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“The Recovery Act and Broadband: Evaluation of Broadband Investments on Small Businesses and Job Creation”

TESTIMONY OF JAMES M. GLEASON

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Thank you, Madame Chairwoman and members of the Committee. It is a great honor and a privilege for me to be here before this committee to tell you about my independent company and the great broadband work of many other companies that are members of the American Cable Association (ACA).

My name is Jim Gleason, and I am the President and Chief Executive Officer of NewWave Communications and past Chairman of ACA. ACA represents nearly 900 smaller and medium-sized cable companies providing advanced video, telephone service, and, most importantly, high-speed broadband Internet access to 7 million customers in predominantly rural and smaller markets in every state.

My company, NewWave, serves more than 115,000 customers in Kentucky, Illinois, southeast Missouri, northeast Arkansas and western Tennessee and is headquartered in Sikeston, Missouri. At NewWave, we provide cable television, high-speed broadband and data services and telephone service, specializing in smaller and mid-sized communities.

As small and medium-sized independent cable operators, we represent a unique perspective on the broadband marketplace. Our members have historically invested in communities where the ‘big guys’ find it unattractive to provide service, whether that is in rural communities such as Union Star, MO, or in more urban markets such as Lawrence, KS. To date, ACA members have built these networks in the most rural areas of our country without any direct federal subsidy.

I appreciate the opportunity today to share with you ACA's perspective on key issues facing small, independent cable and broadband providers across America as they continue to be leaders in rolling out broadband service to consumers residing in some of the most economically challenging areas to deliver state-of-the-art communications technology.

ACA AND BROADBAND STIMULUS APPLICATIONS

ACA members view the \$7.2 billion broadband stimulus program as an important opportunity to continue their great work in constructing broadband facilities in remote and rural areas so these communities can enjoy technological parity with densely populated urban areas so accustomed to being the first in line.

I'm pleased to report that in all, 83 ACA members have applied for \$1.3 billion in grants and loans under the two stimulus programs run by the National Telecommunications and Information Administration (NTIA) and the Rural Utilities Service (RUS).

ACA members applied for both last-mile and middle-mile projects in both unserved and underserved areas. ACA members submitted applications to fund 127 projects.

My company, NewWave, has applied for \$10.1 million in funds to upgrade fiber and cable facilities in 11 communities in Illinois, Indiana, Missouri and South Carolina. The network upgrades will be state-of-the-art fiber-to-the-curb designs and will offer these rural communities DOCSIS 3.0 technology that will offer data speeds up to 100 Mbps.

In addition, fiber-optic facilities will be constructed out of the communities and will connect them to larger, high-capacity fiber lines for broadband access. The vast majority of the areas NewWave has applied for are unserved by other providers and would not have broadband access without this program. NewWave has coordinated with a wide range of community organizations and leaders and has submitted dozens of letters of support for these projects.

As companies with decades of experience in rural America, ACA members have a proud track record of achievement that demonstrates why they are ideal candidates to receive funding from NTIA and the RUS. ACA members are uniquely positioned to advance the goal of providing every American with affordable access to the Internet over advanced communications networks, and are prepared to extend broadband into many of the economically and technically challenging areas in the country. I encourage the NTIA and RUS to closely consider all of our members' applications.

THE GOVERNMENT'S IMPORTANT FOCUS ON THE MIDDLE MILE IS GOOD.

Over the years, ACA has demonstrated that the issues and challenges facing rural areas and the small cable operators that serve them is substantially different than the issues and concerns facing urban areas and companies the size of Comcast and Time Warner Cable.

As we talk about broadband, that distinction becomes even more critical.

Although many focus exclusively on the need to upgrade the Internet communications path that enters the home and office, ACA has attempted to draw attention to the middle mile.

NTIA and the RUS should not waste taxpayer dollars on funding broadband projects that intend to provide service in areas already served.

Overbuilding established broadband providers with taxpayer support would reduce the amount of stimulus money available to provide broadband to the truly unserved and would limit funding for critical middle-mile projects.

Why is funding middle-mile projects so crucial?

ACA members have already upgraded their local networks, providing consumers with much faster broadband speeds. What is still needed in rural communities is better and more affordable middle-mile connections between the local community and the nearest internet access point. The middle mile is the part of the network that runs between a cable broadband provider's central office and an access point to the Internet's backbone. The current middle-mile link is typically an expensive, low-capacity facility that effectively slows data speeds between what the local cable network can supply and what is actually delivered or received from the Internet backbone.

The data chokepoint has persisted because the owners of these middle-mile facilities have failed to invest in upgrades to coincide with the last-mile investment made by ACA members.

End-user download speeds in rural areas would be much faster if local broadband providers had access to affordable, high-speed middle-mile facilities.

We all agree that broadband speeds in many rural areas need to be much faster to create more jobs and stimulate more business activity that we all want to see.

