: \$141 million

The RUS has \$2.5 billion budget authority, but the ability to use some of this for loans rather than grants helps create greater leverage as amounts loaned will not count against the agency’s budget.

Funding priority will be given to projects that serve unserved areas, underserved areas, that can commence promptly and that can be completed timely.

3. Conditions

Non-discrimination and network access requirements will be determined in coordination with FCC, but will likely include the FCC four broadband principles.

4. Other Matters

Scott Deutchman, Acting Senior Legal Advisor to Acting FCC Chairman Copps, discussed the FCC Public Notice released that morning in Docket No. GN 09-29, seeking comments by March 25, 2009 on the FCC Report to Congress on rural broadband deployment, required by 2008 Farm Bill and due to Congress by May 22, 2009.

The meeting concluded with a public comment and question period.

⁶ The timing on these has not been announced but they are anticipated to run roughly concurrently with the NTIA’s grant rounds, i.e., 4th Quarter 2009 and 2nd Quarter 2010.

II. Significant Dates and Deadlines

1. The NTIA and RUS will hold a series of 6 public meetings at the following times and places:

March 16	Washington, D.C.
March 17	Las Vegas
March 18	Flagstaff, AZ
March 19	Washington, D.C.
March 23	Washington, D.C.
March 24	Washington, D.C.

All meetings in Washington, D.C. will be held at the Department of Commerce beginning at 10:00 a.m. The field hearings in Las Vegas and Flagstaff, AZ will each begin at 4:00 p.m. local time.

2. March 25, 2009 – Comments due in FCC Docket No. GN 09-29. This docket seeks comment on Congress's directive in the 2008 Farm Bill that the FCC, in conjunction with the Department of Agriculture, develop a comprehensive rural broadband strategy. The FCC's report to Congress is due on May 22, 2009.

While this reporting requirement predates the Recovery Act, the FCC's notice states that "we expect that the rural broadband strategy developed in this docket will inform our effort to develop a comprehensive national broadband plan pursuant to the Recovery Act." Accordingly, we urge interested clients to take this "first bite at the apple" in suggesting the course of the FCC's rural broadband policy.

3. April 8, 2009 – At its next Open Meeting, the FCC is expected to issue a Notice of Inquiry (NOI) to begin gathering data to use in developing a national broadband strategy to be included in its February, 2010 report to Congress required under the Recovery Act.

4. April 13, 2009 - Comments to NTIA and RUS on criteria for grant and loan programs pursuant to Section 6001 of the Recovery Act.

III. Additional Considerations

1. Q: Who may apply for NTIA funds?

A: Sec. 6001(e) of the Recovery Act specifies eligible applicants shall be:

(1)(A) A State or political subdivision thereof, the District of Columbia, a territory or possession of the United States, an Indian tribe...or native Hawaiian organization;

- (B) a nonprofit –
 - (i) foundation,
 - (ii) corporation,
 - (iii) institution, or
 - (iv) association; or

(C) any other entity, including a broadband service or infrastructure provider, that the Assistant Secretary finds by rule to be in the public interest.

2. Q: Do the broadband funding provisions of the Stimulus Act address other broadband-related portions of the Recovery Act such as smart grids and health information technology?

A: Yes. Projects that can leverage other broadband technologies were briefly but favorably mentioned at the NTIA/RUS/FCC meeting in Washington on March 10. In addition, in the NTIA/RUS joint request for information published on March 12, 2009, NTIA Criterion #1 The Purposes of the Grant Program asks:

- c. How should the BTOP leverage or respond to the other broadband-related portions of the Recovery Act, including the...USDA grants and loans program as well as the portions of the Recovery Act that address smart grids, health information technology, education and transportation infrastructure?

Furthermore, RUS grants and loans are provided for under the heading “Distance Learning, Telemedicine and Broadband Program of the Recovery Act”, which asks and answers, in relevant part:

5. What benchmarks should RUS use to determine the success of its Recovery Act broadband activities?

The Recovery Act gives RUS new tools to expand the availability of broadband in rural America...Factors to consider include, but are not limited to:

- b. Critical facilities provided new and/or improved service:
 - i. Educational institutions.
 - ii. Healthcare providers.
 - iii. Public service/safety.

3. Q: What is the role of states in broadband funding applications and projects?

A: See NTIA Criterion #2 The Role of the States, which states:

The Recovery Act states that the NTIA may consult the States (including the District of Columbia, territories and possessions) with respect to aspects of the BTOP.⁷ The Recovery Act also requires that, to the extent practical, the BTOP award at least one grant to every State.⁸

NTIA Criterion #2 then asks the following questions:

- a. How should the grant program consider State priorities in awarding grants?
- b. What is the appropriate role for States in selecting projects for funding?
- c. How should NTIA resolve differences among groups or constituencies within a State in establishing priorities for funding?
- d. How should NTIA ensure that projects proposed by States are well-executed and produce worthwhile and measurable results?

Furthermore, as noted in the answer to Question #1 above, states and political subdivisions may themselves apply for NTIA funds.⁹

As always, should you have any questions or comments, please do not hesitate to contact David N. Baker at dbaker@wstelecomlaw.com, Robert J. Butler at rbutler@wstelecomlaw.com, or Walt Sapronov at wsapronov@wstelecomlaw.com.

⁷ Section 6001(c) states that the Assistant Secretary may consult a State, the District of Columbia, or territory or possession of the United States with respect to--

(1) The identification of areas described in subsection (b)(1) or (2) located in that State; and
(2) the allocation of grant funds within that State for projects

in or affecting the State.

⁸ Recovery Act Sec. 6001(h)(1).

⁹ Recovery Act, Section 6001(e).