

**TESTIMONY OF W. TOM SIMMONS
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**before the
SUBCOMMITTEE ON RURAL DEVELOPMENT, BIOTECHNOLOGY, SPECIALTY
CROPS, AND FOREIGN AGRICULTURE**

**on the
RURAL BROADBAND PROGRAMS**

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Chairman McIntyre and members of the Subcommittee, thank you for inviting me to testify today as part of your review of rural broadband programs. My name is Tom Simmons and I am the Senior Vice President of Public Policy for Midcontinent Communications. Midcontinent is the leading provider of cable television services, as well as local and long distance telephone service, high-speed Internet access, and cable advertising services for communities in North Dakota, South Dakota and Minnesota. Midcontinent's service area includes over 200 communities serving nearly 250,000 customers. The size of our communities ranges from densities of 5 to 116 homes per mile of cable plant and populations range from less than 125 in Dodge, North Dakota to our largest community, Sioux Falls, South Dakota, which has a population of more than 150,000.

I am also here today representing the National Cable and Telecommunications Association ("NCTA"). NCTA is the principal trade association of the cable industry in the United States. NCTA represents cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks, as well as equipment suppliers and providers of other services to the cable industry. The cable industry has long been at the forefront of the growth and deployment of broadband service. Since 1996, the cable industry has invested over \$145 billion to upgrade and expand its networks to provide broadband

access. The result of this investment is that cable operators today offer broadband to 92 percent of U.S. households. The cable industry is expected to invest another \$14 billion continuing such upgrades and expansion this year.

The cable industry believes strongly that quality broadband services should be available to all regions of the country, including the least densely populated areas of the country.

Broadband is a crucial driver of economic recovery and global competitiveness. Broadband links rural America to the rest of the country and the world, creates jobs, improves educational opportunities, and delivers health care more efficiently. Midcontinent has invested over \$100 million to bring broadband to our service areas, but we recognize that there are still some rural consumers who lack access to broadband. And even in areas where one or more providers offer broadband service, there can be other barriers to adoption – such as affordability, the lack of a computer or other equipment needed to connect to the Internet, and low levels of basic “digital literacy.”

Bringing service to these unserved areas and facilitating broadband adoption by underserved populations, *e.g.*, low income consumers, are the appropriate objectives for rural broadband programs. Thanks to the hard work of this Subcommittee, Congress substantially reformed the rural broadband program in the 2008 Farm Bill to focus on unserved areas, and we look forward to seeing the Rural Utilities Service (“RUS”) implement this program in accordance with the statutory intent.

Likewise, we are pleased that the Broadband Initiatives Program (“BIP”) funded by the stimulus bill places special emphasis on remote and rural areas without *any* first generation broadband. Specifically, under the Notice of Funds Availability (“NOFA”) released last week, BIP grants will be used exclusively to fund projects in these areas. While broadband projects in

“underserved” rural areas are also eligible for support, underserved has been carefully defined in a way that we are hopeful will avoid wasting taxpayers’ monies by subsidizing additional competitive entrants in communities where an existing provider has already invested private risk capital. We agree with RUS’ determination that only loans and loan/grant combinations should be used to fund projects in these areas.

My testimony today will address each of these points in a little more detail.

Rural Broadband Programs Should Focus on Unserved Areas and Underserved Populations

Extending the physical availability of broadband where it currently does not exist should be the government’s highest priority in terms of distributing broadband grants for infrastructure construction. While the number of consumers with access to broadband at home has grown over the past year,^{1/} some geographic areas still lack the necessary infrastructure to offer broadband services. As the Department of Agriculture recently noted, “broadband Internet access is becoming essential for both businesses and households” and “many compare its evolution to other technologies now considered common necessities”^{2/} Broadband Internet access would benefit businesses as well as provide “rural residents access to goods and services that may not otherwise be available locally or via dial-up Internet.”^{3/}

Even where broadband is available, two key obstacles – lack of interest and lack of resources – greatly affect whether Americans subscribe to broadband. Enabling underserved *populations* to acquire and make effective use of broadband service is a critical component of

^{1/} PEW INTERNET & AMERICAN LIFE PROJECT, *Home Broadband Adoption 2009*, at 3 (June 2009) (“Pew”); <http://www.pewinternet.org/~media/Files/Reports/2009/Home-Broadband-Adoption-2009.pdf> (finding that 63% of adult Americans had broadband at home as of April 2009, “up from 55% in May, 2008”).