Upgrading the middle-mile link would help greatly on both counts and will take advantage of the investment already made in the local communities by facilitating buildout without showing preference to a last-mile provider.

Because the distance between those two points can be many miles, if not counties, apart, ACA members simply don't have the resources to construct new middle-mile links on their own in a fiscally prudent manner.

The RUS's large financial commitment to the middle mile is encouraging.

For instance, the RUS has allocated up to \$800 million in loans and loan/grant combinations for middle-mile projects. Continued focus on middle-mile facilities is essential to these communities.

THE AGENCIES SHOULD REVIEW FUNDING RESTRICTIONS AND REVISE FUNDING RULES TO ELIMINATE APPLICATION BARRIERS.

In the first funding round, NTIA and RUS received about 2,200 applications seeking \$28 billion in combined funding for broadband facilities as well as broadband awareness, training, support and construction of local computer centers.

To say the least, that was a strong response, and we are scheduled to learn in November the names of the first entities to receive funding.

Without diminishing the level of support for NTIA and RUS funding so far, I should explain that turnout from ACA members would have been even better if NTIA and the RUS had not attached funding restrictions that made it difficult or impossible for small cable companies to apply.

For example, ACA members that didn't seek funding noted that the federal government's insistence on holding the first lien would have violated terms and conditions contained in many of their bank loan agreements, making applying for the program impossible.

The 10-year prohibition on the sale of federally funded projects was also cited as a deterrent to participation by ACA members.

I will discuss later some of these restrictions and highlight both how they affected my company in particular and the ACA membership in general. We hope these onerous restrictions will be lifted before applications for the second round are due.

In my own company's experience with the stimulus programs and our applications, we have noted the following concerns:

DIVIDING THE PROGRAM BETWEEN TWO AGENCIES WITHOUT CONSISTENT RULES CAUSES CONFUSION AND INEFFICIENCIES.

Depending on the geographic location of their projects, RUS applicants were forced to compete for loan/grant combinations instead of simply the grant money. Meanwhile, Broadband Technology Opportunities Program (BTOP) applicants were free to request grant funds only; however, if your project was rural you were required to file at the RUS. While you could also file at BTOP, RUS has the first review of the application and thus you faced the uncertainty that funding for your project would be a grant/loan combination.

Because all of my company's projects are in rural areas and only two happened to be located in "non-remote" areas, meaning it was within 50 miles of a non-rural community, NewWave could only request a loan/grant combination through RUS. We would have preferred having access to a larger portion of the grant funds as that would have allowed us to do more in the rural areas we serve, including expanding the scope of our project.

The rules of eligibility for grants should be the same for both agencies. Companies, including ACA members, wanting to serve rural areas should not be placed at a disadvantage by being forced into loan/grants when companies serving non-rural areas do not have similar obligations.

THE RULES GIVE CURRENT RURAL UTILITIES SERVICE (RUS) BORROWERS A LEG-UP ON THE COMPETITION.

The broadband program's scoring criteria automatically awards five points to applicants that have borrowed under Title II of the Rural Electrification Act. Awarding previous borrowers a five-point advantage discouraged companies like NewWave that built their networks on private investment from applying for broadband funds all together.

The scoring of an application should be made on the merits of their project, not the applicant's history with the agency.

THE NOTICE OF PROPOSED FUNDED SERVICE AREA PROCESS FORCES COMPANIES TO INVEST RESOURCES TO DEFEND THEIR CURRENT SERVICE AREAS WHETHER THEY WANTED TO ENGAGE IN THE PROGRAM OR NOT.

NewWave is investing additional funds to defend its current service area from hastily prepared applications that propose to build on top of systems that adequately serve the market with affordable broadband internet access. We fail to understand why NewWave and other ACA members had to invest their limited resources to respond to applications that weren't even vetted for completeness.

In addition, the response process, for the reasons stated below, was burdensome and time-consuming, and problems with the mapping tool and response form made it difficult for existing service providers to respond to all applications proposing to overbuild their service areas. As recently as yesterday, the mapping tool has been down for periods of time during the response process, limiting the ability of existing service providers to respond.

NewWave alone – a small company – will spend in excess of \$30,000 simply telling the government where we already serve.

In light of this, we would hope that the agencies will not presume, as suggested in the Notice of Funds Availability, that there is no existing service provider in an area if they did not receive a response, and that the agency and applicants will engage in their own due diligence to determine if an area is already served, and therefore not eligible for funding. Doing so will help avoid using scarce taxpayer resources in areas that already have broadband service.

Remember, our members already tell the FCC the broadband areas we serve, along with the number of subscribers and speeds, twice a year by census tract locations through the FCC's Form 477.

THE GOVERNMENT PROGRAM IS DISCOURAGING PRIVATE INVESTMENT IN RURAL AREAS.

