

**Before the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
and
RURAL UTILITIES SERVICE
Washington, D.C. 20230**

In the Matter of)
)
Broadband Technologies Opportunities Program) Docket 090309298-9299-01
)

**COMMENTS OF
RANDOLPH J. MAY
PRESIDENT
THE FREE STATE FOUNDATION***

These comments are submitted to provide guidance to NTIA and the Rural Utilities Service in carrying out the duties assigned by Congress in implementing the broadband grant and loan programs that are part of the American Recovery and Reinvestment Act of 2009. In order to implement the Recovery Act in the most effective and efficient manner, consistent with achieving Congress’s principal dual objectives of helping to stimulate the economy while at the same time furthering broadband deployment and utilization, the implementing agencies ought to take what I have previously described as a “minimalist” approach. I am attaching as Appendix A to these comments my March 9 paper, “Broadband Stimulus: Prudent Minimalism Will Lead to Maximum Impact.”

As I said there, by advocating a “prudential minimalist” approach I do not mean to imply the agencies’ task is not important or large. Rather I mean to say that the dual congressional objectives are most likely to be achieved with maximum effectiveness if

* These comments express the views of Randolph J. May, President of the Free State Foundation, an independent, non-profit Section 501(c)(3) free market-oriented think tank. They do not necessarily represent the views of the Board of Directors or others associated with FSF.

NTIA and RUS do not overreach or depart from common sense principles. Another way of thinking about the “prudent minimalist” approach is to consider the extent to which free market-oriented principles can be incorporated into the implementing rules and policies.¹ In this respect, as a supplement to the views expressed in Appendix A, I summarize a desirable market-oriented approach as follows:

1. Focus predominantly on unserved areas. By definition, unserved areas are ones in which the private sector has not yet chosen to invest because of the high cost of building out networks in relation to the expected returns on invested capital. These areas are most appropriate for government subsidies because it is reasonable to assume such subsidies are not as likely to displace private investment as they would in areas that are not “unserved.” Sound public policy and fiscal responsibility dictates that the government should avoid whenever possible providing taxpayer subsidies to support activities that otherwise can be supported by the private sector. And by focusing primarily on unserved areas, the subsidies are less likely to stifle the development of private sector competition that otherwise might emerge in areas that already have one or more providers.

2. Favor private companies over government providers. Another market-oriented principle favors the provision of services by private companies rather than government providers for services not traditionally considered core government functions. Certainly, the provision of communications services has not been considered a core government function in this country. Indeed, communications services are provided predominantly by private sector companies. While there are exceptions to this rule, most

¹ It is true, of course, that to some extent it is ironic, or some may say even oxymoronic, to speak of free market principles in the context of a massive government stimulus program. But the point here is not to get hung up debating the ideal way to promote economic recovery, but rather to suggest concrete ways in which the broadband portion of the stimulus package can be carried out most efficiently to achieve maximum impact with the taxpayers' dollars.

have not turned out happily. This surely has been the case with respect to most municipalities and states that have gotten into the business of providing broadband services.² The government entities just don't have the expertise and experience required to build and operate modern broadband communications networks as efficiently and effectively as private sector companies.³ More often than not, even putting aside substantial fees paid to outside consultants and managers, taxpayers are left to foot the bill for even larger build-out and operating subsidies than originally envisioned. For this reason, private sector grant applicants should be favored over government entities.

3. Rely heavily on competitive bidding procedures to award funds. Congress envisioned that competitive bidding procedures would be used in awarding the money to be disbursed. This market-oriented approach, which is the prevailing norm for government procurement in many other contexts, makes sense if the available funds are to be used most efficiently to achieve "the biggest bang for the buck." NTIA should devise relatively simple and straightforward forms of "reverse auctions" to award funds to the lowest bidder. Grants should not be made to multiple providers to build out facilities in the same area. Just such an approach of subsidizing multiple service providers to build out facilities in the same area led to the explosive growth in the existing high cost USF fund. Even if the implementing agencies decide to distribute some grants through an award process other than reverse auctions, they should still use reverse auctions to

² See, for example, the very good recent Institute for Policy Innovation paper, "We Told You So! Continue to Say No to Municipal Broadband Networks," March 6, 2009, authored by Barry Aarons, IPI Senior Research Fellow. The paper may be found at: www.ipi.org

³ It is worth noting in this context that when then-President-elect Obama was asked in November why the government just didn't take over General Motors and Chrysler, he responded: "We don't want government to run companies. Generally, government historically hasn't done that very well."

distribute a significant proportion of the funds. In the early going, the agencies may want to experiment with a few simple forms of reverse auctions to trial certain models.

4. Avoid adopting net neutrality or net-neutrality-like regulations. As explained in Appendix A, the implementing agencies are not required to impose on grantees any conditions that would mandates net neutrality-like or open access obligations beyond the obligations that may be inherent in the principles contained in the FCC's 2005 Broadband Policy Statement. And they should not do so because any such regulatory conditions not only would constitute unsound policy, but they would be counterproductive in that some otherwise well-qualified providers may well be dissuaded from bidding for grant funds. Were this to happen, the overall economic efficiency and effectiveness of the broadband program would suffer.