^{2/} U.S. DEPT. OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, *Rural Broadband at a Glance*, at 1 (February 2009), available at http://www.ers.usda.gov/Publications/EIB47/EIB47_SinglePages.pdf

our national broadband strategy. Many rural and low-income households do not subscribe to the broadband services that are available because they do not have the necessary equipment, training, or educational opportunities to take advantage of the benefits of Internet use. Indeed, approximately 35 million households in the United States who currently have access to broadband do not use it.^{4/} Examples of possible demand-side stimulus programs include making computers or laptops available at a discount to qualifying households, subsidizing monthly service fees for low-income households, providing for reimbursement of telehealth expenditures, or other tailored means designed to stimulate adoption by targeted groups.

The Broadband Initiative Program Is Properly Focused on Unserved and Remote Areas

Today's hearing is extremely timely in light of last week's release of the NOFA for the \$2.5 billion in rural broadband stimulus funding, now known as the Broadband Initiatives Program. The rural broadband provisions of the Recovery Act^{5/} and last week's NOFA build on Congress's determination in the 2008 Farm Bill that government subsidies should be focused on unserved rural areas.

Consistent with the Farm Bill, the Recovery Act appropriately targeted funding to areas "without sufficient access to high speed broadband service to facilitate rural economic development." Also like the Farm Bill, the Recovery Act gives priority to projects that provide service to the highest proportion of rural residents that do not have access to broadband service;

^{3/} *Id.* at 4.

^{4/} *Moving the Needle on Broadband: Stimulus Strategies to Spur Adoption and Extend Access Across America*, National Cable and Telecommunications Assoc., at 2 (Mar. 17, 2009). Notably, of that number, only 30 percent have more than a high school education. *Id.* Broadband adoption continues to increase in households with a high school education or greater. The Pew Internet & American Life Project's most recent study indicates that home broadband adoption increased between 2008 and 2009 at a rate of 30% for those with a high school education, 8% for those with "some college" education, and 5% with at least a college education. *See* Pew at 16.

projects that will be fully funded if the requested funds are provided; and projects that can start promptly after the enactment of the Act.^{6/}

Midcontinent and NCTA welcome the Recovery Act's focus on unserved areas and Secretary Vilsack's recent Senate testimony that his intent is to direct "at least 75% [of the stimulus funds] to unserved rural areas." With about 10 million households, most located in rural areas, lacking access to broadband,^{7/} this is surely the right approach. While we are still reviewing the 121-page NOFA, we are pleased that it appears to confirm the Secretary's intent and fulfill Congress's objective to bring broadband to areas of the country that lack this critical service today.

Specifically, the NOFA directs that broadband *grants* will be available solely in unserved rural areas, defined as rural areas without even first generation broadband with speeds of 768 kilobits per second downstream. The scoring criteria announced in the NOFA underscores the focus on bringing broadband to unserved areas: the greater the number of unserved households in an area, the more points a proposal will receive; the more remote a proposed project, the more points the application will receive. Midcontinent is currently pulling together the needed information to apply for BIP funding to expand its broadband footprint to areas that are currently unserved.

Prioritizing unserved areas for government support is not only the best use of stimulus funds, it also avoids creating disincentives for providers to continue deploying broadband through private investment. A robust broadband strategy inevitably depends on this continued

^{5/} American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) ("Recovery Act").

^{6/} *Id.*

private investment – government subsidies cannot fund all the broadband deployment needed for the country to become truly broadband-accessible. Companies that have taken the financial risk of serving a rural market without government assistance cannot realistically be expected to continue to do so if they must face a government-subsidized competitor. Moreover, devoting funds to already-served areas creates a greater risk that loans may not be repaid because borrowers will face pre-existing competition. We strongly support RUS’ adoption of an application process to ensure that loans will not subsidize competitive entrants.