Private expansion and M&A activity have slowed with the uncertainty of private enterprises having to compete with government-funded entities. While broadband stimulus can be very helpful to encourage broadband deployment in areas that are truly unserved or underserved, it should not be at the risk of losing private capital investment, which will ultimately achieve more deployment than any stimulus program.

In addition to the experiences of our company with the stimulus programs, our members noted the following concerns:

THE MANDATORY BIP LOAN REQUIREMENT DISCOURAGED APPLICATIONS FROM SMALLER, INDEPENDENT CABLE COMPANIES.

As noted, the BIP loan requirement concerns my company, because we could have done more had we been able to file for grants rather than loan/grants. Many companies, however, did not participate because the rules would have forced them to apply for a loan if they served a non-remote

rural area. Let me explain. The NOFA requires that rural area applicants must first file with RUS through the BIP program. The rules also provide that BIP applications for non-remote rural areas must include a loan component of at least 50% of the funds received. The definition of remote is very restrictive and thus many members would have been forced to file for a loan or loan/grant at BIP as the first option.

We heard from various members that the building of some projects simply could not be economically justified by a loan or loan-grant application. By contrast, if the area was non-rural, the applicant could apply for a grant at BTOP and not worry about a loan. The rule has the effect of discouraging applications in the rural areas where they are drastically needed.

THE STIMULUS RULES CREATE TAX UNCERTAINTY AND DISPARITY.

The uncertainty over the tax implications of an award, combined with the tax exempt status of other applicants, was also a deterrent for small companies like mine and other members of the ACA. The Frequently Asked Question section on the Broadband USA website noted that non-tax exempt applicants should consult their tax advisors as to whether the proceeds would be taxable and noted that the payment of taxes was not an eligible cost under either the BIP or BTOP program. In addition, taxable co-ops and other tax-exempt entities competing for the funds would not have to incur such liability creating a competitive disadvantage for many of our members.

The government should remove any uncertainty and specifically state whether the grant proceeds are taxable.

THE "FIRST LIEN" RULE DISCOURAGED MORE APPLICATIONS.

ACA members that didn't seek funding noted that the federal government's insistence on holding the first lien would have violated terms and conditions contained in many of their bank loan agreements, making applying for the program impossible.

While we understand why such a restriction was placed in the rules to protect stimulus funds in the case of a default, the effect of the rule is to simply disenfranchise a whole class of industries and applicants, like ACA members, who have done nothing to date other than to deploy broadband to their customers in smaller markets and rural areas *without* the need for government help.

Now, when government help through the stimulus programs could actually assist to fund unserved or underserved areas that capital markets can't, program rules prevent such funding unless all private funding is subordinated. The effect of this rule is to favor current borrowers of the RUS funding programs and put new applicants with legitimate projects at a disadvantage, despite the fact that the funding programs are truly supposed to be technology neutral.

THE 10-YEAR LIMITATION ON SALE DISCOURAGED MORE APPLICATIONS.

The NOFA generally prohibits the subsequent sale of the funded facilities and limits the ability of a recipient to sell the funded facilities for 10 years and places restrictions on the sale after 10 years. Many of our members were concerned over the no-sale restrictions. The problem is that the NOFA states that the agencies are not allowed to consider sales until after 10 years. While a company could

seek a waiver of the entire rule, the uncertainty caused by the rule and the seemingly high yet unknown, standard required to obtain a waiver caused members not to apply.

Most of all, the restrictions failed to recognize an important business principle: Sometimes capital is needed to improve a company and make it a better target for an acquisition by a larger company that can provide even *more* services to consumers.

We believe the funding agencies should be sensitive to the important business concerns of our members and liberally provide waivers of the 10-year rule where it can be demonstrated that lifting the rule will benefit consumers in those markets.

REVISIONS ARE NEEDED TO THE APPLICATION REVIEW PROCESS.

Our member companies and our colleagues at the National Cable & Telecommunications Association, OPASTCO, ITTA, Western Telecom Alliance and USTA share and support the goal of achieving universal broadband availability while maintaining the highest level of integrity in the agency broadband initiatives established to achieve that goal. Unfortunately, the application information made available by the agencies about pending applications for areas listed as “unserved” and “underserved” makes it difficult, and in some cases impossible, for our members to examine and respond fully and completely to those applications within the 30-day deadline set by the agencies.

Ultimately, we are concerned that the data before your agencies may inadvertently provide an inaccurate or incomplete picture and potentially compromise the integrity of the process.

In many, if not most, instances the proposed funded service areas are not congruent with the service areas of our members, and our members can only supply complete and accurate data for their own service areas.

The agencies’ independent due diligence and review of the entire proposed funded areas will be critical in determining the extent of broadband service in each area – whether these areas are actually “unserved” or “underserved” – using the best available data (including the FCC’s Form 477 data I mentioned and state broadband maps and deployment information) even in the absence of a filing from an outside party.

