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Final Broadband Stimulus Text Includes \$7.2B in Funding, But No Tax Credits

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- The pending congressional economic stimulus package contains \$7.2 billion of broadband funding but no broadband tax credits, according to final House-Senate legislative language posted last night by the House Rules Committee.
- The House is expected to begin floor debate and move toward a vote on final passage today, while a Senate vote may come later today or slip into the weekend.
- As expected, the broadband funding would be split between agencies, with the Department of Commerce's NTIA to administer \$4.7 billion in grants, and the Department of Agriculture's RUS to administer \$2.5 billion in grants and loan activity. The bill gives both agencies various mandates, while leaving them much discretion, which has both merits and drawbacks for industry.
- The broadband grant and loan provisions could be of some use to telecom carriers, cable companies, and others, including equipment manufacturers and semiconductor vendors (e.g., JNPR, ADTN, CSCO, BRCM, GLW), but we continue to believe the market impact will likely be modest. For instance, we believe it will be difficult for the initiative to move the needle for Verizon (VZ) and AT&T (T), given their size, though the funding could be more helpful to Qwest (Q), which is smaller and advocated grants, some mid-size RLECs (e.g., EQ, CTL, IWA), and a few unaffiliated wireless providers such as Sprint (S) and Clearwire (CLWR).
- We believe the elimination of the Senate broadband tax credits is a disappointment for some incumbent broadband providers with taxable income, most notably Verizon. Cable and others charged that Verizon would have reaped a tax windfall on its existing FiOS fiber high-speed business plan, without spurring much incremental deployment, though Verizon maintained it would have had to make further upgrades to claim the proposed 20% tax credit for next-generation investment.
- There are various tax provisions of general applicability, such as for bonus depreciation, as well as incentives for smart-grid and health-information technology that could be of some use to communications and tech industry parties, depending on their circumstances.
- The bill also contains \$650 million in additional funding for the NTIA's DTV converter box coupon program and related activities.

NTIA Broadband Program

Goals and Funding Breakdown. The conference report reconciles the differences between the House and Senate versions of the American Recovery and Reinvestment Act (H.R. 1), providing \$4.7 billion for the Broadband Technology Opportunities Program of the National Telecommunications and Information Administration (NTIA). The Senate bill had provided \$7 billion to the NTIA, with the option of transferring some rural funding to the Rural Utilities Service (RUS), while the House bill had roughly split \$6 billion between the NTIA and RUS. The House-Senate agreement generally adopted the Senate's structural approach and language for the NTIA provisions while incorporating some of the House's priorities. The NTIA is to develop the program in consultation with the Federal Communications Commission, but the FCC would not be given final say on deciding certain key definitions, as the House bill would have mandated.

The lion's share of the funding will go to grants to boost broadband deployment, but up to \$350 million is to fund the development of a national broadband inventory map that would be published within two years; at least \$250 million is to fund innovative programs to increase broadband adoption; at least \$200 million is to fund public computer centers at community colleges and in libraries; and \$10 million is to be used for audits and oversight. Some money can be transferred to the FCC, which in addition to working with the NTIA on the broadband grant issues is to craft a national broadband plan within one year that is aimed at achieving universal broadband access, with a detailed strategy for achieving affordability and benchmarks for meeting the overall goal. No more than 3% of the overall NTIA funding can be used for administrative costs.

Agency Leeway on Definitions, Data Speeds. The final bill gives the NTIA various mandates, but allows the agency substantial flexibility in implementing the details. For instance, the purpose of the grants is to foster broadband service to unserved areas and underserved areas, as well as to promote various broadband objectives in schools, libraries, health-care providers, and other entities. The legislation does not define "unserved" and "underserved," areas, but instead says the NTIA can consult with the states in order to identify unserved and underserved areas, and shall if practical award at least one grant per state. The program is to be developed as fast as practicable, with all grants to be awarded by Sept. 30, 2010.

The bill does not set minimum data speeds for broadband service. The NTIA is to consider whether a grant application for an area will, if approved: (1) increase broadband affordability and subscribership, (2) "provide the greatest broadband speed possible to the greatest population of users," given the potential of next-generation networks to create more jobs, (3) improve service for health-care delivery, education, and children, and (4) "not cause unjust enrichment as a result of support for non-recurring costs through another Federal program." Conferees did not adopt the House's specific set-aside for funding wireless systems, though they did direct the NTIA to factor in the "technical differences between wireless and wireline networks," which would appear to give wireless a fighting chance for funding against faster wireline networks. The NTIA is also to consider whether an applicant is a "socially and economically disadvantaged small business," which is language that its proponents believe can pass constitutional muster.

Eligibility Looks Broad. Industry parties had been concerned about Senate language that seemed to require for-profit companies to enter into some sort of public-private partnerships in order to receive funding. The conference report allows the participation of any entity, including a broadband service or infrastructure provider, that the NTIA finds by rule to be in the public interest, though the Federal share of any project will generally be limited to 80%, unless the agency grants a waiver. The conferees noted their desire for broad participation by wireless carriers, wireline carriers, backhaul providers, satellite carriers, public-private partnerships, and tower companies. They also clarified that broadband needs could be served by any provider able to construct last-mile, middle-mile, or long-haul facilities, and throughout the country's rural, suburban, and urban areas.

Net Neutrality Provisions. Grant recipients would have to meet a host of reporting and other requirements, including network-neutrality type duties. Combining provisions of both the Senate and House bills, the harmonized legislation requires the NTIA, in coordination with the FCC, to publish "non-discrimination and interconnection obligations" for grantees, which at a minimum would have to include adherence to the four broadband principles in the FCC's 2005 Internet policy statement. We believe the details in this area could prove to be quite contentious.

RUS Broadband Program.

The Basics. The conference report appropriates \$2.5 billion to the Rural Utilities Service for broadband grants, loans, and loan guarantees. The House bill had envisioned \$2.825 billion for RUS, while the Senate had only sought \$100 million. The reconciled bill largely adopted the House appropriations language for the RUS program, which contained fewer mandates than were created for the NTIA broadband program. As befits a program under the RUS, there would be a greater focus on rural areas, with at least 75% of an area targeted for funding to be in a "rural area without sufficient access to high speed broadband service to facilitate rural economic development, as determined by the Secretary of Agriculture."

Priorities. The legislation would create a series of funding priorities, including for applications to build broadband systems that give end users a choice of more than one service provider. This would appear to give new broadband entrants a leg up in areas where there is an incumbent provider. The vagueness of the language could invite arguments that the provision is intended to favor applicants whose networks would be more "open" to other service providers, but there is no express network neutrality language.

There would be a priority for funding projects that serve the "highest proportion of rural residents that do not have access to broadband service," and for funding applications from borrowers or ex-borrowers under title II of the Rural Electrification Act (we understand that to be a telephone loan program). The latter provision would appear to help many RLECs who have participated in that program, but our understanding is Qwest would not benefit, while it's unclear if AT&T and Verizon would, particularly in light of their many acquisitions, some of which may have involved REA, title II borrowers or ex-borrowers. There would also be priority given to parties that can show their projects would be fully funded or can be completed with the RUS grants or loan backing. No areas receiving funding under the RUS program would be eligible for the NTIA broadband program.

For more background, see our notes, "Broadband Stimulus Update -- Some Grant Details Emerge; Tax Credits Still Look Out, But No Final Word," Feb. 12, 2009, and "Broadband Stimulus: Industry Impact Looking Modest," Jan. 30, 2009, among others.

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