We also applaud Secretary Vilsack’s recognition that the best use of stimulus funding may not be the same in all rural areas. As he noted, “[i]n some parts of the country, it may be more important that we fund the ‘middle mile,’” while in other areas “it may be the last mile that’s most important.”^{8/} Accordingly, the NOFA confirms that middle mile projects will be available for BIP funding. This approach is consistent with the language and intent of the Recovery Act’s broadband provisions, which do not favor any particular technology but rather contemplate that RUS will judge applicants based on which “will best meet the broadband access needs of the area to be served, whether by a wireless provider, a wireline provider, or any provider offering to construct last-mile, middle-mile, or long haul facilities.”^{9/}

While demand-side programs for underserved populations will not be funded through BIP, RUS will provide loans and loan/grant combinations for underserved *areas*. The NOFA appears to largely address our concern that funding for underserved areas could result in the subsidization of areas where Midcontinent and others have already invested risk capital to

^{7/} Jon M. Peha, *Bringing Broadband to Unserved Communities*, The Hamilton Project, at 11 (The Brookings Institution) (July 2008); http://www.brookings.edu/~media/Files/rc/papers/2008/07_broadband_peha/07_broadband_peha.pdf.

^{8/} *Vilsack: Broadband Program Will Target Unserved Areas, Offer Simple Process*, TR DAILY (June 4, 2009).

provide broadband, by establishing a presumption that at least two of three specified factors will need to be present in an area to qualify as “undeserved.”^{10/} To ensure that BIP loans and loan/grant combinations are appropriately targeted at areas with the greatest need, we urge RUS to rigorously enforce the NOFA’s presumption that an application meet at least two of these factors in order to qualify as an underserved area project.

The Broadband Stimulus Program Must be Administered With Transparency

Also like the 2008 Farm bill, the Recovery Act and its implementing rules include important governance and accountability standards, requiring the Secretary of Agriculture to report to the Appropriations Committees on planned spending and actual obligations describing the use of the funds. Ensuring accountability is essential, particularly given the Inspector General’s recent concerns about RUS’ ability to disburse Recovery Act funds:

We remain concerned with RUS’ current direction of the Broadband program, particularly as they receive greater funding under the [Recovery Act], including its provisions for transparency and accountability. As structured, RUS’ Broadband program may not meet the Recovery Act’s objective of awarding funds to projects that provide service to the most rural residents that do not have access to broadband service.^{11/}

We are confident that Jonathan Adelstein, should he be confirmed by the U.S. Senate as Administrator of the RUS, recognizes the importance of transparency and accountability and will move swiftly to address OIG’s concerns.

^{9/} H. CONF. REP. NO. 111-16, at 774 (2009).

^{10/} Those factors are: (1) no more than 50 percent of the households in the proposed funded service area have access to facilities-based, terrestrial broadband service at greater than 768 kilobits downstream; (2) no fixed or mobile broadband service provider advertises broadband transmission speeds of at least 3 megabits per second downstream in the proposed funded service area; or (3) the rate of broadband subscribership for the proposed funded service area is 40 percent of households or less.

^{11/} REPORT NO. 09601-8-TE, U.S. DEPARTMENT OF AGRICULTURE, OFFICE OF INSPECTOR GENERAL, RURAL UTILITIES SERVICE BROADBAND LOAN AND LOAN GUARANTEE PROGRAM, AUDIT REPORT, at 2 (March 2009) (“OIG 2009 Report”).

To ensure that funding is properly dedicated to unserved areas and only those underserved areas meeting the requisite factors, it is important that the entire award process be transparent to the public. The provision of inaccurate information has hindered RUS' efforts in its loan determination and allowed loans to be made on the basis of faulty information.^{12/} In this regard, we welcome the NOFA's requirement that BIP applicants provide a detailed description of the proposed funded service area^{13/} and RUS' plan to post each such description on the broadbandusa.gov website for a 30-day public inspection period. The transparent, open process contemplated by the Recovery Act will assist both the agencies evaluating loans and grants, and the public, whose tax money supports the programs.

Applicants should also be required to identify all sources of funding for the project. For example, the Recovery Act requires applicants for BTOP funds to "disclose . . . the source and amount of other Federal or State funding sources from which the applicant receives, or has applied for, funding for activities or projects to which the application relates."^{14/} The NOFA confirms this requirement for all BIP applications.

RUS Should Minimize the Burdens of New Regulatory Requirements Adopted in the NOFA and Ensure Competitive Parity

There remain a number of provisions in the Recovery Act and the NOFA that could undermine the job creation and other benefits of rapid broadband deployment intended by

^{12/} See, e.g., *Iowa Cable and Telecomm. Assn. and Mediacom Comm. Corp. v. United States Dep't of Agriculture*, Case No. 06-C-256, Complaint for Declaratory and Injunctive Relief (filed S.D. Iowa May 30, 2006).