In sum, in implementing the broadband portion of the Recovery Act, NTIA and RUS are urged to rely, to the greatest extent possible, on the market-oriented principles discussed herein and in Appendix A.

Respectfully submitted,

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Broadband Stimulus: Prudent Minimalism Will Lead to Maximum Impact

by

Randolph J. May*

This week the National Telecommunications and Information Administration, the Department of Agriculture's Office of Rural Development, and the FCC will hold the first of what the agencies say will be several public meetings to discuss implementing the broadband initiatives funded by American Recovery and Reinvestment Act of 2009, a.k.a. as the \$787 billion stimulus package.

The \$7.2 billion allocated in the stimulus package to broadband *can* be money well spent, at least compared to the uses to which some of the remaining \$780 billion will be spent, if the broadband fund initiatives are implemented in a sensible fashion. Although \$7 billion is by no means a minimal amount of money – even in today's currency -- in approaching their tasks, the government disbursing agencies should act in what I would call a prudential minimalist fashion.

The legislation delegates NTIA broad discretion in implementing the program. (I am going to focus on the NTIA program because, with acknowledgements to Bonnie and Clyde, that is where the bulk of the money resides.) In carrying out its duties, NTIA is going to be faced with a multitude of choices. If NTIA opts for an appropriately minimalist approach, at least in important respects, it is more likely to have maximum impact – more bang for the buck, to stick with B & C. And maximum impact in spurring broadband deployment and usage must be a principal objective.

Here is what I mean in this context by a prudent minimalist approach.

- As the economic stimulus package moved through the legislative process, there was much discussion concerning whether net neutrality or open access requirements should be included in the legislation. For example, the House-passed bill included a provision mandating that grant recipients operate on an "open access" basis and requiring the FCC to define that term in 45 days. The bill that was passed does not contain the open access requirement. Instead, it requires NTIA, in consultation with the FCC, to publish "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" in the FCC's 2005 broadband policy statement.

The "at a minimum" language is significant. NTIA should quickly announce that grant recipients will be required to comply with the FCC's broadband principles and no more. If NTIA tries to further define a non-discrimination obligation, it risks delaying the disbursement of the broadband funds while it struggles to define what will surely be a contentious new standard. And there is a substantial danger that it will adopt obligations that are more regulatory than those inherent in the existing broadband policy statement. Delay obviously works against one of the central goals of the stimulus legislation: to get funds disbursed quickly so worthwhile projects can get underway. And adoption of regulatory obligations more onerous than those that currently exist, or of conditions sufficiently ambiguous that they subsequently might be interpreted to be so, risks deterring well-qualified providers from participating in the funding process.

- Another choice calling for a minimalist approach relates to the allocation of funds between "unserved" and "underserved" areas. Funds should be targeted predominantly to unserved areas presently lacking any broadband service. This approach is minimalist in the sense that trying to do more is likely to be less impactful and more wasteful. Figuring out which areas meet an "underserved" criterion and how to disburse funds in a way that efficiently addresses such "underservedness" is a much more difficult task than identifying areas without service and directing funds to a provider to serve those areas.
- In context, another minimalist approach would be to implement a simple form of reverse auction to award the funds for unserved areas to the lowest bidder. It generally will be a wasteful expenditure of public funds to award grants to multiple providers to build out facilities in the same area. Just such an approach of subsidizing multiple service providers to build out facilities in the same area has led to the explosive growth in the existing high cost USF fund. The stimulus legislation contemplates "competitive" grants, and NTIA should define and implement a relatively simple competitive bidding process. Besides ensuring that the stimulus money is not used wastefully, NTIA has an opportunity to demonstrate, even if only on a pilot project basis, the efficacy of competitive bidding mechanisms in a way that may be instructive with respect to improving the efficiency of other government subsidy programs.

- Finally, while states and localities are eligible for grants, NTIA should ensure that most of the funds are directed to private sector companies, especially with respect to funds designated for building out facilities. The state and localities can play important consultative roles in providing information concerning unserved and underserved areas. But recent history has shown that states and localities are not adept at constructing and operating telecommunications networks in an efficient manner. As opposed to private sector companies which possess expertise and experience in the field, when governments become involved in building out and operating communications networks, it is common for them to run into trouble. It is also common for them to pay various significant fees to outside consultants and companies to "plan" and "manage" the projects, funds that otherwise could be used for construction of the actual broadband facilities.

NTIA, the Department of Agriculture, and the FCC have a large job to do if the stimulus funds are going to be used in a way fulfills the primary congressional purposes of helping to stimulate the economy without delay and increasing broadband deployment and usage. In deciding how to implement the legislation, the agencies will face many choices, some difficult.

By no means are the above comments to be a guide for resolving all of those choices. But they are intended to suggest, as the agencies embark on their tasks, that in several respects they recognize the risks inherent in trying to do more rather than less. This is especially true with respect to "net neutrality," where at the end of the day Congress wisely drew back from using the stimulus bill to require any change in existing regulatory policy.

If the government agencies act with a proper degree of prudent minimalism, they are most likely to have the maximum impact and the maximum benefit.

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