This will help avoid situations in which scarce government funding is unintentionally awarded to ineligible applicants.

I have attached our letter for the record outlining the following problems and solutions with respect to the mapping tool and response form:

1. The format of the broadband mapping tool creates a significant barrier to submitting data in a timely fashion. Providing a dataset of census block/group/tract information with application numbers would simplify and speed the process for responding.
2. The database’s 7,500 Census Block limit creates a barrier to obtaining information about areas where funding is proposed and should be lifted.

3. The mapping tool/database does not link applications to all states covered by proposed funded service areas. This should be corrected to permit complete responses from existing service providers.

RISKS TO AFFORDABLE BROADBAND – NEED FOR CONTENT NEUTRALITY

The effort by the American Recovery and Reinvestment Act of 2009 to make broadband service available to everyone in the country enjoys wide public support.

For many, broadband's promise of improving life in so many ways, on so many levels, is building excitement for a government-backed technology mission that we really haven't seen since the days when the U.S. entered and won the space race after the launch of Sputnik by the Soviet Union.

But successful broadband policy can't focus exclusively on availability. It also must focus on affordability, bearing in mind that those on the lower end of the income scale may choose to use their disposable income on things other than the purchase of a broadband subscription.

To keep the price of broadband affordable for all, ACA has urged Congress and the FCC to prevent broadband content providers, especially media conglomerates with market dominance, from imposing closed Internet business models on broadband access providers, especially those small businesses which have no real bargaining power.

Failure to police anti-consumer and anti-competitive practices will end up forcing all consumers to pay higher monthly broadband access fees to receive content that a large percentage of them have no intention of viewing.

Here is a real world example of what I mean: ESPN360, owned by the Walt Disney Co., is pioneering such a closed Internet business model.

Disney wants ACA members to pay fees for ESPN360 based on the cable company's total number of broadband subscribers or else none of the broadband subscribers may view ESPN360 content. A consumer cannot individually subscribe to ESPN360.

Disney's plan is designed to force customers who have no interest in viewing sporting events over the Internet to pay for ESPN360 and subsidize the cost of the service for consumers actually interested in viewing ESPN360 content.

Disney's ESPN360 business model is bad for competition and bad for consumers.

Disney's quest to extract per-subscriber fees from broadband access providers will drive up the cost of broadband for all existing customers; put the price of broadband service beyond the means of low-income consumers; and obviously delay the arrival of affordable broadband access for every American.

RISKS TO AFFORDABLE BROADBAND – NEED FOR CONSUMPTION BILLING

Another risk to affordable broadband is the potential adoption of regulations that would not allow broadband access providers to experiment with flexible-pricing models.

U.S. House legislation has already been introduced that would effectively ban large broadband access providers from being able to charge higher prices to consumers who download catalogs of HD movies than to casual users who limit their Internet time to checking e-mail and visiting a few Web sites. Obviously, more usage requires more investment, but why should casual low-bandwidth-consumption users have to pay for the high-bandwidth behavior of a few?

Consumption-based billing is pro-consumer in every respect.

Under such a system, high-bandwidth users would be required to shoulder the cost of their heavy Internet activity and would not be allowed to shift that financial burden onto less energetic Web surfers. Without it, there would be no disincentive on the high-bandwidth users to curtail their behavior.

Without consumption-based billing, extreme demands placed on the network by a small minority would have to be paid for by everyone else. That's simply unfair.

In addition to being unfair, a ban on consumption-based billing would frustrate the goal of universal and affordable broadband access.

In a recent paper released in association with Georgetown University, widely respected economists Kevin Hassett and Robert Shapiro concluded that flexible-pricing models will speed broadband adoption, rather than deter it, because network providers won't need to raise prices on everyone in order to recover the cost of network investments largely undertaken to satisfy the needs of those who consume the most bandwidth.

Hassett and Shapiro's paper found that when flat-rate plans were in use, broadband access providers were forced to recover their network upgrade costs from all users equally, which drove up the monthly price of broadband for everyone and made it harder for the most price-sensitive consumers to purchase a broadband subscription.

Reliance on flat-rate plans, the economists said, would delay broadband adoption by low-income consumers and fail to close the digital divide.

Customers who rely on the Internet just to find a job by e-mailing resumes should not have to pay more for broadband simply because other customers are watching the latest blockbusters in HD.

CONCLUSION

On behalf of ACA and my company, we appreciate what Congress and the funding agencies are doing to support broadband expansion and growth in smaller markets and rural areas. We support you and pledge to be there beside you in this effort.

Our hope is that reasonable revisions to the funding programs as outlined here will provide even greater use of the funds by ACA members and others and provide the benefit the government intended for consumers in smaller markets and rural areas.

Thank you for your attention, and I would be pleased to answer your questions.