^{13/} The description must include a map; data describing the geography and demographics of the proposed funded service area, including information as to whether the proposed funded service area is unserved or underserved; names of the census designated communities and identification of areas not within a census designated community within the proposed funded service area; information as to whether these communities and areas are rural or non-rural, remote and unserved, underserved or served; the methodology for making the above classifications; and whether the applicant is seeking a waiver from providing less than 100% coverage of any census block.

^{14/} Recovery Act, § 6001(e)(6).

Congress. The precise impact of these provisions will depend on how RUS implements them. *First*, the broad interconnection and nondiscrimination requirements applicable to BIP and BTOP projects go beyond the existing FCC broadband principles and include a first-time broadband interconnection mandate. We are concerned that requiring providers to implement new and largely undefined requirements could chill investment and bog providers down in litigation – at the very time when the focus should be on swiftly building broadband and creating jobs. We urge RUS and NTIA to apply these requirements in a manner that gives providers maximum flexibility rather than tying their hands with complex technical and service rules. Broad questions about policies like “open access” and “net neutrality” are more appropriately addressed at the FCC.

Second, while we were disappointed that Congress established a statutory priority under BIP for current or former borrowers under the REA’s rural telephone loan program, we believe the NOFA properly limited this priority to a single 5 point preference. That said, we believe that even this preference is appropriate only for borrowers in good standing. To the extent a previous borrower has not completed past projects in a timely manner or otherwise is behind in its loan repayments, a deduction from the scoring of its application is warranted.

Finally, we are concerned by the prohibition on the use of interconnected facilities funded by BIP to provide services that compete with projects funded by existing REA loans. This one-sided restriction would effectively prevent new entrants from using BIP interconnection agreements to provide voice service in competition with existing borrowers. Having adopted an interconnection requirement for BIP, RUS should not limit the requirement in this anti-consumer manner. By inhibiting competitors from offering a “triple play” of services (voice, video, and data), moreover, the restriction arguably violates the statutory priority for BIP projects that give

end users a choice of broadband providers (a priority, by the way, that is not explained in the NOFA).

Notwithstanding these reservations, based on our review of the NOFA to date we believe that it faithfully implements the Recovery Act. Of course, the ultimate success of BIP will be determined by the hundreds of decisions that RUS will have to make in response to specific applications. We look forward to working with RUS and this Subcommittee to ensure that the program fulfills its promise.

The 2008 Farm Bill Will Improve the Existing RUS Loan Program

While the Recovery Act and the NOFA help point the rural broadband stimulus programs in the right direction, the existing rural broadband loan program has had a troubled past. We were therefore heartened when Congress reformed the RUS broadband loan program as part of the 2008 Farm Bill^{15/} and we believe that the changes made in that law will address many of the problems identified by OIG. We thank the members of this Subcommittee and the full Committee for your hard work in achieving these reforms.

By now, we are all familiar with the 2005 USDA Inspector General's audit of the rural broadband loan program, which was established in 2002. The Office of the Inspector General (OIG) found that the program had "not maintained its focus on rural communities without preexisting service" and was instead subsidizing competition in suburban areas and in communities already served by one or more existing broadband providers.^{16/}

The threat of a government subsidized competitor in rural markets also creates a disincentive for a company that does not receive federal support to extend service to rural

^{15/} Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 6110 ("2008 Farm Bill").

communities. As the OIG report made clear, “[the] RUS may be setting its own loans up to fail by encouraging competitive service; it may also be creating an uneven playing field for preexisting providers operating without Government assistance”^{17/} Perhaps even more fundamentally from a taxpayer standpoint, subsidizing competition is a waste of scarce RUS loan funds that should instead be targeted to areas where a market-based solution has not developed.

Regrettably, it appears that RUS has not yet addressed OIG’s 2005 findings and recommendations. Just a few months ago, in March 2009, OIG released a second report concluding that “the key problems identified in our 2005 report – loans being issued to suburban and exurban communities and loans being issued where other providers already provide access – have not been resolved.”^{18/} Despite OIG’s 2005 initial findings, “RUS continued to make loans to providers in areas with preexisting service, sometimes in close proximity to urban areas” while awaiting the enactment of the 2008 Farm Bill.^{19/} The loan application statistics contained in the OIG report bear out the Inspector General’s concerns about the program. OIG reported that of “37 applications approved by RUS since September 2005, 34 were granted to applicants in areas where one or more private broadband providers *already offered service*.”^{20/} And although the 2008 Farm Bill does not explicitly prohibit granting loans to preexisting service areas, OIG expressed its concern that “the overwhelming majority of communities (77 percent)

^{16/} AUDIT REPORT 09601-4-TE, RURAL UTILITIES SERVICE BROADBAND GRANT AND LOAN PROGRAMS, U.S. DEPARTMENT OF AGRICULTURE, OFFICE OF INSPECTOR GENERAL, SOUTHWEST REGION, at ii (Sept. 2005).

^{17/} *Id.*

^{18/} OIG 2009 Report at 9.

^{19/} *Id.* at 2.

^{20/} *Id.* at 5 (emphasis added).

receiving service through the broadband program already have access to the technology, without RUS' loan program."^{21/}

We are hopeful that the new RUS administrator will quickly redress these failings by implementing the reforms of the 2008 Farm Bill. In particular, the Farm Bill prioritized funds for unserved areas and directed the Secretary of Agriculture to "give the highest priority to applicants that offer to provide broadband service to the greatest proportion of households that, prior to the provision of the broadband service, had no incumbent service provider."^{22/} Equally important, the Act also redefined the term "rural" to encompass an area that has a population of 20,000 or less, but not including any urbanized area contiguous or adjacent to a city or town that has a population of greater than 50,000.^{23/} We are pleased that the NOFA adopted this definition of "rural area" for the BIP.

The Farm Bill also established more stringent project eligibility standards, requiring, with certain exceptions, that not less than 25% or more households in the proposed service territory be served by not more than one broadband service provider and no portion of the proposed service territory be served by three or more providers in order for a project to be eligible for funding.^{24/} The law also improved the transparency of the loan process by directing the Secretary of Agriculture to publish a notice for each loan or loan guarantee application describing the content of the application, including the identity of the applicant; each area proposed to be served by the

^{21/} *Id.* at 6.

^{22/} 2008 Farm Bill, § 601(c)(2); *see also* CONF. REP. NO. 110-627, at 832 (2008). And the House Report indicated that eligibility requirements were tightened for the broadband loan program in order "to refocus on both rural and unserved areas of the country and provides additional criteria to USDA to prevent entities from receiving loans to serve only markets already sufficiently served with highspeed and affordable broadband service." *See* HOUSE REP. NO. 110-256, at 232 (2008).

^{23/} 2008 Farm Bill, § 601(b)(3).

^{24/} 2008 Farm Bill, §§ 601(d)(2)(A)(i),(ii).

applicant; and the estimated number of households without terrestrial-based broadband service in those areas.^{25/}

Although the 2008 Farm Bill took the appropriate steps towards ensuring that unserved rural areas receive first loan priority and implementing additional disclosure requirements, the revised regulations governing that program have yet to be released. In order to bring the rural loan program in line with the reforms Congress mandated last year, we urge that RUS release these rules as soon as possible.

^{25/} 2008 Farm Bill, § 601(d)(5). Transparency would be further served by requiring each applicant to include in its application a project area map, whether and to what extent that project area is believed to be served based on the data collected by the FCC on its Form 477; information on the number of potential customers in the proposed project area; a geographical representation and numerical estimate of the unserved households within the proposed project area that the applicant believes will be served upon completion of the project; the number and identity of existing providers of broadband service, if any, in the proposed project area; and details regarding planned network construction, including types of equipment that will be deployed, and a showing that network performance will meet or exceed the speed eligibility requirements. As noted above, these are similar to the showing required in a BIP application.

Conclusion

The cable industry strongly supports the goal of ensuring that all Americans, including citizens in rural areas, have access to broadband services. We have invested billions of dollars to help achieve this goal. We also understand and accept that government assistance through subsidies may be the only answer in some unserved rural areas, but any government program designed to promote broadband deployment must be carefully defined and targeted at those unserved areas that lack broadband service. The new Broadband Initiatives Program and the existing rural broadband loan program, as restructured by the 2008 Farm Bill, appear to meet these objectives and both will be subject to stringent government oversight to ensure that government funds are allocated appropriately, taxpayers are protected, and private entrepreneurs already serving the community are not harmed or penalized in the process.

Mr. Chairman, thank you for inviting me to testify today. I am happy to answer any questions you or the Members of the Committee may have.